Court File No.: T-1621-19

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant
(Moving Party)

-and-

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEF OF ONTARIO, AMNESTY INTERVNATIONAL and NISHNAWBE ASKI NATION

Respondents
(Responding Parties)

MOTION RECORD OF THE RESPONDENT, CANADIAN HUMAN RIGHTS COMMISSION in response to the Applicant's Motion for Stay of Order

(as per the Directions by the Court of October 25, 2019)

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TAB 1

Court File No. T-1621-19

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

CROSS-EXAMINATION OF SONY PERRON
on his affidavit sworn October 3, 2019,
held at the offices of ASAP Reporting Services Inc.,
100 Queen Street, Suite 940, Ottawa, Ontario,
on Thursday, November 14, 2019, at 10:00 a.m.

APPEARANCES:

Mr. Robert Frater, Q.C. Mr. Max Binnie	on behalf of the Applicant
Mr. David P. Taylor Ms. Barbara McIsaac	on behalf of the Respondent/ First Nations Child and Family Caring Society of Canada
Mr. Stuart Wuttke Mr. Thomas Milne	on behalf of the Respondent/ Assembly of First Nations
Ms. Jessica Walsh	on behalf of the Respondent/ Canadian Human Rights Commission
Ms. Sinéad Dearman	on behalf of the Respondent/ Chiefs of Ontario
Ms. Molly Churchill	on behalf of the Respondent/ Nishnawbe Aski Nation

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to work toward providing the right services to children and family.

31 Q. In the future?

A. In the future.

32 Q. What steps have been taken to deal with the issues of the past discrimination, should Cabinet and the ministers instruct you to move forward on the basis of compensation?

A. Sorry. Can you repeat the question?

33 Q. All right. If the ministers and/or Cabinet instruct you to proceed with some kind of compensation, what steps have you taken to date in anticipation of those instructions?

A. As I said before, we have reviewed the September 6th decision, what are the specific orders in terms of who need to be compensated according to the order. We have done an assessment of what might be the financial application of that, and there is some detail about that in my affidavit.

And we have identified the information that we have in the department about

how it will proceed. We have to look also, and this is described in my affidavit, about the other example of broad compensation that happened in recent past, and how they have operated. There are various models. So this is the kind of work we have done so far.

34 Q. All right, in anticipation of instructions you might receive?

A. In anticipation that we have a Tribunal order that gives us specific action to take, and our job is to assess how this could be made possible.

35 Q. Now, in paragraph 5 of your affidavit, you say that the Tribunal ordered Canada to pay this maximum, you are referring to the $40,000, to a number of categories of individual. But you will agree with me that Canada is not required to pay anything until the Tribunal issues an order with regard to a compensation process, correct?

A. The Tribunal order from September 6th indicated that the Tribunal will rule after a future submission from the parties on the process, and this is probably at the time where we would get some specific instruction about

how this should go about. In the past, however, there has been orders where the Tribunal was very precise in terms of date and these timeline were really, really short. So I cannot presume where the Tribunal would go, but this is where we would know more about how this would proceed.

36 Q. Right. But you will agree with me that no money actually has to be paid out to anybody until the compensation process has been either agreed on by the parties or ordered by the Tribunal.

A. There is no payments that are required at this time until we have a future ruling from the CHRT based on the September 6th decision.

37 Q. Now, in paragraph 5(a), you refer to one of the categories of individuals who are entitled to compensation as being:

> "First Nations children living on reserve and in the Yukon who were removed from their families or communities, necessarily or unnecessarily."

Could I get you to take a look at paragraph 249 of the actual Tribunal decision? Do you have that? I notice, actually, it's not in your motion record, Mr. Frater.

A. I do not have a copy of the order. Thank you. 249?

38 Q. 249, please. Take a look at that, and then I will ask my question.

A. Okay.

39 Q. Now if you want to go back to the beginning of that paragraph, in my version it's the bottom of page 83 of the decision. And I would suggest to you that your statement in paragraph 5(a) of your affidavit is overly broad because the Tribunal specified that this group of victims was:

> "First Nations children living on reserve and in the Yukon territory who was as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and

communities." (As read) Correct?

A. So you are trying to paraphrase paragraph 239 -- 249?

40 Q. Yes. Well, I was reading from 249, I believe.

A. Yes.

41 Q. So that is the category of --

A. This is the order that was issued on September 6th, 2000.

42 Q. And I'm suggesting to you that your statement in paragraph (a) is overly broad in terms of the children involved, because it doesn't define it by children placed in care outside their extended families and communities.

A. The -- my affidavit is a summary of the order, but it doesn't replace the content of the order in terms of how we need to act. So, and it doesn't pretend to be a translation of the order here.

43 Q. All right. So we have to go back to the order to be absolutely certain about which categories of children are to be compensated under the order?

A. Of course. The order is the frame for compensations that have been given by the Tribunal.

44 Q. Right. Now at paragraph 6 of your affidavit, you say:

> "Canada is required to report back to the Tribunal by December 10, 2019, on a compensation process agreed by the complainants."

Are you -- I put it to you that the Tribunal wants you to report back if we reach an agreement, but if agreement hasn't been reached, the parties would make submissions on a compensation process?

A. So could you repeat your question?

45 Q. Well, I'm having a little trouble with paragraph 6, because I put it to you that what the order says that if the parties agree on a compensation process, they will come back to the Tribunal with that compensation process and present it to the Tribunal by December 10th. Correct?

A. Yeah. My understanding, however, is that any party can go back to the Tribunal at any time with their own proposal to the Tribunal.

46 Q. Exactly. So if the parties don't reach an agreement, the various parties would each make their own submissions to the Tribunal as to what the process should be.

A. I would say beside Canada, the other parties have the discretion to make a submission or not.

47 Q. Right. Okay. Now in paragraph 8 of your affidavit you say,

> "Given the scope and impact of the Tribunal's decision, I believe that commencing the compensation process before the Tribunal's decision can be judicially reviewed is unfair to the claimants, to ISC and the government more generally, and so is not in the public

interest."

First of all, I think we have agreed that the current order doesn't require the government to actually pay any money at the moment.

A. There is nothing in the order that require paying of money between now and December 10th -- 9th.

48 Q. Actually --

A. Could you just confirm what is the date of December? Just to make sure.

49 Q. It is December 10th.

A. December 10th.

50 Q. Correct. Or until such time as either the parties who agree to a compensation process or the Tribunal orders a compensation process.

A. Yeah, and we, based on previous experience, the Tribunal sometimes have ordered executive decisions pretty quickly.

51 Q. Well, but at the moment, you don't have to pay any money to anybody?

A. There is no request to do any payment at this point.

52 Q. Now, in paragraphs 17 to

20 of your affidavit, you talk about Jordan's Principle and steps that the department ISC has taken to deal with the various discriminatory conduct that the Tribunal has found?

A. Yeah, it summarizes a number of specific action that have been taken over time to address the service issues that were identified by the Tribunal over time.

53 Q. And you will agree with me that none of those steps address the past discrimination. They are all looking forward to address issues that come up.

A. Well, some orders did address the past of the systematic discrimination issues. For example, the Tribunal have ordered to reimburse agencies for past expenditures that where they would have incurred a likely deficit in their operation. The Tribunal has ordered, and even Canada went beyond a review of cases of Jordan's Principle that might have been denied, and we did. So there was a number of actions that look at the past.

54 Q. All right. But by and large, these are steps that you have implemented for the future to deal with discriminatory

practices?

A. Yeah, most of the action taken by Canada since 2016 has been about reforming the Child and Family Services Program and funding models for the Child and Family Services agencies, as well as implementing Jordan's Principle.

55 Q. Thank you. Now going back to paragraph 2 of your affidavit. Sorry to jump around a bit. You say in the last sentence of that paragraph,

> "As a result, I understand the two groups within ISC that are most immediately affected by the Tribunal's order."

Which two groups are those?

A. The two sectors in Indigenous Services Canada that are involved in this, there is the Child and Family Services reform sector, and there is the First Nation and Inuit Health Branch sectors. So those are two sectors that are actively involved in implementation of the order, and addressing deficiencies that were identified over time by the

Tribunal.

And also I would say a number of issues that may not have got Tribunal attention, but were identified between the parties as reforms that needed to be undertaken.

56 Q. And would these two groups also be involved in the development of an implementation process if that were to be done?

A. The expertise around Child and Family Services or Jordan's Principle is a sector.

57 Q. And how many people are employed approximately in these two sectors?

A. The sectors are, for the First Nation Brach we probably have around 2,500 employees, but most of them are not involved in Jordan's Principle. The group that support Jordan's Principle is smaller than that.

And for the Child and Family Services reform group, I don't have the exact numbers. We are talking about a couple of hundreds, but I don't have the number exactly.

58 Q. That's fine. And of those, how many people would be involved in the sort of -- I would think it was the policy side of

things and actually working on a compensation process, if you were to do that.

A. I don't have that information. I haven't performed any assessment to determine this at this point. We have people that are doing policy work on various subject, various aspects in these sectors, but we haven't done an assessment of how many people we would need to put on such a team.

59 Q. All right. And have you ever visited the offices of the Caring Society?

A. Yes. I did visit the office of the Caring Society.

60 Q. And are you aware that the Caring Society has two full-time and four part-time employees?

A. No, I was not aware of this.

61 Q. But you would agree with me that the Caring Society operates with a relatively small staff?

A. It's definitely a small organization.

62 Q. And you are familiar with the various activities of the Caring Society, are

you?

A. I wouldn't say that I'm familiar with all the activities, but I'm familiar with some. I'm familiar with some of the work of the Dr. Blackstock in terms of reaching out, working with children, promoting, conferencing. Of course she's a highly visible person.

63 Q. And you would agree with me that the Caring Society is engaged in many more activities than just this Human Rights Tribunal case?

A. My understanding is that it's a very active organization, and Dr. Blackstock, the leader of the organization, is very active.

64 Q. Now, in paragraph 7 of your affidavit you say:

> "I'm advised, based on the department's interpretation of the Orders, that immediate implementation would require a significant investment of human and financial resources."

What information do you rely on for that assessment?

A. As it's indicated in my affidavit, we have done general costing of what it might mean in a number of individual that could end up being compensated under the order of the Tribunal of September 6th, looking at the various class that are identified in the detailed order.

So we have a size of -- we have a sense of the size of the class, of the group, and we were able to assess in comparison to other large settlement or resolution like that, and compensation process that happen in recent past, what it would take to address such process.

65 Q. So?

A. So significant here is the general number. I can get more specific, for example, under the residential school settlement process, at the peak it was -- there was an expenditure of 60 million dollar a year to manage a secretary, to do the education and the payment of the claim.

There is different process, but this gives us an indication that it's a significant undertaking when you look at broad

compensation like that.

66 Q. But you are referring to the actual payment of the compensation and the administration of the structure developed to pay the compensation?

A. Yeah. And this is not -- it's not an indication that it would be as such a structure that we'd require in that case, but it gives an element of comparison. And we look at different models that use alternative model outside agencies to do the payment, and we get to a significant amount, whatever model would be used in the future for our compensation like that.

67 Q. So it's fair to say that you in the department have had some considerable experience in developing an administration -- administrating, pardon me, compensation schemes?

A. There is some people that are currently in the department that have been involved in compensation process in the past. Surely, yes.

68 Q. And I assume that their expertise and knowledge would be useful in developing a compensation scheme in this case as well.

A. We would rely on people that have expertise in doing this, as well as engagement with the involved parties to determine the best course of action.

69 Q. Now in paragraph 7, you also say:

"The public service is not in a position to seek -- "

A. Sorry. Can you repeat the number? Seven? Thank you.

70 Q. Seven, sorry. Second half of that paragraph:

"The public service is not in a position to seek the required authority to pursue meaningful discussions with the Assembly of First Nations and the First Nations Child and Family Caring Society prior to December 10th as ordered by the Tribunal."

And that's because typically

A. Yeah, it was identified by the Tribunal as an element that will be subject of a future decision.

96 Q. I'm sorry to jump back. At paragraph 6, you mention the December 10th date. You state that:

> "Canada is required to report back to the Tribunal by December the 10th on a compensation process agreed by the complainants. Failure to reach an agreement will result in a panel ordering one of its own creation."

Now, with respect to that, has Canada contemplated asking for an extension of that December 10th deadline?

A. Yes, this was part of the initial assessment to determine how we can proceed. The understanding, however, was that going to an extension will not be sufficient. We needed -- if there was concern about the decision

itself, we needed to go through a judicial review within 30 days after the order in order to protect the right of Canada and the government going forward to bring this forward in court. So this was considered, yes, and I understand that our legal counsel recently informed the parties that we would be asking the Tribunal for an extension of that date.

97 Q. So within that 30-day period, were you aware that should Canada receive consent of the parties, that a simple extension could have been made to the Federal Court by way of letter?

A. I think this was mentioned that this was a possibility, yes.

98 Q. And the department chose not to explore that possibility, is that correct? With the parties.

A. I'm not sure about the verb you use, like "chose," but the fact is that we haven't, so I assume that the conclusion is the same.

99 Q. Thank you. At paragraph 13 of your affidavit, you speak about the department working with the parties. Never mind.

You already answered that question, so I will move on to the next one.

With respect to the section at paragraph 17 to essentially -- to 31. On the reforms to the Child and Family Services, compliance with respect to Jordan's Principle, and steps taken to address systemic discrimination.

AFN won't be speaking questions about this, other than we do agree that none of these paragraphs actually address compensation?

A. These paragraphs address the systemic discrimination that have been identified by the Tribunal, and all these measures were to address systemic discrimination. Now, the compensation is an individual compensation that is directed by the Tribunal, so we have a view that Canada's work towards addressing the systemic issue related to the Child and Family Services programming, as well as implementing the broad definition of Jordan's Principle, which were two of the systematic deficiencies that were clearly made in the merit decision of 2016.

100 Q. That's correct. But you would agree that they don't speak to compensation

as ordered in the last order by the Tribunal?

A. They don't talk about compensation as defined in the order of September 6, 2019.

101 Q. Thank you.

A. Sorry. I think I've used the word in English, "systematic." I would like to say systemically. Sorry. For the record.

102 Q. Moving on to paragraph 42 of your affidavit. In this section you talk about potential harm to Canada's relationship with the claimants. You mention that the parties will have to initiate discussions. Would you agree that the order is only to discuss compensation process at this time?

A. The order has an element of discussion about the compensation process, but there is a specific in the order about who should be compensated and how they should be compensated under which criteria. So it's more than ordering only discussion.

103 Q. You also mention in this paragraph, you know, further orders. You would -- would you agree that Canada already expects that further orders with respect to regarding the

TAB 2

Court File No.: T-1621-19

FEDERAL COURT

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ATTORNEY GENERAL OF CANADA

APPLICANT
(MOVING PARTY)

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

RESPONDENTS
(RESPONDING PARTIES)

WRITTEN REPRESENTATIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION ON MOTION TO STAY

OVERVIEW

1. These are the written representations of the Canadian Human Rights Commission (the "Commission") on the Attorney General of Canada's ("Canada") motion to stay the orders of the Canadian Human Rights Tribunal (the "Tribunal") in 2019 CHRT 39 (the "Compensation Ruling"), pending determination of Canada's concurrent application for judicial review of that Ruling. The Commission opposes Canada's request for a stay.

2. For the purposes of this motion, the Commission accepts that Canada's judicial review raises serious issues to be determined regarding the Compensation Ruling. However, as will be explained, the only steps actually required by the Compensation Ruling are that Canada consult with the Assembly of First Nations ("AFN") and First Nations Child and Family Caring Society ("Caring Society"),

and provide further submissions to the Tribunal about a process for implementing the compensation award. The evidence does not show that complying with these limited steps would cause Canada irreparable harm.

3. In the absence of such harm, the balance of convenience favours advancing with work at the Tribunal level to develop a compensation process, so as to not unduly delay potential redress for victims of discrimination. If the Tribunal issues a subsequent ruling that actually requires Canada to make compensation payments before this Court has determined the judicial review, it will be open to Canada to bring a fresh motion for a stay.

PART 1 – BACKGROUND

A. The Tribunal Compensation Ruling at Issue

4. The Compensation Ruling comes three years after the Tribunal found, in its merits decision, that Canada had systemically discriminated against First Nations children and families through discriminatory practices, including its underfunding of prevention services, and failure to fully implement Jordan's Principle.[1] Canada did not challenge the merits decision. In the Compensation Ruling at issue, the Tribunal found Canada liable to pay compensation to victims of these discriminatory practices.[2]

5. The Compensation Ruling does not actually order Canada to pay compensation by or before any particular date. Instead, the Ruling directs Canada to (i) consult with the Assembly of First Nations ("AFN") and the Caring Society, and—if they wish to participate—the Commission and other interested parties, and (ii) make further submissions to the Tribunal by December 10, 2019 on a process for delivering compensation.[3] As part of the work to establish a compensation

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[1] 2016 CHRT 2 [Attorney General of Canada's Book of Authorities ("AGC's Book of Authorities", Tab 16].
[2] 2019 CHRT 39 at paras 234, 242, 245-248 [AGC's Book of Authorities, Tab 21].
[3] 2019 CHRT 39 at para 269 [AGC's Book of Authorities, Tab 21].

process, the Tribunal also invites the parties, including Canada, to request clarification on or suggest variations to the Compensation Ruling, if appropriate.[4]

B. Canada's Motion to Stay the Tribunal's Compensation Ruling

6. Canada has filed a motion to stay the Compensation Ruling, pending the disposition of its concurrent application for judicial review of the Compensation Ruling.[5] Its position is that Indigenous Services Canada and/or the government as a whole would suffer irreparable harm by complying with the Compensation Ruling at this time.

7. At paragraph 49 of its Written Representations, Canada outlines three categories of irreparable harm it claims will occur if the stay is not granted: (i) the risk of inconsistent decisions as a result of parallel proceedings at the Tribunal and at the Federal Court; (ii) Canada having to pay large sums of compensation that may not be recoverable should the judicial review be dismissed; and (iii) Canada making significant and unnecessary human and financial resource investments to establish and implement a compensation process.[6]

8. In his affidavit dated October 3, 2019, Sony Perron, Associate Deputy Minister of Indigenous Services Canada, provides further details on the harm Canada says it would experience by following the Compensation Ruling. Mr. Perron asserts it would be harmful to Canada to commence work toward a compensation process when there is a possibility that such a process could be altered by future Tribunal or Federal Court decisions.[7] He says there could be a significant loss of public funds if Canada were to pay compensation and subsequently learn of a change

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[4] 2019 CHRT 39 at para 270 [AGC's Book of Authorities, Tab 21].
[5] Notice of Motion for Stay of Order of the Attorney General of Canada dated October 4, 2019 [AGC's Motion Record, Tab 1].
[6] Written submissions of the Attorney General of Canada dated October 4, 2019 at para 49 (AGC's Motion Record, Tab 5].
[7] Affidavit of Sony Perron affirmed October 3, 2019 at para 42 [AGC's Motion Record, Tab 3].

of direction due to a Federal Court decision.[8] He also states that in order to implement the Compensation Ruling, his department would require significantly more human and financial resources than are currently allocated.[9] In addition, Mr. Perron mentions that Canada requires instructions from Cabinet to engage in discussions related to compensation, and that due to the timing of the 2019 Canadian federal election, it was unable to engage in such discussions.[10]

9. During cross-examination, Mr. Perron agreed that the Compensation Ruling does not require Canada to make any payments at present. He explained that his understanding was that the Ruling allowed any party to make proposals to the Tribunal at any time on a compensation process, and that the orders do not require the government to pay money before December 10, 2019.[11]

10. When asked about his assertion that compliance with the Compensation Ruling would require significant investment, Mr. Perron agreed that this comment was based on a general costing his department undertook to estimate the cost of administering and paying out compensation, as opposed to the cost of engaging in conversations to develop a compensation process.[12] He noted that the costing was informed by information about other large settlements, and that there are staff in his department with experience administering compensation schemes.[13]

11. Mr. Perron said that Canada has been unable to engage in discussions about compensation due to the timing of the Federal Election. However, he also agreed

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[8] Affidavit of Sony Perron affirmed October 3, 2019 at para 45 [AGC's Motion Record, Tab 3].
[9] Affidavit of Sony Perron affirmed October 3, 2019 at paras 7, 33, 34, 40 [AGC's Motion Record, Tab 3].
[10] Affidavit of Sony Perron affirmed November 8, 2019 at paras 8-9 [filed by the Attorney General of Canada on November 8, 2019 in support of its Motion]; Affidavit of Sony Peron affirmed October 3, 2019 at para 4 [AGC's Motion Record, Tab 3].
[11] Transcript, Cross-Examination of Sony Perron, November 14, 2019 at page 16, lines 7-15; page 19, lines 4-25; page 20, lines 1-25; page 21, lines 1-24 [CHRC's Motion Record, Tab 1].
[12] Transcript, Cross-Examination of Sony Perron, November 14, 2019 at page 26, lines 16-25; page 27, lines 1-25; page 28, lines 1-13 [CHRC's Motion Record, Tab 1].
[13] Transcript, Cross-Examination of Sony Perron, November 14, 2019 at page 26, lines 16-25; page 27, lines 1-25; page 28, lines 1-25; page 29, lines 1-4 [CHRC's Motion Record, Tab 1].

Canada could have (i) asked the Federal Court to extend the 30-day deadline for filing an application for judicial review, or (ii) asked the Tribunal to extend the December 10, 2019, for submissions on implementation. Canada did not do the former, and only recently advised of its intention to do the latter.[14]

PART II - ISSUES

12. The Court must determine the following issue in this motion: can Canada meet the high threshold of showing that a stay of the Compensation Ruling is warranted?

PART III - ARGUMENTS

A. General Legal Principles

13. A judicial review of a Tribunal decision does not automatically stay the decision under review. Canada has therefore sought a stay of the Compensation Ruling under Rules 3 and 398 of the *Federal Courts Rules*.[15]

14. A stay of a ruling pending judicial review is an extraordinary remedy.[16] For Canada to obtain a stay of proceedings, it must satisfy the three-part test endorsed by the Supreme Court of Canada for the granting of a stay.[17] The test requires that an applicant show there is: i) a serious issue to be tried; ii) it would suffer irreparable harm if the stay were not granted, and (iii) the balance of

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[14] Transcript, Cross-Examination of Sony Perron, November 14, 2019 at page 43, lines 4-25; page 44, lines 1-22 [CHRC's Motion Record, Tab 1].
[15] *Federal Courts Rules*, SOR/98-106.
[16] *Nadarajah v. Canada (Citizenship and Immigration)*, 2018 CanLII 58459 [CHRC's Motion Record, Tab 7].; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [AGC's Book of Authorities, Tab 36].
[17] The test is set out in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110) [CHRC's Motion Record, Tab 6], and restated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [AGC's Book of Authorities, Tab 36].

convenience favours granting the stay.[18]

B. Canada has not met the Test for Granting a Stay

(i) Serious Issues

15. Canada has raised a number of grounds upon which it challenges the Compensation Ruling. The Commission agrees with Canada that reasonableness will be the appropriate standard for review of these grounds.

16. Indeed, specialized human rights tribunals are owed "a particularly high degree of deference" when exercising their broad statutory discretion to award remedies.[19]

17. Despite the deference that this Court should pay to the Tribunal on the merits of the judicial review of the Compensation Ruling, the Commission concedes for the purposes of this stay motion that the Canada has raised serious issues to be determined.

(ii) No Irreparable Harm

18. In order to obtain a stay, Canada must concretely show how complying with the Compensation Ruling will cause it irreparable harm. It is not sufficient for Canada to speculate about harm that may occur because of its compliance with the Ruling. Like any other applicant seeking a stay, a government authority must adduce evidence of irreparable harm that will occur if the Court does not grant the stay.[20]

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[18] *RJR-MacDonald Inc., supra* at pages 348; 347-349 [AGC's Book of Authorities, Tab 36].
[19] *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at 301 [CHRC's Motion Record, Tab 8] (Dissent of Evans JA, later endorsed by unanimous Supreme Court of Canada in *Public Service Alliance of Canada v. Canada Post Corp.*, [2011] 3 SCR 572.
[20] *Belzberg v. Canada (Commissioner of Patents)*, [2009] F.C.J. No. 1197 at paras 16-19 [CHRC's Motion Record, Tab 3].

19. Contrary to what Canada suggests in paragraphs 47-70 of its Written Representations, the evidence on this motion does not show that complying with the Compensation Ruling would cause Canada irreparable harm. This is the case for several reasons.

20. First, Canada argues that in order to comply with the Compensation Ruling, it would have to make potentially irrecoverable monetary payments.[21] However, as Mr. Perron has acknowledged, the Ruling does not actually require Canada to make any payments. It simply orders Canada to consult about a compensation process and make submissions to the Tribunal about this process.

21. Second, Canada contends it would need to hire more staff and seek budget increases to comply with the Compensation Ruling.[22] However, while increases to human and financial resources may eventually be required for actual implementation of a compensation process, available evidence does not show that Canada needs additional resources at present to comply with the Ruling's operative aspects. There is no evidence that dedicating the resources necessary to consult and make further submissions would cause irreparable harm.

22. Third, Canada alleges that consulting with the AFN and Caring Society will harm relations with Indigenous peoples, if the application for judicial review is later granted.[23] Yet there is no evidence that Indigenous peoples share this view and, to the contrary, it appears that Canada's challenge of the Compensation Ruling is straining its relations with Indigenous peoples. For example, First Nations youth have publically voiced their discontent with Canada's decision to challenge the

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[21] Affidavit of Sony Perron affirmed October 3, 2019 at para 45 [AGC's Motion Record, Tab 3]; Written Representations of the Attorney General of Canada dated October 4, 2019 at para 3 [AGC's Motion Record, Tab 5].

[22] Affidavit of Sony Perron affirmed October 3, 2019 at paras 7; 32-34; 40 [AGC's Motion Record, Tab 3].

[23] Affidavit of Sony Perron affirmed October 3, 2019 at paras 42-45 [AGC's Motion Record, Tab 3].

Compensation Ruling.[24]

23. Furthermore, First Nations individuals have expressed their desire to use compensation for their experience in the child welfare system, if awarded, to fund post-secondary education and related expenses.[25] They have also said that such compensation would serve as an acknowledgement of the harms suffered by children who spent time in the child welfare system.[26]

24. Fourth, the Commission agrees with Canada that where a government authority is involved, public interest considerations may be relevant at the second stage of the test for a stay (i.e., whether refusing a stay will cause irreparable harm), and the third stage (i.e., whether the balance of convenience favours a stay).[27] However, the fact that matters engage public interest considerations does not automatically favour a government authority's position in respect of a stay. A careful examination of the specific issues is still required to determine the propriety of granting the extraordinary remedy of a stay in any given case.

25. Here, the public interest cases that Canada has cited in support its stay request are distinguishable from the current situation.

26. For instance, courts have found irreparable harm where the granting of a stay would prevent a government entity from taking steps intended to protect the public from harm. In *RJR-MacDonald Inc. v. Canada*, the Supreme Court of Canada dismissed a tobacco company's application for a stay of laws requiring the company to comply with new packaging requirements because the stay

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[24] Exhibit 26 to the Affidavit of Cindy Blackstock affirmed October 24, 2019 [filed by the Caring Society on October 24, 2019].

[25] Affidavit of Erickson Owen affirmed October 25, 2019 at para 10 [filed by the Assembly of First Nations on October 25, 2019]; Affidavit of Rachelle Metatawabin affirmed October 30, 2019 at para 11 [filed by the Assembly of First Nations on November 8, 2019].

[26] Affidavit of Erickson Owen affirmed October 25, 2019 at paras 10-11 [filed by the Assembly of First Nations on October 25, 2019].

[27] *Canadian Council for Refugees v. Canada*, [2008] F.C.J. No. 131 at para 18 [CHRC's Motion Record, Tab 4].

would impede Canada's legislatively mandated responsibility to protect public health.[28]

27. Similarly, in *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*, the Federal Court of Appeal dismissed a company's application for a stay of proceedings brought against it for anti-competitive behaviour because the stay would prevent the Director of Investigation and Research from fulfilling his duty under the *Competition Act* to protect the public interest in respect of competition.[29]

28. The present case is different. Refusing the requested stay will not prevent Canada from fulfilling a legislated public interest mandate, or from taking steps it would otherwise take to protect the public. For example, complying with the Compensation Ruling does not stop Canada from carrying out duties to enforce a particular regulatory scheme. Instead, it merely requires Canada to consult and make proposals about how to implement a financial remedy for persons affected by a system that Canada has accepted was discriminatory. Nothing about consulting with the parties to this matter about a compensation process, and making submissions thereon, jeopardizes the health or safety of the public. In such circumstances, refusing a stay will not cause irreparable harm, whether to the public interest, or otherwise.

(iii) Balance of Convenience Favours Dismissing the Stay Motion

29. For the reasons previously stated, Canada has failed to demonstrate irreparable harm that would occur from it complying with the Compensation Ruling. Lack of irreparable harm alone constitutes sufficient grounds for the Court to dismiss this motion. Nonetheless, the Commission will also address the balance of convenience as another criterion Canada fails to meet in order to obtain a stay.

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[28] *RJR-MacDonald Inc. supra* [AGC's Book of Authorities, Tab 36].

[29] *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*, [1994] F.C.J. No. 1504 [AGC's Book of Authorities, Tab 15].

30. One of the purposes of the quasi-constitutional *Canadian Human Rights Act* ("CHRA") is to provide redress and compensation to victims of discrimination. Such compensation should be effective in promoting rights protected by the CHRA and meaningful in vindicating any loss experienced by the victim.[30] To be meaningful, compensation should also be as timely as possible.

31. If the Compensation Ruling is stayed, and the judicial review dismissed, the compensation process and related payments to victims of discrimination will be further delayed, likely by a year or more.

32. Delaying compensation to victims of discrimination is contrary to victims' interests in receiving timely compensation, as well as to the public interest in the expeditious resolution of quasi-constitutional human rights disputes. On balance, this harm to victims and the public interest outweighs any inconvenience that Canada will experience if it complies now with the Compensation Ruling, pending the completion of the judicial review.

PART IV—ORDER SOUGHT

33. For all the foregoing reasons, the Commission respectfully asks this Court to dismiss Canada's motion to stay the Compensation Ruling, without prejudice to Canada's ability to bring a fresh motion for a stay of any subsequent rulings the Tribunal may make regarding financial compensation for victims of Canada's discriminatory practices.

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[30] *Robichaud v. Canada (Treasury Board),* [1987] 2 S.C.R. 84 at paras. 13-15 [CHRC's Motion Record, Tab 9]; *Jane Doe v. Attorney General of Canada*, 2018 FCA 183 at para. 23 [CHRC's Motion Record, Tab 5; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2016 CHRT 10 at paras. 11-12, 14 [AGC's Book of Authorities, Tab 17].

34. The Commission does not seek costs, and asks the Court not to award costs against it, since it is appearing in its capacity as a public interest litigant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2019.

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PART V—AUTHORITIES

Case law

Belzberg v. Canada (Commissioner of Patents), [2009] F.C.J. No. 1197

Canadian Council for Refugees v. Canada, [2008] F.C. J. No. 131

D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research), [1994] F.C.J. No. 1504

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2016 CHRT 2

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2016 CHRT 10

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 39

Jane Doe v. Attorney General of Canada, 2018 FCA 183

Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110

Nadarajah v. Canada (Citizenship and Immigration), 2018 CanLII 58459

Public Service Alliance of Canada v. Canada Post Corporation, 2010 FCA 56

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84

TAB 3

Belzberg v. Canada (Commissioner of Patents), [2009] F.C.J. No. 1197

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

Sharlow J.A.

Heard: In writing.

Judgment: September 25, 2009.

Docket A-316-09

[2009] F.C.J. No. 1197 | 2009 FCA 275 | 396 N.R. 342 | 78 C.P.R. (4th) 81

Between The Commissioner of Patents and the Attorney General of Canada, Appellants, and Sydney H. Belzberg, Respondent

(25 paras.)

Case Summary

Civil litigation — Civil procedure — Appeals — Stay of proceedings pending appeal — Irreparable harm — Motion by Crown for stay pending appeal dismissed — The Crown sought to appeal an order made on judicial review that required the Commissioner of Patents to issue a patent to the respondent, pursuant to s. 27 of the Patent Act — The appeal involved interpretation of the provision — The appellate court refused to grant a stay — The Crown was not at liberty to ignore an order requiring it to file an affidavit in support of its motion — There was thus no factual basis provided to establish irreparable harm were a stay not granted.

Intellectual property law — Patents — Procedure — Appeals — Motion by Crown for stay pending appeal dismissed — The Crown sought to appeal an order made on judicial review that required the Commissioner of Patents to issue a patent to the respondent, pursuant to s. 27 of the Patent Act — The appeal involved interpretation of the provision — The appellate court refused to grant a stay — The Crown was not at liberty to ignore an order requiring it to file an affidavit in support of its motion — There was thus no factual basis provided to establish irreparable harm were a stay not granted — Patent Act, s. 27.

Motion by the appellants, the Commissioner of Patents and the federal Crown, for a stay pending disposition of their appeal. The respondent, Belzberg, submitted a patent application in 1994. His request for expedited examination was granted in 1996. Following conclusion of the examination process in 2002, the final action report alleged that the patent application was defective. In 2005, the Patent Appeal Board reviewed the rejection. In 2007, the Board concluded that the alleged defects were unsubstantiated. The Board reversed the examiner's rejection of the application and ordered that it be returned. The Commissioner issued a decision concurring with the Board and returning the application to the examiner for further prosecution in accordance with the Board's recommendations. Further examinations were undertaken and further requisitions were issued in relation to matters that had arisen during the prior examination but were not raised in the final action report or before the

Board. In 2008, the respondent successfully applied for judicial review of the Commissioner's decision on the basis that an examination could not be restarted after disposal of all defects alleged in a final action report. The court ordered the Commissioner to grant the respondent's patent application under s. 27 of the Patent Act. The Commissioner and the Crown appealed and sought a stay of the order. The Crown's appeal contended that the Act should be interpreted to preclude an applicant from seeking review of a Commissioner's decision prior to a decision to grant or refuse a patent.

HELD: Motion dismissed.

The appeal raised a question of law that was not frivolous or vexatious. However, the Crown failed to submit an affidavit in respect of irreparable harm in the absence of a stay. Such failure was sufficient to deny the motion, as the Crown's request for an oral hearing was rejected with an order that the Crown file an affidavit in support of its motion. The Crown was not at liberty to ignore the order. Moreover, the Crown's motion record did not establish that irreparable harm would accrue to the Crown or the public interest were a stay not granted. The appeal was a dispute regarding statutory interpretation rather than a challenge to the validity of a law. There was no evidence regarding factual considerations of potential confusion or inconsistencies caused by the decision under appeal. There was no need to consider the balance of convenience.

Statutes, Regulations and Rules Cited:

Patent Act, R.S.C. 1985, c. P-4, s. 27

Counsel

Written representations by:

Jacqueline Dais-Visca, for the Appellants.

Fraser D. Rowand, Paul V. Lomic and Jeff M. Tracey, for the Respondent.

REASONS FOR ORDER

SHARLOW J.A.

1 The Commissioner of Patents and the Attorney General of Canada (collectively, the "Crown") have moved for a stay of the order of Justice Simpson dated June 23, 2009 pending the disposition of this appeal of that order. The respondent Sydney H. Belzberg opposes the motion. The reasons for Justice Simpson's order are reported as *Belzberg* v. *Commissioner of Patents*, 2009 FC 657.

2 The basic facts appear to be undisputed. Mr. Belzberg submitted a patent application in 1994.

His request for an expedited examination was granted in 1996. The patent examination process resulted, in 2002, in a "Final Action Report" alleging that the patent application was defective. A Patent Appeal Board hearing was convened in 2005 to review the rejection of the application. In January of 2007, the Board concluded that none of the alleged defects was substantiated and recommended that "the examiner's rejection of the application be reversed and that the application be returned to the examiner for further prosecution consistent with these recommendations". It is not clear from the material before me what further prosecution was contemplated by the Board, if any. The Commissioner issued a decision concurring with the decision of the Board and returning the application to the Examiner "for further prosecution consistent with the Board's recommendation". The result was that further examinations were undertaken and further requisitions issued in relation to matters that had arisen during the prior examination but were not raised in the Final Action Report or considered by the Board.

3 In 2008, Mr. Belzberg commenced an application for judicial review of the decision of the Commissioner. In paragraph 2 of Justice Simpson's reasons, the issue raised by Mr. Belzberg is stated as follows:

> ... whether the Commissioner may restart an examination of a patent application after disposing of all of the defects alleged in an examiner's rejection labelled "Final Action" under section 30 of the *Patent Rules*, SOR/96-423.

4 Justice Simpson allowed the application for judicial review, set aside the decision and granted ancillary relief, including the following order:

> The Commissioner is to forthwith make a decision granting the Patent Application under section 27 of the [*Patent Act*] as it was amended by [Mr. Belzberg] in the Voluntary Amendment.

5 Section 27 of the *Patent Act*, R.S. 1985, c. P-4, reads as follows (my emphasis):

> 27. (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.
>
> * * *
>
> 27. (1) Le commissaire accorde un brevet d'invention à l'inventeur ou à son représentant légal si la demande de brevet est déposée conformément à la présente loi et si les autres conditions de celle-ci sont remplies.

6 At the risk of oversimplifying, it seems to me from Justice Simpson's reasons that she was required to consider whether section 27 of the *Patent Act* imposes a mandatory obligation on the Commissioner to issue a patent when the regulatory process reaches a certain point. Having concluded that there was such a mandatory obligation, she was required to consider whether the critical point in the regulatory process had been reached when the Commissioner, rather than granting the patent, made the decision challenged by Mr. Belzberg which prolonged the patent examination process. She concluded that the challenged decision was made after the critical point had been reached, which led her to make the order under appeal.

7 The Crown's appeal is based primarily on its position that the relevant provisions of the *Patent Act* should be interpreted to preclude a patent applicant from seeking judicial review of any decision of the Commissioner made before the decision to grant or refuse to grant a patent.

8 The Supreme Court of Canada has established a three part test to determine whether a stay should be granted (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311). Generally, the applicant for a stay must show that there is a serious question to be tried, that irreparable harm will be suffered if the stay is not granted, and that the balance of inconvenience favours the granting of a stay.

9 The notice of appeal provides a sufficient basis for concluding that the appeal raises a question of law that is not frivolous or vexatious. Therefore, the first test is met.

10 The question of irreparable harm is problematic in this case. Irreparable harm is a question of fact, but the Crown has submitted no affidavit. To understand why there is no affidavit, it is necessary to consider part of the procedural history of this matter.

11 The Crown's motion record was filed with a request that it be decided after an oral hearing. In an order dated September 3, 2009, Justice Trudel rejected that request. Her order goes on to say this:

> The appellants shall also file an affidavit supporting the motion as required by Rule 364(2)(*c*) of the *Federal Courts Rules*.

12 The Crown has not complied with this order, which in my view is a sufficient basis to dismiss the motion. However, I will consider, first, the letter dated September 9, 2009 to the Court from counsel for the Crown, and second, the question of whether the absence of an affidavit would in any event be fatal to the Crown's motion for a stay.

13 The letter of September 9, 2009 reads in part as follows:

> Please be advised that the Attorney General of Canada has elected to not file any affidavit evidence in respect of the motion to stay the Order of Justice Simpson dated June 23, 2009. As can be seen from the Motion Record and Written Submissions, the stay of proceedings is based on the public interest and the only materials relied upon are the applicable legislation and the Decision under appeal.

14 I make three observations about this letter. First, counsel for the Crown has assumed incorrectly that, despite being ordered to file an affidavit, the Crown need not respect the order but is free to "elect" not to do so. Second, counsel for the Crown has assumed incorrectly that it is appropriate, upon receiving an order of this Court to which it objects, to express the objection by way of a letter rather than a motion to reconsider or vary the order. Third, the Crown has failed to appreciate that the order of Justice Trudel actually favoured the Crown, because it provided an opportunity to correct what may be a fatal deficiency in the Crown's motion record (see, for example, *Attorney General of Canada v. J.P.*, 2009 FCA 211).

15 I turn now to the question of whether the Crown's motion record as it stands provides any basis upon which I could determine the question of irreparable harm in the Crown's favour, assuming the motion is not dismissed summarily for failure to comply with a court order.

16 The Crown's written submissions, paragraphs 33 to 37, purport to discuss the question of irreparable harm, but those paragraphs are directed at the proposition that Mr. Belzberg cannot claim to have suffered irreparable harm from the decision of the Commissioner that he successfully challenged in the Federal Court. They do not address the question of whether any irreparable harm would result to the Crown or the public interest if the stay is not granted.

17 Paragraphs 16 to 22 of the Crown's submissions, entitled "Public Interest in Granting a Stay Pending Appeal", sets out the Crown's position that where a statutory authority is seeking a stay of an order pending appeal, there is an overriding public interest that justifies the Court in finding for the Crown on the question of irreparable harm. This position is based primarily on the following excerpt from *RJR-MacDonald* (paragraph 71):

> In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

18 The quoted statement from *RJR-Macdonald* was made in the context of a case involving a challenge to the validity of a statute, where a party affected by a regulation made under the statute wished to be relieved of an onerous obligation to comply with the regulation until the challenge was resolved. The Crown in this case is seeking a stay of an order in which there was no challenge to the validity of a law, but only a dispute as to its interpretation.

19 I do not read *RJR-MacDonald* as authority for the proposition that, where the Crown seeks a stay of an order pending appeal, it is relieved of the burden of adducing evidence of irreparable harm, if not to the Crown itself, at least to the orderly administration of the law. That burden may be easily met in some cases, but I do not accept that the burden is automatically met simply because the Crown seeks a stay.

20 It may be that the issue of the orderly administration of the *Patent Act* was on the mind of counsel for the Crown when writing, in paragraph 22 of the Crown's submissions, that "the consequence of not granting a stay pending appeal will be confusion, additional delay, and inconsistency in the processing of patent applications in what is already a very litigious area of the law." In my view, this is the kind of submission that cannot be assessed without a factual foundation, because it requires knowledge of the practice of patent examinations, a topic on which I am not prepared to take judicial notice. The Crown argues that it is important to preserve the "administrative and procedural *status quo*", without purporting to explain what the "administrative and procedural *status quo*" is (apart from its argument that the order under appeal is wrong in law).

21 It might be helpful to know, for example:

a) whether it is common and accepted practice for the Commissioner to make decisions like the one challenged in this case, or whether the facts of this case are unique;

b) whether it is common and accepted practice for a patent application to be returned for examination after a Board hearing that appears to favour the applicant on the merits;

c) whether a patent examination period of 13 to 15 years is considered normal; and

d) whether it is possible to determine how many other patent applicants may be in a position to raise one or more of the issues determined by Justice Simpson in Mr. Belzberg's favour, and if so, how many other potential cases there are.

22 It would also be helpful to have a factual basis for the Crown's submission that the decision under appeal can be expected to result in confusion, additional delay, and inconsistency. Who is likely to be confused by the decision? Who is obliged to act inconsistently because of the decision, and in what way? There is no evidence on any of these factual questions, and I cannot discern the answers from the decision under appeal or in the legislation.

23 In the absence of any evidence that irreparable harm will result if the stay is not granted, I would be compelled to dismiss the Crown's motion for a stay.

24 The Crown's motion for a stay will be dismissed for failure to comply with the order of Justice Trudel dated September 3, 2009.

25 The respondent has sought costs on a solicitor and client basis. I agree that solicitor and client costs are warranted. An order will be made accordingly. The Crown has submitted that the Commissioner cannot be compelled to pay costs. I am not persuaded that this is so, but I need not decide that point. The order will provide that the costs will be payable by the Attorney General of Canada in any event of the cause.

SHARLOW J.A.

TAB 4

Canadian Council for Refugees v. Canada, [2008] F.C.J. No. 131

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

Richard C.J.

Heard: January 30, 2008.

Judgment: January 31, 2008.

Docket A-37-08

[2008] F.C.J. No. 131 | 2008 FCA 40 | 164 A.C.W.S. (3d) 564 | 373 N.R. 387

Between Her Majesty the Queen, Appellant, and Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe, Respondents

(54 paras.)

Case Summary

Civil litigation — Civil procedure — Judgments and orders — Enforcement — Stay of — Application by Crown for stay of judgment declaring Safe Third Country Agreement invalid allowed — Serious issues raised regarding whether agreement violated Canadian Charter of Rights and Freedoms and international conventions — Crown would suffer irreparable harm if public confidence in government called into question — Public interest in maintaining agreement and its underlying system for providing efficient determination of refugee claims outweighed any inconvenience to individuals or public interest groups if stay granted — Federal Courts Rules, Rule 398(1)(b).

Constitutional law — Constitutional validity of legislation — Application by Crown for stay of judgment declaring Safe Third Country Agreement invalid allowed — Serious issues raised regarding whether agreement violated Canadian Charter of Rights and Freedoms and international conventions — Crown would suffer irreparable harm if public confidence in government called into question — Public interest in maintaining agreement and its underlying system for providing efficient determination of refugee claims outweighed any inconvenience to individuals or public interest groups if stay granted — Canadian Charter of Rights and Freedoms, 1982, ss. 7, 15.

Immigration law — Constitutional issues and legislation — Canadian Charter of Rights and Freedoms — Convention refugees — Procedure (fundamental justice) — Application by Crown for stay of judgment declaring Safe Third Country Agreement invalid allowed — Serious issues raised regarding whether agreement violated Canadian Charter of Rights and Freedoms and international conventions — Crown would suffer irreparable harm if public confidence in government called into question — Public interest in maintaining agreement and its underlying system for providing efficient determination of refugee

claims outweighed any inconvenience to individuals or public interest groups if stay granted — Immigration and Refugee Protection Act, s. 102.

Immigration law — Refugee protection — Practice and judicial review — Application by Crown for stay of judgment declaring Safe Third Country Agreement invalid allowed — Serious issues raised regarding whether agreement violated Canadian Charter of Rights and Freedoms and international conventions — Crown would suffer irreparable harm if public confidence in government called into question — Public interest in maintaining agreement and its underlying system for providing efficient determination of refugee claims outweighed any inconvenience to individuals or public interest groups if stay granted.

International law and conflict of laws — Treaties and conventions — Operation and effect — Application by Crown for stay of judgment declaring Safe Third Country Agreement invalid allowed — Serious issues raised regarding whether agreement violated Canadian Charter of Rights and Freedoms and international conventions — Crown would suffer irreparable harm if public confidence in government called into question — Public interest in maintaining agreement and its underlying system for providing efficient determination of refugee claims outweighed any inconvenience to individuals or public interest groups if stay granted — Safe Third Country Agreement.

Application by the Crown for a stay of a judgment that declared the Safe Third Country agreement invalid. Canada and the United States entered into the agreement to share responsibility for the determination of refugee claims, to ensure claimants had access to one full and fair status determination procedure, and to ensure claims were handled efficiently. Either party had to return refugee claimants to the other country when the claimant crossed the border at a land entry point for adjudication of their claims. The judge held the government exceeded its jurisdiction in adopting regulations putting the agreement into operation. The judge found the United States did not comply with its non-refoulement obligations under several international conventions. He also found the return of a refugee claimant from Canada to the United States for a refugee determination would violate the Canadian Charter of Rights and Freedoms. The judgment was set to become effective February 1, 2008, at which time the agreement, in place since 2004, would cease to operate in Canada. The Crown appealed the decision. Several public interest groups and a John Doe opposed the application for a stay. They relied on three affidavits. Moreno was granted refugee status in Canada but her common-law partner was not, and was returned to the United States and detained. He was then deported to Honduras and was killed three months later. No evidence showed the partner made a refugee claim in the United States, and details of his deportation were not provided. Giantonio, the director of the Vermont Refugee Assistance organization, gave three examples of individuals who sought refugee status in Canada but were found ineligible due to the agreement, and were then deported to Colombia by the United States. Benatta deposed his United States asylum claim was rejected in December 2001, concurrent with an indictment for possession of false documents. The charges, later dropped, resulted in Benatta's detention until 2006 when he was allowed to return to Canada to resume his claim for refugee protection. An experienced immigration law professor deposed on behalf of the Crown that despite some unfortunate incidents, the United States had enacted the proper laws forbidding cruel, inhuman and degrading treatment and ensuring the Geneva Conventions were being followed.

HELD: Application allowed, and a stay granted.

The issues in the Crown's appeal deserved full appellate review on their merits before ordering a suspension of the agreement. There were serious issues raised which were neither frivolous nor vexatious. The Crown satisfied the court that irreparable harm would result from the suspension of the agreement, as it would call into question

whether the government was promoting the public interest. The presumption that the government entered into the agreement in the public interest was not rebutted by the lower court's decision. Public interest groups which opposed the stay would not suffer personal harm, nor would a John Doe respondent who had been living in the United States since 2000 with a claim for protection still pending. The public interest in maintaining in place the Regulations made to given effect to the agreement outweighed any detriment that would result from granting the stay.

Statutes, Regulations and Rules Cited:

Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Safe Third Country Agreement), Article 4(1)

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 15

Convention against Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3

Convention relating to the Status of the Refugee, 189 U.N.T.S. 150, Article 33

Federal Courts Rules, SOR/98-106, Rule 398(1)(b)

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 5(1), s. 101(1)e), s. 102, s. 102(1)

Immigration and Refugee Protection Regulations, s. 159.1, s. 159.2, s. 159.3, s. 159.4, s. 159.5, s. 159.6, s. 159.7

Refugee Convention

Appeal From:

Appeal from a judgment of justice Phelan dated january 17, 2008.

Counsel

Greg G. George and Matina Karvellas, for the Appellant.

Barbara Jackman, Andrew Brouwer and Leigh Salsberg, for the Respondents (Canadian

Council for Refugees, Canadian Council of Churches and John Doe)

The judgment of the Court was delivered by

RICHARD C.J.

1 The appellant, who was the respondent in the Federal Court, seeks an Order staying the Judgment of Justice Phelan dated January 17, 2008 allowing the respondents' application for a declaration invalidating the *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, also known as the *Safe Third Country Agreement* (STCA) between the Government of Canada and the Government of the United States of America (U.S.) (*Canadian Council for Refugees v. Canada*, [2007] F.C.J. No. 1583, 2007 FC 1262).

2 The STCA is an agreement pursuant to subsection 102(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims. The essence of the STCA is expressed at article 4(1), which states that "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry [...] and makes a refugee status claim". Similar agreements between European Union (EU) member states have existed for many years.

3 Justice Phelan held that the Governor in Council exceeded its jurisdiction when it adopted Regulations designating the U.S. a safe third country and putting into operation the STCA, as he was of the view that the U.S. did not comply with its non-refoulement obligations under article 33 of the *Convention relating to the Status of Refugee*, 189 U.N.T.S. 150 (April 22, 1954), or the *Refugee Convention* (RC), and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (June 26, 1987) or *Convention against Torture* (CAT). He further held that the return of a refugee claimant from Canada for a refugee determination by the U.S. asylum and refugee system would violate sections 7 and 15 of the *Charter of Rights and Freedoms* (*Charter*) because of the U.S.'s apparent failure to comply with its non-refoulement obligations.

4 Justice Phelan's judgment will become effective on February 1, 2008, at which point the STCA, which has been in effect since December 2004, will cease to operate in Canada.

5 The appellant seeks an Order to stay Justice Phelan's judgment until such time as this Court has had an opportunity to consider and render its decision.

6 The appellant submits that the requirements of a stay have been met as: there are serious issues to be determined, the appellant will suffer irreparable harm and the balance of convenience favours the appellant. The appellant also requests that this proceeding be expedited.

7 A brief history of the STCA between Canada and the United States and its implementation in Canada is found in the affidavit of Bruce A. Scoffield sworn September 19, 2006 which was filed

in the proceedings before Justice Phelan. Mr. Scoffield is the Director for Operational Coordination in the International Region, Citizenship and Immigration Canada.

> Canada and the U.S. have a long history of cooperation relating to the movement of persons across their shared border. A formal joint commitment to bilateral responsibility sharing came in 1995 through the adoption of the "Shared Border Accord" ("SBA"). In December 1995, a preliminary draft of a responsibility sharing agreement based on the Safe Third Country concept was made public. [...] (para. 16)
>
> [...]
>
> This joint commitment was reaffirmed on December 12, 2001 when the then Minister of Foreign Affairs, the Honourable John Manley, and the Director of the U.S. Office of Homeland Security, Governor Tom Ridge, announced the "Smart Border Declaration" and associated Action Plan. The Declaration and Action Plan committed the two governments to collaborative efforts to enhance the security of our shared border while facilitating the legitimate flow of people and goods. One of the thirty-two specific commitments agreed in the Action Plan was the negotiation of a bilateral safe third country agreement. (para. 19)
>
> [...]
>
> Canada and the U.S. signed the Agreement on December 5, 2002. In its preamble, the two governments set out their objectives related to international cooperation, burden and responsibility sharing. The two governments recognized that the sharing of responsibility for refugee protection must include access to a full and faire refugee status determination in order to guarantee the effective implementation of the Refugee Convention and the Convention against Torture. [...] (para. 24)
>
> The Agreement applies to situations where a refugee claim is made to one party by a refugee claimant who arrives at a land border port of entry directly from the territory of the other party. The Agreement generally assigns responsibility for adjudicating refugee claims in such cases to the "country of last presence". [...] For the moment, the Agreement is limited in application to refugee claims made at ports of entry where the movement of refugee claimants across the border can easily be observed and the country of last presence can readily be established. [...] (para. 25)
>
> Following a final round of negotiations on the Agreement in the fall of 2002, authority was sought, further to *IRPA* s. 102(1)(a), to designate the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture and approval of the Agreement and authority to sign it was al so requested. *IRPA* s. 102(2) required that the Governor in Council consider four factors when considering designating a country as safe. These are: (1) whether it is a party to the Refugee Convention and the Convention against Torture; (2) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention against Torture; (3) its human rights record; and (4) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection. (para. 26)
>
> [...]
>
> Draft implementing regulations were pre-published in the *Canada Gazette Part I* on October 26, 2002. During the public comment period, the government received input from academics, members of the legal community and NGOs. The UNHCR also provided

comments relating to the draft regulations. [...] In November 2002, the House of Commons Standing Committee on Citizenship and Immigration held hearings on the draft regulations, and subsequently released a report recommending a number of amendments. The government response to that report was tabled in the Hose of Commons on May 1, 2003, and noted that the Government accepted, in whole or in part, twelve out of seventeen recommendations made by the committee. [...] (para. 28)

[...]

Final regulations were published in the *Canada Gazette Part II* on November 3, 2004. [...] (para. 31)

Two additional rounds of consultations were undertaken by the Government prior to implementation of the Agreement, focusing on the development of operational instructions and manuals. [...] (para. 32)

[...]

A monitoring plan for UNHCR staff in both Canada and the U.S. was jointly agreed upon by each government. UNHCR's mandate under this plan is to assess whether implementation of the Agreement is consistent with its terms and principles as well as with international refugee law. [...](para. 34)

[...]

The UNHCR is presently engaged with the two governments in a review of the first year of the Agreement's implementation which addresses, *inter alia*, specific observations and recommendations made by UNHCR as a result of its monitoring activities. Although the review is not yet final, UNHCR's Representative did provide an overview of UNHCR's assessment of the Agreement's first year to the Standing Committee on Citizenship and Immigration when he appeared as a witness on May 29, 2006. In his remarks, Mr. Asadi noted that overall UNHCR's findings were positive. (para. 36)

[...]

In response to a question from a member of the Committee, Mr. Asadi went on to state that "We consider the U.S. to be a safe country. Otherwise we would have not agreed to do this monitoring and we would have said so at the very beginning." [...] (para. 38)

[...]

Distinct from the monitoring and oversight of implementation of the Agreement itself is the Government's continuing review of the factors relevant to the designation of the U.S. as a safe third country. Prior to the signing of the Agreement and since its implementation, the Government has continued to monitor developments in U.S. law and policy which could have an impact on the integrity of the Agreement, as mandated by the November 2004 Order in Council on directives for ensuring a continuing review of factors set out in s. 102(3) of *IRPA* with respect to countries designated under s. 102(1)(a) of *IRPA*. The Government makes use of numerous sources of information to this end, including academic and NGO commentary, diplomatic reporting from Canadian missions in the U.S., our ongoing dialogue with the UNHCR, and regular exchanges with American officials. [...] (para. 42)

8 In summary, Canada and the United States entered into an agreement to share responsibility for the determination of refugee claims. The rationale for this agreement is to ensure that

refugee claimants have access to one full and fair refugee status determination procedure and that refugee claims are handled in an orderly and efficient manner.

9 The Governor in Council (GIC) promulgated regulations under the authority of subsections 102(1) and 5(1) of the *IRPA* to implement the STCA. Subject to express exceptions, the STCA requires refugee claimants to seek protection in whichever of the two countries they first enter.

10 The respondents in this appeal, the applicants in the proceeding before Justice Phelan, three advocacy groups and one individual, challenged the validity of the GIC's designations of the U.S. as a safe third country.

11 Justice Phelan declared the regulations *ultra vires* and contrary to sections 7 and 15 of the *Charter* on the ground that the U.S. is not a safe third country that complies with the non-refoulement requirements of article 33 of the *Refugee Convention* and article 3 of the *Convention Against Torture*.

12 The result of invalidating sections 159.1-159.7 of the *Immigration Refugee Protection Regulations* is the termination of the operation of the STCA in Canada.

13 In allowing the application, Justice Phelan certified the following questions:

1. Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?
2. What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?
3. Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(*e*) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

14 The appellant has appealed the judgment by a notice of appeal dated January 18, 2008. The appellant brings this motion under Rule 398(1)(*b*) of the *Federal Court Rules* for a stay of the Judgment pending the determination of the appeal, and seeks an Order expediting the appeal proceedings.

15 This Court has authority to grant a stay pending an appeal before it, including the stay of an order that declares legislation to be invalid or that infringes the *Charter* pending a final determination of the issues.

16 Rule 398(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, as amended, permits this Court to stay an Order of the Federal Court:

> **398.**(1) On the motion of a person against whom an order has been made,
>
> (a) where the order has not been appealed, the court that made the order may order that it be stayed; or

(b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.

398.(1) Sur requête d'une personne contre laquelle une ordonnance a été rendue :

a) dans le cas où l'ordonnance n'a pas été portée en appel, la cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;

b) dans le cas où un avis d'appel a été délivré, seul un juge de la cour saisie de l'appel peut surseoir à l'ordonnance.

17 Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions.

18 A three-stage test is applied to applications for interlocutory injunctions and for stays in private law and *Charter* cases. At the first stage, the applicant must demonstrate a serious question to be tried. The threshold to satisfy this test is a low one. At the second stage, the applicant must establish that it will suffer irreparable harm if the relief is not granted. The third stage requires an assessment of the balance of inconvenience and it will often determine the result in applications involving *Charter* rights. The same principles apply when a government authority is the applicant. However, the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience (*RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311).

Serious Issue

19 Justice Phelan certified three serious questions of general importance which I have referred above in paragraph 13.

20 In addition to the certified questions, the applicant for a stay raises other issues concerning the judge's findings of fact.

21 The respondents do not dispute that there are serious issues raised in this case based on the questions certified by Justice Phelan. However, they do not accept the further issues raised by the appellant.

22 The issues raised on appeal are not frivolous or vexatious. Therefore, the applicant has satisfied the first stage of the three-fold test for a stay.

Irreparable Harm

23 Irreparable harm refers to the nature of the harm suffered rather than its magnitude.

24 The issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage (*RJR-MacDonald*, above, at para. 81).

25 The Supreme Court of Canada has held that the public interest is to be widely construed in *Charter* cases:

> 71. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 72. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights (emphasis added) (*RJR-MacDonald*, para. 73).

26 As noted by the Supreme Court of Canada in *RJR-MacDonald*, above, the public interest considerations will weigh more heavily in a suspension case than in an exemption case where the public interest is more likely to be detrimentally affected. Since the operation of the STCA would be suspended by the operation of the judge's order, this is clearly a suspension case.

27 The applicant for a stay alleges that the appellant will suffer irreparable harm in other respects, which can be summarized as the likelihood of an influx of refugees into Canada from the United States and the corresponding negative impact on border services. This allegation is supported by the affidavit of George Bowles sworn on December 17, 2007.

28 The respondents claim that irreparable harm does not exist merely when there will be administrative inconvenience or expense.

29 The respondents submit that the appellant will not suffer irreparable harm if Justice Phelan's declaration is permitted to take effect. In the alternative, the respondents submit that irreparable harm will be suffered on both sides, but that the harm to the respondents outweighs any alleged harm claimed by the appellant. However, at this second stage of the test, the Court is called upon to consider the harm that the applicant will suffer if the stay is not granted.

30 I am satisfied that the applicant for a stay has satisfied the second requirement of the three-stage test.

Balance of convenience

31 Since the applicant is a government institution, the Court must consider the applicant's inconvenience as well as the respondents' convenience.

32 Once there is some indication that the impugned legislation, regulation, or activity was undertaken pursuant to the government's responsibility for promoting the public interest, a

legislative scheme under attack is presumed to benefit the public interest, *RJR-MacDonald*, above, at paras. 71-80.

33 These principles were subsequently reiterated in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, at para. 9:

> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid [page 771] public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in RJR--MacDonald was of s. 2(b). **The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter.** It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (emphasis added).

34 I do not accept the respondents' contention that the presumption that the STCA Regulations are in the public interest has been displaced by the judgment of the Federal Court. This judgment is under appeal and the presumption of public interest remains pending complete constitutional review.

35 The public interest groups, who are the respondents in this application for a stay, will suffer no personal harm. The respondent, John Doe, has been living in the United States since 2000 and his claim for protection is still pending.

36 However, "public interest" includes both the concerns of society generally and the particular interests of identifiable groups (*RJR-MacDonald*, above, at para. 66).

37 When a private applicant alleges that the public interest is at risk, that harm must be demonstrated (*RJR-MacDonald*, above, at para. 68).

38 The respondents relied on three affidavits (the Moreno affidavit, the Giantonio affidavit and the Benatta affidavit) to demonstrate the public interest component of their position.

39 The Moreno affidavit states that she was granted refugee status in Canada but that her common-law partner was not and was returned to the U.S. and detained. He was subsequently deported to Honduras and three months later he was killed. There is no evidence that he made a refugee claim in the U.S. or of the circumstances surrounding his deportation.

40 Patrick Giantonio is the Executive Director of the Vermont Refugee Assistance. He gave three examples of individuals who sought refugee status in Canada but were found ineligible due to the STCA and were deported back to Columbia by the U.S. There is no information concerning the proceedings followed in the U.S.

41 The Benatta affidavit establishes that, on the same day Mr. Benatta's U.S. asylum claim was rejected in December 2001, he was indicted for possession of false documents. These charges were subsequently dropped by a judge who described them as "a shame". However, Mr.

Benatta remained in detention until 2006 when he was allowed to return to Canada to resume his claim for refugee protection.

42 A further affidavit filed by the applicant for a stay (the Soskin affidavit) discloses that Mr. Benatta did get a hearing for his asylum application in the U.S. on two occasions. By Statement of Claim dated July 16, 2007 filed in the Ontario Superior Court of Justice, Mr. Benatta commenced an action against The Queen in Right of Canada and various government agencies claiming damages arising out of his alleged illegal transfer to authorities in the U.S. This claim has yet to be adjudicated.

43 The affidavit of David Martin, a professor of law at the University of Virginia, with over 27 years of experience in the study and practice of U.S. immigration and refugee law, sworn July 31, 2006 and filed on behalf of the applicant for a stay, states as follows:

> 229. Therefore, although there have been some unfortunate and misguided steps taken by the U.S. government or certain of its personnel in the treatment of prisoners in government custody, the U.S. legal system ultimately responded and has now set forth explicit laws and rulings both forbidding cruel, inhuman, and degrading treatment and dictating that detainees are covered, at a minimum, by common Article 3 of the Geneva Conventions.

44 The three affidavits filed by the respondents do not establish that the public interest is at risk in accordance with the standard established by the Supreme Court of Canada.

45 In his reasons for judgment, Justice Phelan identified three issues, which individually and collectively undermine the reasonableness of the GIC's conclusion of U.S. compliance: 1) the rigid application of the one-year bar to refugee claims; 2) the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion; 3) the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (Reasons for Judgment, para. 239).

46 The respondents argue that, for the time being at least, this decision represents the law. However, it is this very decision that is the subject of an appeal and constitutional review in this Court.

47 At the hearing, counsel for the respondents suggested as an alternative to a stay of the Order of Justice Phelan that the Court consider granting a stay exempting the groups referred to by Justice Phelan in paragraph 239 of his reasons from the application of the STCA.

48 Counsel for the applicant for a stay argued that this proposal would have the same effect as a suspension of the Regulations.

49 Counsel for the applicant for a stay noted that the STCA has been in effect now for more than three years (December 29, 2004 to January 18, 2008).

50 Applying the principles enunciated in the decisions of the Supreme Court of Canada and without pre-judging the outcome of any appeal, I am satisfied that the public interest in

maintaining in place the Regulations made pursuant to legislative authority pending complete constitutional review outweighs any detriment.

51 I find that the balance of convenience favours granting the stay pending the appeal from the judgment of the Federal Court.

Disposition

52 I conclude that the issues in this appeal deserve full appellate review on their merits before ordering a suspension of the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) and that the application for a stay should be granted.

53 Accordingly, the Judgment of Justice Phelan dated January 17, 2008 (Reasons for Judgment [2007] F.C.J. No. 1583, 2007 FC 1262, November 29, 2007) invalidating the Regulations implementing the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) will be stayed until such time as this Court has heard and determined the appeal.

54 The respondents agree with the appellant that it would be in the interest of justice to expedite this appeal and the Court so orders. Accordingly, counsel for the parties to the appeal will provide the Court with a schedule for the timely completion of the steps in the appeal together with a requisition for a hearing.

RICHARD C.J.

TAB 5

Jane Doe v. Canada (Attorney General), [2018] F.C.J. No. 1008

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

E.R. Dawson, D.G. Near and Y. de Montigny JJ.A.

Heard: September 20, 2018.

Judgment: October 10, 2018.

Docket: A-200-17

[2018] F.C.J. No. 1008 | [2018] A.C.F. no 1008 | 2018 FCA 183 | 428 D.L.R. (4th) 374 | [2019] CLLC para. 220-012 | 2018 CarswellNat 5646

Between Jane Doe, Applicant, and Attorney General of Canada, Respondent

(44 paras.)

Case Summary

Labour law — Labour relations boards — Awards and remedial relief — Damages — Application by D for judicial review of decision of Public Service Labour Relations and Employment Board finding employer failed to provide harassment-free workplace but refusing to award her damages allowed — A male co-worker repeatedly made crude and vulgar comments to applicant and sexually assaulted her — Board not satisfied that significant change in applicant's personality and outlook on life necessarily resulted solely from workplace incident — Board erred in not awarding damages — Board's restrictive interpretation of "compensate" resulted in denial of compensation when degrading conduct exacerbated pre-existing condition or contributed to harm caused by another source.

Application by D for judicial review of a decision of the Public Service Labour Relations and Employment Board partially upholding her grievance but refusing to award her damages. The applicant alleged that her employer failed to provide a harassment-free workplace. The employer admitted that a male co-worker repeatedly made crude and vulgar comments of a sexual nature to the applicant and sexually assaulted her. After the incidents, the applicant's personality changed drastically. Medical evidence showed the applicant was diagnosed with Adjustment Disorder With Mixed Anxiety and Depressed Mood. Although symptoms of irritable bowel predated the workplace events, the medical report indicated they have been exacerbated at times since when the applicant had been under a great deal of stress. The Board found that the co-worker's actions were reprehensible and a vulgar prank and humiliating. While the Board accepted that the applicant was angry and that she felt demeaned by the sexual assault, the Board could not make a finding that this one unpleasant experience caused the change in the grievor's personality and lifestyle from confident, cheerful, and outgoing to timid, anxious and fearful. The Board concluded that the applicant's reaction was extreme and that the pain and suffering that she felt she incurred as a result of the co-worker's act was grossly exaggerated. The Board was not satisfied that the significant change in the applicant's personality and outlook on life necessarily resulted solely from the workplace incident.

HELD: Application allowed.

The Board's decision not to award damages was unreasonable as the Board failed to explain why its findings that the co-worker's actions were reprehensible and humiliating did not ground an award for damages for pain and suffering to compensate for the applicant's loss of dignity. The Board did not engage in the required analysis and did not explain why harm suffered by the applicant could only be compensated if the actions of the co-worker were the sole and only cause of the harm. The Board's interpretation of "compensate" was unreasonable because it did not accord with the text of s. 53(2)(e) of the Canadian Human Rights Act. The Board's restrictive interpretation of "compensate" resulted in a denial of compensation when degrading conduct exacerbated a pre-existing condition or contributed to harm caused by another source. This was contrary to the purpose of the remedy and unreasonable. The Board's decision was contrary to the principle, accepted in arbitral jurisprudence, that once pain and suffering caused by a discriminatory practice were established, damages should follow.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(e), s. 65(1)

Counsel

Andrew Raven, Amanda Montague-Reinholdt, for the Applicant.

Richard Fader, for the Respondent.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

E.R. DAWSON J.A.

1 The applicant was employed by the Canadian Border Services Agency (CBSA) as a Border Services Officer at the Douglas, British Columbia port of entry. As discussed in more detail below, the applicant filed two grievances against her employer, one of which asserted that the CBSA had failed to provide a harassment-free workplace. This grievance arose out of the following circumstances.

2 In May 2008, the applicant began working with a male co-worker who repeatedly made crude and vulgar comments of a sexual nature to her.

3 At the hearing into the grievances the applicant testified that the co-worker committed the conduct outlined in Exhibit 1 entitled "Conduct". This conduct was not disputed by the CBSA. In addition to listing a number of comments made by the co-worker between May 2008 and August

28, 2009, Exhibit 1 stated that by July 2009, the co-worker was making sexually explicit and sexually violent comments to the applicant several times a day.

4 The applicant spoke to her superintendent in the fall of 2008 about the co-worker's behaviour. The supervisor then spoke to the co-worker who told the supervisor that he would not make further inappropriate comments. The applicant never filed a written complaint, and management did not follow up to ensure that the offending conduct had stopped.

5 The behaviour continued and culminated on August 28, 2009, when the co-worker committed an act that the CBSA acknowledged constituted a sexual assault. The co-worker was immediately suspended and assigned to a different work location. The applicant went on leave and was later found by WorkSafeBC to have suffered a workplace injury as a result of the co-worker's conduct.

6 During the course of the grievance and adjudication process, the CBSA acknowledged that the applicant was sexually harassed and assaulted by her co-worker (see for example, the employer's final level reply to the grievance (applicant's record, volume 1, page 49)).

7 In 2010, the applicant filed two grievances. The Public Service Labour Relations and Employment Board dismissed one grievance and partially upheld one grievance (2017 PSLREB 55). While the Board found that the employer had failed to provide a harassment-free workplace, the Board went on to find that no payment of compensation to the applicant was warranted (reasons, paragraphs 5-6, 152, 162-163).

8 This is an application for judicial review of the Board's decision.

9 Two issues are raised on this application. First, was it unreasonable for the Board to decline to award damages? Second, does the Board's decision give rise to a reasonable apprehension of bias?

10 For the reasons that follow, I have concluded that the Board's decision was unreasonable. This conclusion makes it unnecessary to consider whether the applicant established a reasonable apprehension of bias.

Was it unreasonable for the Board to decline award damages?

11 Remedial orders of damages are discretionary; as such they are entitled to considerable deference on judicial review. This said, an award will be set aside if it is irrational or contrary to the principles accepted in the arbitral jurisprudence (*Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, 484 N.R. 10).

12 The Board began its consideration of the applicant's request for compensation by way of damages by reviewing the arbitral jurisprudence that had considered the factors to be considered when deciding the appropriateness of a remedial order. Citing *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 110, the Board quoted the following passage:

> When analyzing the eight decisions referred to by the parties ... it became apparent that most of them do not include a detailed analysis of the rational [sic] used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for

> special compensation, if applicable. However, it is clear that **the seriousness of the psychological impacts that discrimination or the failure to accommodate had on the complainants or the grievors** is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors ...
>
> [Emphasis added by the Board]

13 The Board had previously concluded that, contrary to the position advanced by the CBSA, it did have jurisdiction to consider the applicant's claim for damages based on harm to her dignity interest (reasons, paragraph 92). This was a correct appreciation of the purposes of non-pecuniary damages in cases such as this, which purposes include vindicating the claimant's dignity and personal autonomy, and recognizing the humiliating and degrading nature of the wrongful acts.

14 Relevant to the applicant's dignity interest were the Board's findings that the co-worker's actions were "reprehensible" (reasons, paragraph 99), and "a vulgar prank and undoubtedly humiliating in the moment" (reasons, paragraph 144), and that there was "no doubt" that the applicant "was angry and that she felt demeaned" (reasons, paragraph 146).

15 Missing from the Board's analysis was any explanation as to why such findings did not ground an award for damages for pain and suffering to compensate for the applicant's loss of dignity.

16 I am satisfied that when the Board's reasons are read fairly as a whole, the Board found that the co-worker's conduct was not the sole cause of the applicant's medical condition. It followed, in the Board's view, that the applicant was not entitled to damages. Thus, the Board wrote at paragraph 152 of the reasons that the applicant's "extreme reaction, which continued and worsened over the years, simply cannot, on the evidence, be attributed to the co-worker's act or to the employer's post-incident response."

17 This is seen from the following summary of the Board's brief reasons:

* By all accounts, the applicant was a confident employee who handled the work easily and had aspirations of joining the management team. She was well-liked by the other Border Services Officers and engaged in friendly banter with them, including the co-worker. Sometimes that banter had sexual content. ... (reasons, paragraph 142).
* There were steps that a confident employee such as the applicant could have taken to deal with the harassment (reasons, paragraph 143).
* It was "unlikely, to say the least" that the sexual assault, characterized by the Board to be a "vulgar prank", "caused the extreme emotional impact described by the grievor" and her fiancé (reasons, paragraph 144).
* While the Board accepted that the applicant "was angry and that she felt demeaned", on all of the evidence the Board could not make a finding that "this one unpleasant experience caused a sea change in the grievor's personality and lifestyle from confident, cheerful, and outgoing to timid, anxious and fearful" (reasons, paragraph 146).

* The Board could not conclude that the applicant's experience rendered her unfit to work at the Douglas port of entry for 5 1/2 years as of the date of the hearing (reasons, paragraph 147).
* The Board concluded that the applicant's "reaction was extreme and that the pain and suffering that she feels she incurred as a result of the co-worker's act is grossly exaggerated" (reasons, paragraph 148).
* The Board found that there was no case for damages arising from CBSA's failure to exercise all due diligence to prevent the occurrence of harassment in the workplace (reasons, paragraph 152).

18 Consistent with this conclusion is the Board's characterization of the medical evidence presented on the applicant's behalf. At paragraph 65 of the reasons the Board noted that "the reports do not indicate that [the significant change in the applicant's personality and outlook on life] necessarily resulted solely from the workplace incident."

19 This finding is problematic for at least three reasons.

20 First, the CBSA acknowledged that her co-worker's conduct had affected the applicant. Thus, in its response to the level two grievance the employer acknowledged that it was only after a specific discussion that "management gained further insight as to the impact the August 28, 2009 incident" had on the applicant. Further, in an email sent on October 7, 2009, from the chief of operations of the Douglas port of entry to, among others, the CBSA's district director and regional director, the chief of operations wrote that the applicant "has suffered significant emotional trauma over this incident" (applicant's record, volume 1, page 193). Finally, while in its written closing statement to the Board the CBSA sought to avoid any award of damages on a number of grounds, it did not argue that the applicant had not suffered harm as a result of the sexual harassment directed to her by the co-worker or that to be compensable the harm must be caused solely by the co-worker. In this circumstance it is not clear that the applicant knew that the issue of the cause of the harm she suffered was in play.

21 Second, paragraph 53(2)(*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 allows an adjudicator to order that a person found to have engaged in a discriminatory practice "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." Under subsection 65(1) of the Act, any act committed by an employee in the course of employment is deemed to be an act committed by the employer.

22 It is for the Board to determine in every case what "compensate" means and what, if any, payment is appropriate in the circumstances. The proper meaning of "compensate" is a question within the Board's expertise and the Board's interpretation of the relevant statutory provision is reviewable on the standard of reasonableness.

23 To discern the meaning of "compensate", the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by reading paragraph 53(2)(*e*) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the Act. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect.

24 In the present case, the Board did not engage in the required analysis and did not explain why harm suffered by the applicant could only be compensated if the actions of the co-worker were the sole and only cause of the harm.

25 In my view, the Board's interpretation of "compensate" was unreasonable for two reasons.

26 First, the interpretation does not accord with the text of paragraph 53(2)(e) which provides:

> **53.**(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:
>
> ...
>
> (*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.
>
> * * *
>
> **53.**(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 :
>
> ...
>
> (*e*) d'indemniser jusqu' à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

27 By requiring a discriminatory practice to be the sole and only cause of resulting harm the Board has unreasonably added words to the text of paragraph 53(2)(*e*) to the effect that compensation may be paid in respect of a discriminant practice only where that practice is the sole cause of harm.

28 Second, as previously stated, the purposes of non-pecuniary damages include providing a remedy to vindicate a claimant's dignity and personal autonomy and to recognize the humiliating and degrading nature of discriminatory practices. The Board's restrictive interpretation of "compensate" results in a denial of compensation when degrading conduct exacerbates a pre-existing condition or contributes to harm caused by another source. This is contrary to the purpose of the remedy and unreasonable.

29 Third, and finally, the Board's decision was contrary to the principle, accepted in arbitral jurisprudence, that once pain and suffering caused by a discriminatory practice are established, damages should follow:

* "[W]hen evidence establishes pain and suffering an attempt to compensate for it must be made" (*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10, at

paragraph 115, citing *Cruden v. Canadian International Development Agency and Health Canada*, 2011 CHRT 13, at paragraph 170).

* "When evidence establishes pain and suffering, an attempt to compensate for it must be made" (*Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36, at paragraph 213).
* "She suffered significant pain and suffering, which entitles her to compensation under s. 53(2)(e) of the *CHRA" (Legros v. Treasury Board (Canada Border Services Agency)*, 2017 FPSLREB 32, at paragraph 65).
* "By neglecting that aspect of accommodation, the [Correctional Service of Canada] caused the grievor to experience pain and suffering, which it is right to compensate" (*Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52, at paragraph 101).

30 The applicant provided extensive medical evidence. In a Psychology Assessment Report prepared on May 12, 2012 for WorkSafeBC the applicant was diagnosed with "Adjustment Disorder With Mixed Anxiety and Depressed Mood" [page 263]. The report noted:

> Pre-existing Psychological Conditions: She does not have any pre-existing problems with depression, and she hasn't had any past victimization experiences that affected her psychological functioning.
>
> ...
>
> She did not have a psychological disorder or symptoms in the few years prior to the work incident. However, she was likely vulnerable to the development of anxiety with [*sic*] when dealing with significant stress, due to her prior Panic Disorder episode.
>
> The Adjustment Disorder developed as a direct result of the August 28, 2009 critical incident. [Page 264]

31 The medical evidence did detail difficulties related to the applicant's existing irritable bowel syndrome, but was to the effect that the pre-existing condition was worsened by the incident:

* "In addition to the impact of the Events on [the applicant's] physical well being, her emotional and psychological health, have also been significantly negatively affected. [The applicant] had a history of anxiety prior to the Events, however, her anxiety was greatly exacerbated by the Events. ... In summary, the cumulative impact the Events had on [the applicant] has been significant in all aspects of her life" (Letter of Dr. Icton, dated February 13, 2015, applicant's record, volume I, page 217).
* "[A]lthough symptoms of irritable bowel predated the workplace events related to [the co-worker], they have been exacerbated at times since, when she has been under a great deal of stress" (Letter of Dr. Bannerman, dated February 13, 2015, applicant's record, volume I, page 230).

32 At paragraph 148 of its reasons the Board relied on "a serious personal situation of emotional trauma" to conclude that the applicant's claim was "grossly exaggerated" that the pain and suffering she experienced was as a result of the acts of the co-worker. Yet this is

contradicted by relevant evidence, which included the following:

* "Although she acknowledged significant emotional distress and turmoil as a result of the divorce, [the applicant] reported that workplace issues represent a greater stressor. In addition to the sexual assault, the resulting vocational uncertainty and her lack of direction currently have been very unsettling" (Dr. Bannerman, Mental Health Treatment Report, dated May 19, 2010, applicant's record, volume I, page 243).
* "While issues related to her divorce remain, their role in contributing to her emotional distress currently is minimal" (Dr. Bannerman, Mental Health Treatment Report, dated November 8, 2010, applicant's record, volume I, page 248).

33 The evidentiary record before the Board required the Board to consider a number of questions. At a minimum the Board was required to:

i. Review the evidentiary record and find as a matter of fact the extent that pre-existing conditions or domestic stress caused or exacerbated the applicant's many medical and psychological symptoms and conditions.
ii. Determine what symptoms or conditions were compensable as harm arising as a result of a discriminatory practice in light of its findings of fact (*Alizadeh-Ebadi v. Manitoba Telecom Services Inc., supra*, at paragraph 216).
iii. Consider whether all of the harm could be attributed directly to the discriminatory practice (*Hunt v. Transport One Ltd.*, 2008 CHRT 23, at paragraph 47).
iv. Finally, quantify the compensation to be awarded to the applicant for the harm caused by the co-worker.

34 In light of the Board's unreasonable interpretation of "compensate" and its failure to grapple meaningfully with the evidentiary record, I would allow the application for judicial review with costs, set aside the order of the Board to the extent it disentitled the applicant to compensation and remit the issue of remedy to the Board for redetermination by a different member of the Board in a manner consistent with these reasons.

Did the applicant establish a reasonable apprehension of bias on part of the Board?

35 The applicant asserts that the Board's decision "went beyond simply being unreasonable, and entered the realm of sexist prejudice and bias" (applicant's memorandum of fact and law, paragraph 36). She argues that the Board diminished the nature of the sexual harassment and assault, relied on myths and stereotypes, suggested that the applicant was not sufficiently harmed to warrant compensation and made comments reflecting personal hostility towards the applicant. These errors are said to establish a reasonable apprehension of bias on the part of the Board.

36 My finding that the Board's decision was unreasonable makes it unnecessary to consider this issue and I decline to deal with it. It is sufficient that I comment briefly on two points argued by the applicant.

37 First, it is correct that the Board never referred to the culminating incident as a "sexual

assault", notwithstanding that in its reply to the final level grievance the CBSA acknowledged that the applicant had been "the victim of a sexual assault" [applicants record page 49].

38 There are typically a number of reasons why a judge or adjudicator may use certain language to describe offensive, unacceptable conduct. One reason may be an effort to be sensitive to the victim of such conduct. However, at the same time, it is necessary to take care not to inappropriately downplay or diminish the seriousness of unacceptable conduct. The sexual assault at issue in this case could not be reasonably characterized as a "prank".

39 Second, a review of the Board's reasons for not awarding compensation, read in the context of the medical evidence, shows that the Board failed to grapple with the evidence. The Board never explained, for example, why it preferred one expert's evidence over another on the issue of the impact of the applicant's divorce on her condition. Instead, again by way of example, the Board relied on its characterization of the applicant as a "confident employee" to find that there were steps a confident employee could have taken but the applicant did not take in order to conclude that the work environment created by the co-worker was to the applicant "not as difficult to cope with as [she] now describes it" (reasons, paragraph 143).

40 Similarly, instead of dealing with the expert evidence as to the effect the sexual assault had on the applicant, the Board simply concluded "it seems unlikely, to say the least, that it caused the extreme emotional impact described by" the applicant and her fiancé (reasons, paragraph 144).

41 The Supreme Court has cautioned that there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" (*R v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at paragraph 65). It follows from this that any delay in the disclosure of an assault may not give rise to an adverse inference against the credibility of a complainant.

42 In my view, characterizing an employee as a "confident employee who handled the work easily and had aspirations of joining the management team" (reasons, paragraph 142) similarly does not permit an inference to be made that such an employee would react in a particular way to an escalating number of sexually explicit and violent comments made by a co-worker. One employee might complain immediately to management while another might "go along to get along". It was an error for the Board to conclude that the applicant exaggerated how difficult it was to cope with her work environment on the basis that the Board characterized the applicant to be a "confident" employee.

43 Equally, because there is no one typical response by victims to a sexual assault, there was no basis for the Board to infer mainly from the applicant's responses that the co-worker's conduct could not have caused the harm described by the applicant. This is particularly troublesome when the Board's own concept of logic or common sense was substituted for its assessment of the actual evidence before it.

Conclusion

44 For these reasons I would allow the application for judicial review with costs, set aside the order of the Board to the extent it disentitled the applicant to compensation and remit the issue of remedy to the Board for redetermination by a different member of the Board in a manner consistent with these reasons. Given the delay to date, the Board may wish to expedite the redetermination.

E.R. DAWSON J.A.
D.G. NEAR J.A.:— I agree.
Y. de MONTIGNY J.A.:— I agree.

TAB 6

Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110

Supreme Court Reports

Supreme Court of Canada

Present: Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

1986: June 20 / 1987: March 5.

File No: 19609.

[1987] 1 S.C.R. 110 | [1987] 1 R.C.S. 110 | [1987] S.C.J. No. 6 | [1987] A.C.S. no 6

Attorney General of Manitoba, appellant; v. Metropolitan Stores (MTS) Ltd., respondent; and Manitoba Food and Commercial Workers, Local 832, respondent; and The Manitoba Labour Board, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Courts — Procedure — Stay of proceedings and interlocutory injunctions — Constitutional validity of legislation challenged — Board proposing to act pursuant to challenged legislation — Motion to stay Board's proceedings until determination of constitutional validity of legislation-- Decision to deny motion overturned by Court of Appeal — Principle governing judge's discretionary power to grant stay — Appropriateness of Court of Appeal's intervention in motion judge's discretion — Labour Relations Act, C.C.S.M., c. L10, s. 75.1.

Constitutional law — Charter of Rights — Currency of impugned legislation — Whether or not presumption of constitutionality when legislation challenged under Charter.

The Manitoba Labour Board was empowered by The Labour Relations Act to impose a first collective agreement. When the union applied to have the Board impose a first contract, the employer commenced proceedings in the Manitoba Court of Queen's Bench to have that power declared invalid as contravening the Canadian Charter of Rights and Freedoms. Within the framework of this action, the employer applied by way of motion in the Court of Queen's Bench for an order to stay The Manitoba Labour Board until the issue of the legislation's validity had been heard. The motion was denied. The Board, unfettered by a stay order, indicated that a [page111] collective agreement would be imposed if the parties failed to reach an agreement. The Manitoba Court of Appeal allowed the employer's appeal from the decision denying the stay order and granted a stay. At issue here are: (1) whether the Court of Appeal erred in failing to recognize a presumption of constitutional validity where legislation is challenged under the Charter; (2) what principles govern the exercise of a Superior Court Judge's discretionary power to order a stay of proceedings until the constitutionality of impugned legislation has been determined; and (3) whether the Court of Appeal's intervention in the motion judge's discretion was appropriate.

Held: The appeal should be allowed.

The innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the presumption of constitutional validity in its literal meaning -- that a legislative provision challenged on the basis of the Charter can be presumed to be consistent with the Charter and of full force and effect.

A stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules. In order to better delineate the situations in which it is just and equitable to grant an interlocutory injunction, the courts currently apply three main tests.

The first test is a preliminary and tentative assessment of the merits of the case. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. A more recent formulation holds that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. The "serious question" test is sufficient in a case involving the constitutional challenge of a law where the public interest must be taken into consideration in the balance of convenience. The second test addresses the question of irreparable harm. The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.

When one contrasts the uncertainty in which a court finds itself with respect to the merits of the constitutional [page112] challenge of a law at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an interlocutory injunction, not only for the parties to the litigation but also for the public at large, it becomes evident that the courts ought not to be restricted to the traditional application of the balance of convenience.

It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties, and in cases involving interlocutory injunctions directed at statutory authorities, it is erroneous to deal with these authorities as if they had any interest distinct from that of the public to which they owe the duties imposed upon them by statute. Such is the rule even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Charter. The granting of an interlocutory injunction generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant who requests the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type are called exemption cases. The rule of the public interest should not be interpreted as meaning that interlocutory injunctive relief will only be granted in exceptional or rare circumstances, at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons.

Finally, in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar.

Here, the motion judge applied the correct principles in taking into consideration the public interest and the [page113] inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the parties. The Court of Appeal was not justified in substituting its discretion for that of the motion judge: the emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion.

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APPEAL from a judgment of the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, ordering a stay of proceedings pending disposition of a constitutional challenge and allowing an appeal from a decision of Krindle J. (1985), 36 Man. R. (2d) 152, denying an application for a stay of proceedings before The Manitoba Labour Board. Appeal allowed.

Stuart Whitley and Valerie J. Matthews-Lemieux, for the appellant. Walter L. Ritchie, Q.C., and Robin Kersey, for the respondent Metropolitan Stores (MTS) Limited. A.R. McGregor, Q.C., and D.M. Shrom, for the respondent the Manitoba Food and Commercial Workers, Local 832. David Gisser, for the respondent The Manitoba Labour Board.

Solicitor for the appellant: Tanner Elton, Winnipeg. Solicitors for the respondent Metropolitan

Stores (MTS) Limited: Thompson, Dorfman, Sweatman, Winnipeg. Solicitors for the respondent Manitoba Food and Commercial Workers, Local 832: Simkin, Gallagher, Winnipeg. Solicitor for the respondent Manitoba Labour Board: David Gisser, Winnipeg.

The judgment of the Court was delivered by

BEETZ J. —

I The Facts, the Proceedings and the Judgments of the Courts Below

1 The facts are not in dispute. Here is how the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, described them at p. 181:

> Under the terms of the Labour Relations Act, C.C.S.M., c. L-10, there is provision allowing the [page116] Manitoba Labour Board to impose a first collective circumstances where bargaining for a first contract has not been fruitful. In this particular case the respondent union is the certified bargaining agent, but has not been successful in negotiating a first collective agreement with the appellant employer. The union applied to have the Manitoba Labour Board impose a first contract.
>
> The employer then commenced proceedings, by way of originating notice of motion in the Manitoba Court of Queen's Bench, to have those provisions of the Labour Relations Act under which a first collective agreement might be imposed, declared invalid, as contravening the Charter of Rights and Freedoms. Within the framework of that action, the employer then applied by way of motion for an order to stay the Manitoba Labour Board until such time as the issue as to the validity of the legislation might be heard by a judge of the Court of Queen's Bench. The motion for a stay was denied by Krindle, J. (see 36 Man. R. (2d) 152). The board, unfettered by a stay order, then indicated that if the parties failed to conclude a first collective agreement through further negotiations by September 25, 1985, the board would proceed to impose a first contract upon the parties within 30 days thereafter.

2 The employer launched an appeal from the decision of Krindle J. refusing a stay order. The Manitoba Court of Appeal allowed the appeal and granted a stay.

3 The reasons of Krindle J. (1985), 36 Man. R. (2d) 152, for refusing a stay read in part as follows at pp. 153-54:

> The employer argues that the granting of a stay will maintain the status quo between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a status quo in these circumstances is fanciful. As of the date of the application for certification there were 22 employees in the unit. At the date this matter came to Court, only five of the original 22 continued to be employed. The industry in question is a high turn-over one with no history at all of trade union involvement. At some point the union was able to gain the support of a majority of

> the 22. Nine employees wrote in letters opposing the certification of the union. [page117] We are not here looking to a strong base of support that can withstand lengthy periods of having the union appear to do nothing whatsoever for these people. It is acknowledged by both counsel that this case may well have to wend its way up to the Supreme Court of Canada for final resolution, a matter which will take years. Considering the high turn-over rate in the unit and the lack of union tradition in the unit, it seems to me to be self evident that the protracted failure of the union to accomplish anything for the employees in the unit virtually guarantees an erosion of support for the bargaining agent. The right of 55% of the employees within the unit to compell [sic] decertification of the bargaining agent, the right of another union to apply for certification on behalf of those employees, are rights not affected by the stay of proceedings. The status quo cannot be frozen. Attempts to freeze it will prejudice the position of the union.
>
> The employer argues that the imposition of a first contract may prejudice the position of the employer. It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation ....
>
> Counsel for the employer also raises concern about the contents of the agreement to be imposed. The unit in question is situate in a mall on an Indian Reservation outside The Pas. The terms of the lease between the employer and the owner of the shopping mall contain a provision regarding the employment of a certain minimum percentage of Indian people. That requirement may cause problems if the usual seniority clauses present in most agreements are simply rubber stamped into this first agreement. It may well be that the traditional seniority provisions will have to be modified somewhat in this case to accommodate the requirements of the lease. Surely, though, that is a matter to be brought to the attention of the Board during the course of the Board's hearings into settling the terms of the agreement. I cannot imagine that the Board would fail to give consideration to such a problem in arriving at those terms.
>
> . . .
>
> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year [page118] period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.
>
> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

4 In reviewing the decision of the learned motion judge, the Manitoba Court of Appeal did not make any finding that Krindle J. was in error in concluding that stay ought to be refused, or that she had declined to exercise her discretion or had acted on a wrong principle in exercising her discretion. The Court of Appeal at pp. 181-83, exercised fresh discretion based on additional considerations which, in its view, were not before the motion judge:

The appeal first came before this court on September 10, 1985 before a panel consisting of Matas, Huband and Philp, JJ.A. Before any hearing took place on the merits of the appeal, the court adjourned for a few moments, consulted with Court of Queen's Bench authorities as to the prospect of an earlier date for a hearing in the Queen's Bench of the employer's attack on the legislation, resumed the hearing and informed counsel that one day could be set aside for such a hearing on September 25, 1985. This would enable a hearing on the validity of the legislation to take place before any collective agreement could possibly be imposed. Counsel for employer, union and the Manitoba Labour Board, agreed to the September 25th hearing date ....

It was understood by all concerned that the one-day hearing would proceed on September 25th. On that date counsel appeared before Glowacki, J., of the Court of Queen's Bench, but in addition, counsel representing the Canadian Labour Congress also appeared, requesting permission to intervene. Glowacki, J., was advised by counsel for the C.L.C. that it wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the Charter of Rights and Freedoms.

[page119] Instead of the planned one-day hearing, a hearing of several days' duration was envisaged. Instead of the matter proceeding on September 25th, Glowacki, J., fixed a hearing date for some time in December 1985.

Once again the prospect of a collective agreement being imposed before a hearing to determine the validity of the legislation became real. Counsel for the employer immediately requested a hearing in this court on the appeal from the order of Krindle, J., denying the stay order which had been adjourned sine die on September 10th. The present panel heard the appeal on the afternoon of September 25th.

At the conclusion of that hearing, it was suggested to counsel for the Manitoba Labour Board, that in order to expedite matters and obtain a decision on the validity of the legislation; it was open to the Manitoba Labour Board to direct a reference to this court. We are informed that there are other cases besides this one where provisions of the Labour Relations Act are under attack as violating the Charter, and it was suggested that these matters might also be resolved by way of a direct reference to this court. We have now been informed however that the board "... will not, at this time, be requesting a reference to the Court of Appeal pursuant to the Labour Relations Act".

. . .

By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the Labour Relations Act. As previously noted, other provisions in the Act are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the Act, based upon the Charter in other litigation.

There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the [page120] exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the Charter.
>
> A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

5 In allowing the appeal, the Manitoba Court of Appeal ordered that:

> all proceedings before the Manitoba Labour Board relating to the application for settlement of a first collective agreement between the Applicant and the Respondent Manitoba Food and Commercial Workers, Local 832, pursuant to Section 75.1 of The Labour Relations Act (Case No. 586/85/LRA), be stayed until after this action has been heard and determined by the Court of Queen's Bench, or further Order of this Court.

6 It is from this interlocutory order that the Attorney General is appealing by leave of this Court. He is supported by the Manitoba Food and Commercial Workers, Local 832, (the"Union") and by The Manitoba Labour Board, (the "Board").

II The Issues

7 The points in issue, according to appellant's factum, are as follows:

1. Did the Manitoba Court of Appeal err in failing to recognize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the Canadian Charter of Rights and Freedoms?
2. Did the Manitoba Court of Appeal err in exercising its discretionary power to grant a stay of proceedings until the constitutional validity of section 75.1 of The Labour Relations Act, C.C.S.M., c. L10 has been determined, since the effect of the stay is to render the legislation inoperative?
3. Did the Manitoba Court of Appeal err when it interfered with the exercise of the trial Judge's discretion in refusing to grant a stay of proceedings?

   [page121]

4. Did the Manitoba Court of Appeal apply proper legal principles when it decided that proceedings before a quasi-judicial tribunal; namely, a labour board constituted under provincial legislation, should be stayed?

8 The first issue stated by the appellant is related to the existence of a so-called presumption of

constitutional validity of a law when challenged under the Canadian Charter of Rights and Freedoms and will be dealt with first.

9 The second and fourth issues essentially address the same question: in a case where the constitutionality of a legislative provision is challenged, what principles govern the exercise by a Superior Court judge of his discretionary power to order a stay of proceedings until it has been determined whether the impugned provision is constitutional? This issue arises not only in Charter cases but also in other constitutional cases and I propose to review some cases dealing with the distribution of powers between Parliament and the legislatures and some administrative law decisions having to do with the vires of delegated legislation: as I read those cases, there is no essential difference between this type of cases and the Charter cases in so far as the principles governing the grant of interlocutory injunctive relief are concerned.

10 Finally, the third issue raises the question of the appropriateness of the Court of Appeal's intervention in the motion judge's discretion; it will be examined in the last part of this judgment.

III The Canadian Charter of Rights and Freedoms and the So-called Presumption of Constitutional Validity

11 According to the appellant, the Manitoba Court of Appeal erred in granting a stay of the proceedings since it failed "to recognize that a presumption of constitutional validity continues to exist [page122] where legislation is being challenged on the basis of the Canadian Charter of Rights and Freedoms".

12 I should state at the outset that, while I have reached the conclusion that the appeal ought to be allowed, it is not on account of what the appellant calls a presumption of constitutional validity.

13 We have not been told much about the nature, weight, scope and meaning of that presumption. For lack of a better definition, I must assume that the so-called presumption means exactly what it says, namely, that a legislative provision challenged on the basis of the Charter must be presumed to be consistent with the Charter and of full force and effect.

14 Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading. If it is a presumption strictly so-called, surely it is a rebuttable one. Otherwise a stay of proceedings could never be granted. But to say that the presumption is rebuttable is to open the way for a rebuttal. This in its turn involves a consideration of the merits of the case which is generally not possible at the interlocutory stage.

15 A reason of principle related to the character of the Charter also persuades me to dismiss the appellant's submission based on the presumption of constitutional validity. Even when one has reached the merits, there is no room for the presumption of constitutional validity within the literal meaning suggested above: the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter.

16 As was said by Lamer J., speaking for himself and five other members of the Court in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 496:

> The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.

[page123]

17 The Charter extends its protection to rights of a new type such as mobility rights and minority language educational rights. It is significant also that the effect of s. 15, relating to equality rights, was delayed by three years pursuant to s. 32(2) of the Charter, presumably to give time to Parliament and the legislatures to prepare for the necessary adjustments.

18 Furthermore, the innovative character of the Charter affects even traditional rights already recognized before the coming into force of the Charter and which must now be viewed in a new light. In R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, this Court declined to restrict the meaning of the freedom of conscience and religion guaranteed by the Charter to such interpretation of this freedom as had prevailed before the Charter. At pages 343-44 of the Big M case, Dickson J., as he then was, speaking for himself and four other members of the Court, wrote as follows:

> ... it is certain that the Canadian Charter of Rights and Freedoms does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion;
>
> I agree with the submission of the respondent that the Charter is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter.

19 Similarly, as traditional a right as the presumption of innocence is given a greater degree of protection under the Charter than it has received prior to the Charter: R. v. Oakes, [1986] 1 S.C.R. 103.

20 Thus, the setting out of certain rights and freedoms in the Charter has not frozen their content. [page124] The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the Charter, must remain susceptible to evolve in the future:

> In my opinion the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and

> freedoms must use general language which is capable of development and adaptation by the courts.
>
> (Per Le Dain J., dissenting, although not on this point, in R. v. Therens, [1985] 1 S.C.R. 613, at p. 638.)

21 The views of Le Dain J. reflect those of Dickson J., as he then was, in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

22 In my view, the presumption of constitutional validity understood in the literal sense mentioned above, and whether it is applied to laws enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of this constitutional instrument.

23 This proposition should not be taken as necessarily affecting what has sometimes been designated, perhaps improperly, as other meanings of the "presumption of constitutionality".

24 One such meaning refers to the elementary rule of legal procedure according to which "the one [page125] who asserts must prove" and "the onus of establishing that legislation violates the Constitution undeniably lies with those who oppose the legislation": D. Gibson, The Law of the Charter: General Principles (1986), pp. 56 and 58. By definition, such a rule is essentially directed to the merits of the case.

25 Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: McKay v. The Queen, [1965] S.C.R. 798. In the Southam case, supra, a Charter case, it was held at p. 169 that it "should not fall to the courts to fill in the details that will render legislative lacunae constitutional". But that was a question of "reading in", not "reading down". The extent to which this rule of construction otherwise applies, if at all, in the field of the Charter is a matter of controversy: Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638, at p. 658 (Ont. C.A.); Black v. Law Society of Alberta, [1986] 3 W.W.R. 590, at p. 628 (Alta. C.A.), leave to appeal has been granted, [1986] 1 S.C.R. x; P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés," La Charte canadienne des droits et libertés: Concepts et impacts (1984), pp. 124-26; R.M. McLeod, et al., eds., The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences (1983), vol. 1, pp. 2-198 to 2-209; P.W. Hogg, Constitutional Law of Canada (2nd ed. 1985), p. 327; D. Gibson, The Law of the Charter: General Principles (1986), pp. 57, 58

and 186-88. I refrain from expressing any view on this question which also arises only when the merits are being considered.

[page126]

IV The Principles Which Govern the Exercise of the Discretionary Power to Order a Stay of Proceedings Pending the Constitutional Challenge of a Legislative Provision

26 The second question in issue involves a study of the principles which govern the granting of a stay of proceedings while the constitutionality of a legislative provision is challenged in court by the plaintiff.

27 It should be observed that none of the parties has disputed the existence of the discretionary power to order a stay in such a case and, in my view, the parties were right in conceding that the trial judge had jurisdiction to order a stay: see Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307, at p. 330.

(1) The Usual Conditions for the Granting of a Stay

28 Prior to the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, no distinction between injunctions restraining proceedings and other sorts of injunctions was drawn in English law (Halsbury's Laws of England, vol. 24, 4th ed., p. 577). The Parliament of Westminster then enacted the Act referred to above, which in the main has been adopted by all of the provinces of Canada except Quebec where the distinction between equity and law is unknown. The distinction the English Judicature Act created between a stay of proceedings and an injunction was, however, essentially procedural. Section 24(5) stated that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction provided that "any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof ... shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just." Section 25(8) of the same Act provided further that an injunction may be granted in all cases in which it shall appear to [page127] the Court to be "just and convenient" that such order should be made. See also Boeckh v. Gowganda-Queen Mines, Ltd. (1912), 6 D.L.R. 292.

29 A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions: Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127, at p. 132; Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association, [1979] O.J. No. 682, Ont. Div. Ct., January 17, 1979, Galligan, Van Camp and Henry JJ.; Daciuk v. Manitoba Labour Board, Man. Q.B., June 25, 1985, Dureault J. (unreported); Metropolitan Toronto School

Board v. Minister of Education (1985), 6 C.P.C. (2d) 281 (Ont. Div. Ct.), at p. 292, leave to appeal to the Court of Appeal refused.

30 The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

31 The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843, per McRuer C.J.H.C., at pp. 854-55. The House of Lords has somewhat relaxed this first test in American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court [page128] that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J. speaking for himself and five other members of the Court in a unanimous judgment referred to but did not comment upon this difference in Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, at pp. 9-10.

32 American Cyanamid has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance (Toronto 1983), at pp. 66-77.

33 In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the American Cyanamid description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, Modern Equity (12th ed. 1960), pp. 736-43). In my view, however, the American Cyanamid "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

34 The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves [page129] whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

35 The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

36 I now propose to consider the particular application of the test of the balance of convenience

in a case where the constitutional validity of a legislative provision is challenged. As Lord Diplock said in American Cyanamid, supra, at p. 511:

> ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

37 It will be seen in what follows that the consequences for the public as well as for the parties, of granting a stay in a constitutional case, do constitute "special factors" to be taken into consideration.

(2) The Balance of Convenience and the Public Interest

38 A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

39 The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to [page130] the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

(i) Difficulty or Impossibility to Decide the Merits at the Interlocutory Stage

40 The limited role of a court at the interlocutory stage was well described by Lord Diplock in the American Cyanamid case, supra, at p. 510:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

41 The American Cyanamid case was a complicated civil case but Lord Diplock's dictum, just quoted, should a fortiori be followed for several reasons in a Charter case and in other constitutional cases when the validity of a law is challenged.

42 First, the extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the Province may not yet have been notified as is usually required by law; see Home Oil Distributors Ltd. v. Attorney-General for British Columbia, [1939] 1 D.L.R. 573, at p. 577; Weisfeld v. R. (1985), 16 C.R.R. 24, and, for an extreme example, Turmel v. Canadian Radio-Television and Telecommunications Commission (1985), 16 C.R.R. 9.

43 Still, in Charter cases such as those which may arise under s. 23 relating to Minority

Language Educational Rights, the factual situation as well as [page131] the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff; Marchand v. Simcoe County Board of Education (1984), 10 C.R.R. 169, at p. 174.

44 Furthermore, in many Charter cases such as the case at bar, some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although prima facie in violation of a guaranteed right or freedom, can be saved under s. 1 of the Charter. But evidence adduced pursuant to s. 1 of the Charter essentially addresses the merits of the case.

45 This latter rule was clearly stated in Gould v. Attorney General of Canada [1984] 2 S.C.R. 124 aff. [1984] 1 F.C. 1133, which set aside [1984] 1 F.C. 1119. It was held that a court is not at the interlocutory stage in an adequate position to decide the merits of a case even though the evidence that is likely to be adduced under s. 1 seems of little weight. In the Federal Court of Appeal, Thurlow C.J., dissenting, held at pp. 1137-38 that a court is sometimes entitled to examine the merits of the case and anticipate the result of the action:

> I agree with the criticisms and views expressed by the learned Trial Judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of paragraph 14(4)(e) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the Court to show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.
>
> In such circumstances then should the Court treat it seriously? Should the Court irrevocably deprive the respondent of a constitutional right to which he appears [page132] to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this Court should interfere with the exercise of the discretion of the Trial Judge in the circumstances.

46 Mahoney J., whose opinion was generally approved by this Court, took the opposite view (at p. 1140):

> The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14(4)(e) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional.

47 Such cautious restraint respects the right of both parties to a full trial, the importance of which was emphasized by the judicious comments of May L.J. in Cayne v. Global Natural Resources plc., [1984] 1 All E.R. 225, at p. 238. Also, it is consistent with the fact that, in some cases, the impugned provision will not be found to violate a right or freedom protected by the Charter after all and thus will not need to be saved under s. 1; see R. v. Jones, [1986] 2 S.C.R. 284.

48 In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J.E. Magnet:

> Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.
>
> [page133]
>
> (J.E. Magnet, "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 Man. L.J. 21, at p. 29.)

49 However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

50 Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in Charter cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R.J. Sharpe wrote in Injunctions and Specific Performance, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

(ii) The Consequences of Granting a Stay in Constitutional Cases

51 Keeping in mind the state of uncertainty above referred to, I turn to the consequences that will certainly or probably follow the granting of a stay of proceedings. As previously said, I will not restrict myself to Charter instances. I also propose [page134] to refer to a few Quebec examples. In that province, the issuance of interlocutory injunctions is governed by arts. 751 and 752 of the Code of Civil Procedure:

> 751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.

> 752. In addition to an injunction, which he may demand by action, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.
>
> An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

52 While these provisions differ somewhat from the English law of injunctions, they are clearly inspired by and derived from this law and I do not think that the Quebec cases I propose to refer to turn on any differences between the English law and the Code.

53 Although constitutional cases are often the result of a lis between private litigants, they sometimes involve some public authority interposed between the litigants, such as the Board in the case at bar. In other constitutional cases, the controversy or the lis, if it can be called a lis, will arise directly between a private litigants and the State represented by some public authority; Morgentaler v. Ackroyd (1983), 42 O.R. 659.

54 In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined [page135] from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type, I will call exemption cases.

55 Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.

56 While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, [page136] in cases

involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

57 The following provide examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. I will first address the suspension cases.

58 Société de développement de la Baie James c. Chef Robert Kanatewat, [1975] C.A. 166, is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole. In that case, the Quebec Court of Appeal, reversing the Superior Court, [1974] R.P. 38, dismissed an application for interlocutory injunction which would have required the appellants to halt the James Bay project authorized by the James Bay Region Development Act, S.Q. 1971, c. 34, the constitutional validity of which had been challenged by the respondents. Crête J.A., as he then was, wrote what follows in looking at the balance of convenience at p. 182:

> [TRANSLATION] ... I am not persuaded that the inconvenience suffered or apprehended by the respondents was of the same order of magnitude as the growing energy needs of Quebec as a whole.

59 Turgeon J.A. reached the same conclusions at p. 177:

> [TRANSLATION] It is important to note at the outset that hydroelectricity is the only primary energy resource the province of Quebec has. With the present acute world oil crisis, this resource has assumed a critical importance in guaranteeing the economic future and well-being of Quebec citizens. The interests of the people of Quebec are represented in the case at bar by the principal appellant companies.
>
> The evidence established that is imperative for Hydro-Quebec to complete its program if it is to meet the growing demand for electricity up to 1985 .... A suspension of work would have disastrous consequences, as it would mean an alternative program would have to be [page137] created to produce electricity by thermal or nuclear plants. [Emphasis added.]
>
> (Leave to appeal was granted by this Court on February 13, 1975, but a declaration of settlement out of court was filed on January 1980, further to which, on the same date, Chief Robert Kanatewat and others discontinued their appeal.)

60 In Procureur général du Québec c. Lavigne, [1980] C.A. 25, the Quebec Court of Appeal, again reversing the Superior Court, [1980] C.S. 318, dismissed an application for interlocutory injunction enjoining the Attorney General, the Minister of Education, the Minister of Municipal Affairs and others from temporarily enforcing certain provisions of the Act respecting municipal taxation and providing amendments to certain legislation, S.Q. 1979, c. 72. The statute in question provided for school financing through a system of grants; taxation became a complementary method subject to new conditions. The scheme allegedly violated the constitutional guarantees of s. 93 of the Constitution Act, 1867, an allegation which was later sustained by this Court in Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575.

61 The Superior Court had granted an interlocutory injunction for the following reasons, inter

alia, at p. 323:

> [TRANSLATION] At the outset it must be said that the case at bar is not an ordinary constitutional question: we are not concerned here with the usual conflict between the jurisdiction of the federal government and one of the provinces, the jurisdictional conflict between two provinces or a province which is alleged to be legislating beyond the limits of powers conferred by s. 92 of the B.N.A. Act.
>
> Rather, this is a very special case (like that of s. 133 of the B.N.A. Act), in which the legislation being challenged is said to be contrary to a constitutional guarantee.
>
> Accordingly, the question is not simply a constitutional one, it involves a guaranteed right, like the language right (133).
>
> [page138] In the case of a constitutional guarantee, such as language or religion, it will suffice that a person appears prima facie to have been deprived of a right for him to be absolutely entitled to the remedy of an injunction. This follows from the very nature of the constitutional guarantee. When a right is constitutionally guaranteed, it is indefeasible, however extreme the consequences ... [Emphasis added.]

62 The Quebec Court of Appeal reversed the Superior Court, holding as follows at p. 26:

> [TRANSLATION] The Superior Court judge, indicating the reasons for issuing the injunctions, held that the disputed provisions prima facie infringed the constitutional guarantee contained in s. 93 of the British North America Act, and that in that case it will suffice that a person is deprived of a right for him to be absolutely entitled to the remedy of an injunction, without the need of presenting evidence on damage or the balance of convenience.
>
> On reviewing the record and considering the arguments submitted to us by counsel for the parties in connection with the Superior Court judgments, the Court is of the view that the right relied on by the plaintiffs, the applicants for an interlocutory injunction, is not clear, that the questions involved are highly complex ones. There is some doubt as to the scope of the constitutional guarantees relied on and the effect of the injunctions is to suspend the operation of a considerable portion of the law throughout the Province of Quebec. In the circumstances, the presumption that legislation is valid must prevail over the prima facie uncertain right at this stage of the proceedings. [Emphasis added.]

63 It can be seen that, apart from the presumption of constitutionality, the Court of Appeal took into consideration the paralysing impact of the injunction which would have suspended the operation of an important part of the impugned legislation throughout the Province.

64 A somewhat similar situation arose in Metropolitan Toronto School Board v. Minister of Education, supra. Interim measure regulations which provided for the funding of separate schools were challenged as being ultra vires by the school board and the teachers' federation in an application for judicial review. The Divisional Court vacated an order of a single judge prohibiting the expenditure of funds pursuant to the regulations, pending a decision of the Divisional Court on the [page139] main application. The following words reflect the interest shown by the Court in the preservation of the educational system (at pp. 294-94):

> On the evidence before this Court as between the applicants, on the one hand, and the Roman Catholic Separate School Boards, teachers, students and parents on the other,

> the balance of convenience overwhelmingly is in the latter's favour. The disruption of the educational system and its interim funding is, in the opinion of this Court, a matter to be avoided at all costs. [Emphasis added.]

65 Reference can also be made to Pacific Trollers Association v. Attorney General of Canada, [1984] 1 F.C. 846, where the Trial Division of the Federal Court declined to grant an interlocutory injunction restraining certain Fisheries Officers from enforcing amendments made to the Pacific Commercial Salmon Fishery Regulations, the validity of which had been attacked. And see Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, where the Federal Court of Appeal, reversing the Trial Division, dismissed an application for interlocutory injunction restraining Fisheries Officers from implementing the fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, and the Pacific Commercial Salmon Fishery Regulations, C.R.C. 1978, c. 823. The plan in question was alleged to be beyond the legislative power of Parliament and beyond the powers conferred by the Fisheries Act. The Court noted at p. 795:

> ... the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm; ...

66 These words of the Federal Court of Appeal amplify, somewhat broadly perhaps, the idea expressed in more guarded language by [page140] Browne L.J. in Smith v. Inner London Education Authority, [1978] 1 All E.R. 411, at p. 422:

> He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in American Cyanamid Co v Ethicon Ltd.

67 Similar considerations govern the granting of interlocutory injunctive relief in the context of exemption cases.

68 Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373, is the earliest example I know of an exemption case. The plaintiff club sought an interim injunction restraining the Provincial Treasurer and the Provincial Police Commissioner from collecting from it a provincial tax which was allegedly indirect and ultra vires of the Province or, in the alternative, from closing the club's race track, until a decision was rendered on the merits. Middleton J., concerned with the protection of the public interest, issued the injunction subject to an undertaking by the club to pay into Court from time to time, the amount payable in respect of the taxes claimed.

69 In Campbell Motors Ltd. v. Gordon, [1946] 4 D.L.R. 36, the appellant company sought a declaration that The National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25, and certain regulations made thereunder for the purpose of [s. 2(1)(c)] "maintaining, controlling and regulating supplies and services, prices, transportation ... to ensure economic stability and an orderly transition to conditions of peace" were ultra vires on the ground that the war had come to an end. That appellant company was a used car dealer. It had been convicted four times for

contravention to the regulations further to which its licence had been cancelled by the Wartime Prices and Trade Board, three of its motor vehicles had been seized together [page141] with certain books and records and it had been prohibited from selling any motor vehicles except with the concurrence of the representative of the Board in Vancouver. By a majority decision, the British Columbia Court of Appeal, confirming the motion judge, refused to continue an ex parte interim injunction restraining members of the Board from prosecuting the company for doing business without a licence and also refused to order the return of the company's seized property. Sidney Smith J.A., who gave the reasons of the majority, wrote at p. 48:

> If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

70 Robertson J.A., who agreed with the reasons of Sidney Smith J.A., added at p. 47:

> Subsection (c) of s. 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

71 A more recent example can be found in Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alta. Q.B.), and Law Society of Alberta v. Black (1984), 8 D.L.R. (4th) 346 (Alta. C.A.). The Law Society had adopted two rules, one of which prohibited members from being partners in more than one law firm; the other rule prohibited members residing in Alberta from entering into partnerships with members residing outside Alberta. This latter rule was challenged as being inconsistent with s. 6(2) of the Charter. The Alberta Court of Queen's Bench granted an interlocutory injunction restraining the Law Society from enforcing the two rules against the plaintiff solicitors pending the trial of the action. The Law Society only appealed the order granting the interlocutory injunction with respect to the first rule. In [page142] allowing the appeal, Kerans J.A., who delivered the reasons of the Court, wrote at p. 349:

> It is correct ... that the fact that the injunction is sought against a public authority exercising a statutory power is a matter to be considered when one comes to the balance of convenience. However, we do not agree that the Cyanamid test simply disappears in such a case.

72 The Morgentaler case, supra, is an exemption case involving the Charter which has been quoted and relied upon several times. The plaintiff applicants had opened a clinic offering abortion services, which was not an "accredited hospital" within the meaning of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34. They commenced an action claiming that s. 251 was inconsistent with the Canadian Charter of Rights and Freedoms and an interim injunction and a permanent injunction. Pending the hearing and disposition of the interim injunction, they sought an "interim interim" injunction restraining the Chief of the Metropolitan Toronto Police Force, the Commissioner of the Ontario Provincial Police, and their servants, agents or any persons acting under their instruction, from investigating, enquiring into, reporting and otherwise acting upon the activities of the plaintiffs referable only to s. 251 of the Criminal Code. Linden J., of the Ontario High Court, dismissed their application and expressed the following opinion on the balance of convenience at pp. 666-68:

> The third matter that must be demonstrated is that the balance of convenience in the granting of an interim injunction favours the applicants over the respondents. If only these two sets of parties were involved in this application it might well be that the convenience of the applicants would predominate over that of the respondents, since the applicants have much to lose while the respondents do not. However, this is not an ordinary civil injunction matter; it involves a significant question of constitutional law and raises a major public issue to be addressed -- that is, what may law enforcement agencies [page143] do pending the outcome of constitutional litigation challenging the laws they are meant to enforce?
>
> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences under s. 251 pending the final resolution of the constitutional issue. Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever. In the event that the impugned law is ultimately held to be invalid, no harm would be done by such a course of conduct. But, if the law is ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. This cannot be.
>
> For example, let us assume that someone challenged the constitutional validity of the Narcotic Control Act, R.S.C. 1970, c. N-1, and sought an injunction to prevent the police from investigating and prosecuting that person for importing and selling narcotics pending the resolution of the litigation. If the court granted the injunction, the sale of narcotic drugs would be authorized by court order, which would be most inappropriate if the law is later held to be valid.
>
> . . .
>
> In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement. Such a course of action seems to be the best method of ensuring that our society will continue to respect the law at the same time as it is being challenged in an orderly way in the courts. This does not mean, however, that in exceptional circumstances this court is precluded from granting an interim injunction to prevent grave injustice, but that will be rare indeed.

73 The principles followed in the above-quoted cases have been summarized and confirmed for the greater part by this Court in Gould, supra. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(e) of the Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the Canadian Charter [page144] of Rights and Freedoms which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. By a majority decision reversing the Trial Division, the Federal Court of Appeal dismissed his application. Mahoney J., with whom this Court expressed its general agreement, wrote at p. 1139 as follows:

> Paragraph 14(4)(e) plainly cannot stand unless, by virtue of section 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society.

74 That the respondent inmate had thus a prima facie case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, inter alia, to be found at pp. 1139-40:

> To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

75 And, as we have already seen above, Mahoney J. went on to hold that the interlocutory injunction should be refused for the additional reason that it decided the merits, a matter that should not be resolved at the interlocutory stage.

76 The same principles have been followed recently in Bregzis v. University of Toronto (1986), 9 C.C.E.L. 282, where the applicant, an associate librarian, was retired involuntarily from his employment with the university, when he reached the age of sixty-five, in accordance with the university's mandatory retirement policy. He challenged [page145] the legality of the retirement policy as well as s. 9(a) of the Human Rights Code, 1981, S.O. 1981, c. 53, on the ground that they offended s. 15 of the Canadian Charter of Rights and Freedoms. In his reasons, Osborne J. of the Ontario Supreme Court referred to judgments in both Morgentaler, supra, and Gould, supra, and agreed that "the spectrum of concern on the balance of convenience issue must be wider than the issue joined by the parties themselves" (p. 286).

77 Another case involving facts somewhat similar to Bregzis is Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146, where the plaintiffs, fifteen doctors with active medical practices, contested the validity of a hospital regulation approved by the Minister of Health pursuant to the Hospital Act, R.S.B.C. 1979, c. 176, and under the authority of which their admitting privileges had been terminated because they were over the age of sixty-five. The regulation allegedly constituted discrimination based on age in violation of s. 15(1) of the Canadian Charter of Rights and Freedoms. In a unanimous judgment, the British Columbia Court of Appeal confirmed the judgment of the Supreme Court of British Columbia which had granted the doctors an interlocutory injunction restraining the hospital from interfering with their privileges pending termination of the issue. While the Court of Appeal did not explicitly refer to the public interest, it nevertheless showed its concern for the safety of the fifteen respondents' patients in holding that "All of the doctors were in good health at the material time" (at p. 154).

78 Finally, in Rio Hotel Ltd. v. Liquor Licensing Board, [1986] 2 S.C.R. ix, Rio Hotel Ltd., which had admittedly violated the conditions of its liquor permit relating to the presence of nude dancers on the premises, challenged the validity of those conditions on the basis of the Charter as well as of ss. 91 and 92 of the Constitution Act, 1867. It had [page146] lost in the New Brunswick Court of Appeal and was threatened with the cancellation of its permit when, in an unreported judgment dated July 31, 1986, this Court granted it leave to appeal as well as a stay of proceedings before the Liquor Licensing Board, pending the determination of its appeal. The stay was granted subject to compliance with an expedited schedule for filing the materials and

for hearing the appeal. No reasons were given by this Court but those who were present at the oral argument of the application for leave to appeal and for a stay could easily infer from exchanges between members of the Court and counsel that the Court was alive to the enforcement problems created for the New Brunswick Liquor Licensing Board with respect to licence holders other than the Rio Hotel.

(iii) Conclusion

79 It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.

80 The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

81 The problem had already been raised in the Campbell Motors case, supra, where Robertson J.A. wrote at p. 47 in the above-quoted passage:

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> If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish ....

82 In a case like the Morgentaler case, supra, for instance, to grant a temporary exemption from the provisions of the Criminal Code to one medical doctor is to make it practically impossible to refuse it to others. This consideration seems to have been very much in the mind of Linden J. in that case where, passing from the particular to the general, he wrote at p. 667:

> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences ... Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever.

83 This being said, I respectfully take the view that Linden J. has set the test too high in writing in Morgentaler, supra, that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of Law Society of Alberta v. Black, supra, and Vancouver General Hospital v. Stoffman, supra, can be considered as exceptional or rare. Even the Rio Hotel case, supra, where the impugned provisions were broader, cannot, in my view, be labeled as an exceptional or rare case.

84 On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in Morgentaler, supra, is closer to the [page148] mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

85 One of these instances is Home Oil Distributors Ltd. v. Attorney-General for British Columbia, supra, where the majority of the British Columbia Court of Appeal confirmed the granting of an interlocutory injunction restraining the enforcement of the Coal and Petroleum Products Control Board Act, S.B.C. 1937, c. 8, pending final determination of the validity of this statute which regulated the price at which gasoline could be sold in the province. The impugned legislation was intra vires on its face. The sole ground invoked against it was that it constituted a colourable attempt to regulate the international oil industry and to foster the local coal industry at the expense of that of foreign petroleum. And the sole evidence of this colourable intent was the interim report of a Royal Commission made prior to the passing of the statute. In Home Oil Distributors Ltd. v. Attorney-General of British Columbia, [1940] S.C.R. 444, this Court looked at the report of the Royal Commission but it upheld the validity of the legislation. The granting of an interlocutory injunction by the motion judge, confirmed by the Court of Appeal, in a case of this nature, is an early and perhaps the first example where this was done in Canada. In a strong dissent, McQuarrie J.A. was the only judge who dealt at any length with the public interest aspect of the case and underlined the one million dollars a year cost of the injunction to the public. The decision seems to have been regarded as an isolated one in the Campbell Motors case, supra, at p. 48, in a passage that may amount to a veiled criticism. In my view, the Home Oil Distributors decision of the British Columbia Court of Appeal constitutes a weak precedent.

86 The other instance is Société Asbestos Ltée c. Société nationale de l'amiante, [1979] C.A. 342, where the Quebec Court of Appeal, reversing the Superior Court, issued an interlocutory injunction restraining the Attorney General and any other [page149] person, physical or corporate, from enforcing any right conferred upon them by Bill No. 70, Loi constituant la Société nationale de l'amiante and by Bill No. 121, Loi modifiant la Loi constituant la Société nationale de l'amiante, pursuant to which the appellant's property could be expropriated and the constitutional validity of which had been challenged in a declaratory action. The two statutes in question had been enacted in the French language only, in violation of s. 133 of the Constitution Act, 1867, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

87 In short, I conclude that in a case where the authority of a law enforcement agency is constitutionally challenged, no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry. Such is the rule where the case against the authority of the law enforcement agency is serious, for if it were not, the question of granting interlocutory relief should not even arise. But that is the rule also even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Canadian Charter of Rights and Freedoms.

88 I should point out that I would have reached the same conclusion had s. 24 of the Charter

been relied upon by counsel. Assuming for the purpose of the discussion that this provision applies to interlocutory relief in the nature of the one sought in this case, I would still hold that the public interest must be weighed as part of the balance of convenience: s. 24 of the Charter clearly indicates that the remedy sought can be refused if it is not considered by the court to be "appropriate and just in the circumstances".

[page150]

89 On the whole, I thus find myself in agreement with the following excerpt from Sharpe, op. cit., at pp. 176-77:

> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

90 I would finally add that in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part. See in this respect Black v. Law Society of Alberta, supra, p. 453, and the Rio Hotel case, supra.

V Review of the Judgments of the Courts Below

91 Finally, it is now appropriate to review the judgments of the courts below in light of the principles set out above.

92 The main legislative provision under attack is s. 75.1 of The Labour Relations Act of Manitoba, enacted in S.M. 1984-85, c. 21, s. 37, which enables the Board to settle the provisions of a first collective agreement. It is alleged by the employer that these provisions in question violate ss. 2(b), (d) and 7 of the Canadian Charter of Rights and Freedoms relating respectively to freedom of expression, freedom of association, liberty and security of the person. The Manitoba Court of Appeal has taken the view that the employer raises "a serious challenge" to the constitutional validity of the impugned provision and all the parties have conceded that the constitutional challenge is indeed a serious one. The test of a "serious question" applicable in a constitutional challenge of a law has therefore been met.

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93 The "irreparable harm" test also clearly appears to have been satisfied.

94 As I read her reasons, Krindle J., at p. 153 implicitly accepted the employer's argument that

the imposition of a first contract was susceptible to prejudice its position:

> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.

95 It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

96 The same observation should be made with respect to the position of the union; as I understand the findings of Krindle J., the very existence of the unit was compromised without the imposition of a first collective agreement.

97 Krindle J.'s findings of facts have not been questioned by the Court of Appeal and it is not for this Court to review these findings.

98 Krindle J. then considered the balance of convenience and I refer in this respect to the above-quoted parts of her reasons for judgment. I am of the view that she applied the correct principles. More particularly, at p. 154, she looked at the public interest and at the inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the employer and the union:

> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained. [page152] In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

99 While this is an exemption case, not a suspension case, and each case, including a fortiori an exemption case, turns on its own particular facts, yet, the inconvenience suffered by the parties is likely to be quite similar in most cases involving the imposition of a first collective agreement. Accordingly, the motion judge was not only entitled to but required to weigh the precedential value and exemplary effect of granting a stay of proceedings before the Board. I have not been persuaded that she committed reversible error in concluding that "the granting of

a stay in this case would invite the granting of stays in most other cases of applications for first agreements".

100 I now turn to the reasons of the Court of Appeal. I repeat that the Court of Appeal did not find any error of facts or law in the judgment of Krindle J. nor any abuse of her discretion. The main consideration which appears to have been present in the mind of the Court of Appeal is the issue of delay in disposing of the merits.

101 Thus, the Court of Appeal observed that it was open to the Board to direct a reference to the Court of Appeal "in order to expedite matters and obtain a decision on the validity of the legislation" and it noted that the Board declined to do so. I would not go so far as to say that this was not a relevant consideration but it was anything but determinative.

102 According to the reasons of the Court of Appeal, at p. 182, the Canadian Labour Congress, which had obtained leave to intervene on the merits,

> ... wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed [page153] by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the Charter of Rights and Freedoms.

103 The appellate level is not the conventional forum for the adducing of evidence and the case may not have appeared to the Board to be a clearly appropriate one for a direct reference to the Court of Appeal. In any event, what matters is not so much the attitude or conduct of the Board in declining to request a reference to the Court of Appeal as the impact of a stay upon the litigants who came within the purview of the Board's authority and upon the public in general. To repeat what was said by Browne L.J. in Smith v. Inner London Education Authority, supra, at p. 422:

> ... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

104 The other new factors which were not before the motion judge and on the basis of which the Court of Appeal purported to exercise fresh discretion are also all related to the issue of delay. I find it convenient here to repeat part of the above-quoted reasons of the Court of Appeal (pp. 182-83):

> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the Labour Relations Act. As previously noted, other provisions in the Act are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the Act, based upon the Charter in other litigation.
>
> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned [page154] motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the Charter.
>
> A stay is therefore granted, with costs in cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

105 With the greatest of respect, these reasons contain in my view at least two fatal errors of law.

106 In the first place, the Court of Appeal was not justified in substituting its discretion for that of the motion judge on the basis of new facts which were not before the latter.

107 The emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a court of appeal to exercise a fresh discretion. In the case at bar, the Court of Appeal failed to indicate in what respect the new facts affected the judgment of Krindle J. It did not even refer to her reasons. Each of those new facts related to the issue of delay in hearing and deciding the merits, a factor which, as can be seen in her above-quoted reasons, had been considered and taken into account by Krindle J.

108 The House of Lords has recently emphasized the limits imposed upon a Court of Appeal in substituting its discretion to that of a motion judge with respect to the granting of an interlocutory injunction, even in a case where the Court of Appeal has the benefit of additional evidence: Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042. In this latter case, which presents striking similarities with the case at bar, the Court of Appeal had held it was justified in exercising fresh discretion in view of additional evidence [page155] adduced before it, and had set aside the decision of the motion judge without commenting upon it. The House of Lords restored the judgment of first instance in a unanimous judgment delivered by Lord Diplock:

> Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the

> judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.
>
> [page156] In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J. for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence 'so virtually we have to consider it all afresh'.
>
> My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, it any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only it they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions. [p. 1046.]

(See, also to the same effect, Garden Cottage Foods Ltd.

v. Milk Marketing Board, [1983] 2 All E.R. 770 (H.L.))

109 I have no hesitation in holding that the Manitoba Court of Appeal erred in thus substituting its discretion to that of the motion judge and, on this sole ground, I would allow the appeal.

110 But there is more.

111 The Court of Appeal did not exercise its fresh discretion in accordance with the above-stated principles. It did not itself proceed to consider the balance of convenience nor did it consider the public interest as well as the interest of the parties. It only urged the parties to be expeditious. But urging or even ordering the parties to be expeditious does not dispense from weighing the public interest in the balance of convenience. It simply [page157] attenuates the unfavourable consequences of a stay for the public where those consequences are limited.

112 The judgment of the Court of Appeal could be construed as meaning that an interlocutory stay of proceedings may be granted as a matter of course whenever a serious argument is invoked against the validity of legislation or, at least, whenever a prima facie case of violation of the Canadian Charter of Rights and Freedoms will normally trigger a recourse to the saving

effect of s. 1 of the Charter. If this is what the Court of Appeal meant, it was clearly in error: its judgment is in conflict with Gould, supra, and is inconsistent with the principles set out herein.

VI Conclusions

113 I would allow the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

114 There should be no order as to costs.

TAB 7

Federal Court Cour fédérale

Date: 20180627

Docket: IMM-2858-18

Toronto, Ontario, June 27, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KAJAPARAN NADARAJAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON MOTION on behalf of the Applicant for an Order granting a stay of the deportation of the Applicant to Sri Lanka, scheduled for June 27, 2018 pending final determination of the Applicant's underlying application for judicial review;

AND UPON reading the written submissions and hearing the oral submissions of the parties;

AND UPON considering that a stay will only issue upon the Applicant convincing the Court on the conjunctive, tripartite test that (i) there is the existence of a serious issue to be

determined by the Court, (ii) irreparable harm which will ensue, and (iii) the balance of convenience in issuing such order lies in his favour, acknowledging that the issuance of a stay is an extraordinary remedy wherein the Applicants must demonstrate special and compelling circumstances that would warrant exceptional judicial intervention: *Toth v Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302 (FCA), *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311;

AND UPON this motion being granted for the following reasons:

1. The Applicant took issue with the consideration of evidence he submitted – both in terms of the lack of consideration of his affidavit explaining his lack of evidence submitted to the Refugee Protection Division at the time of his refugee hearing, as well as other affidavits with respect to his allegations of mistreatment in his native country.

2. The Respondent conceded that one particular issue may not have been properly addressed with respect to evidence that may have impacted on the Pre-Removal Risk Assessment [PRRA] decision – namely his affidavit.

3. This issue alone is significant and in my view meets the first part of the tripartite stay test.

4. Other issues were also raised which raise a serious issue, including the PRRA officer's treatment of other evidence under the test set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385.

5. Finally, the officer's treatment of the Applicant's profile may also be problematic – which, like the other issues, requires further consideration by the leave and potentially the application judge.

6. I find that irreparable harm flows from the fact that the serious issues are directly related to the risk of return.

7. On the third component of *Toth*, while the Applicant's actions in evading departure from Canada – and thus compliance with the law – are never to be condoned, the Applicant nonetheless ultimately presented himself to authorities.

8. His voluntarily action helps to rehabilitate his stain on the equities, and despite the constraints of section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and acknowledging that a stay is an extraordinary remedy, I have nonetheless been persuaded that the balance of convenience lies in favour of the Applicant in this instance.

THIS COURT ORDERS that the motion for a stay of removal is granted pending final determination of the Applicant's underlying PRRA application for leave and for judicial review.

"Alan S. Diner"
Judge

TAB 8

Canada Post Corp. v. Public Service Alliance of Canada, [2011] 2 F.C.R. 221

Federal Courts Reports

Federal Court of Appeal

Sexton, Evans and Ryer JJ.A.

Heard: Ottawa, November 3, 2009;

Judgment: Ottawa, February 22, 2010.

Nos. A-129-08, A-130-08, A-139-08

[2011] 2 F.C.R. 221 | [2011] 2 R.C.F. 221 | [2010] F.C.J. No. 272 | [2010] A.C.F. no 272 | 2010 FCA 56

Public Service Alliance of Canada (Appellant) v. Canada Post Corporation and Canadian Human Rights Commission (Respondents) Canadian Human Rights Commission (Appellant) v. Canada Post Corporation and Public Service Alliance of Canada (Respondents)

(305 paras.)

Case Summary

Catchwords:

Human Rights — Appeals from Federal Court decision allowing judicial reviews of Canadian Human Rights Tribunal decision finding that Canada Post Corporation (CPC) violating Canadian Human Rights Act, s. 11 by paying employees in male-dominated Postal Operations (PO) group more than employees in female-dominated Clerical and Regulatory (CR) group for work of equal value — Tribunal examining four elements necessary for establishing, on balance of probabilities, prima facie case of wage discrimination — One such element being that work between CR, PO groups of equal value (work of equal value element) — Federal Court finding that Tribunal misapplying standard of proof by adopting standard used to assess damages, erring in law by applying standard of proof lower than balance of probabilities threshold regarding reliability of job information — Principal issues whether Tribunal failing to find that work of equal value element established; whether Federal Court erring in concluding that Tribunal failing to apply correct standard of proof — (1) Tribunal failing to find that work of equal value element established on balance of probabilities — Terminating analysis required to satisfy element after considering reliability of evidence related thereto — Not interpreting phrase "work of equal value" or explaining [page222] applicability to circumstances herein — Presence of reliable evidence related to job information, evaluation plan, evaluation process not meaning that work of equal value element established — Tribunal conflating requisite conclusion with three evidentiary matters needing to be present to permit that conclusion — Use of balance of probabilities standard, "sub-bands of reasonable reliability" unusual — Findings that evidence worthy of consideration not necessarily leading to conclusion that work of equal value element established — (2) Tribunal's findings with respect to job information, evaluation plan, evaluation process not established on balance of probabilities — Tribunal seeming to

justify relaxation of rules with respect to burden, standard of proof — Appeals dismissed — Per Evans J.A. (dissenting): (1) Tribunal not erring over selection of PO comparator group — Selection of PO group not contrary to purpose of Act, s. 11 — Presence of women within male-dominated comparator group acceptable — Well-paid women at CPC not necessarily precluding existence of systemic gender discrimination elsewhere — (2) Tribunal not diluting standard of proof when using phrases "more likely than not", "sufficiently adequate", but directing itself on task of weighing sufficiency of evidence — Reduction of monetary award not indication that evidence falling short of balance of probabilities — (3) Choice of methodology to determine existence, extent of wage gap within discretion of Tribunal — (4) Open to Tribunal to reduce amount of compensation.

Summary:

These were three appeals from a decision of the Federal Court allowing two applications for judicial review of a decision by the Canadian Human Rights Tribunal finding that Canada Post Corporation (CPC) had engaged in a discriminatory practice in violation of section 11 of the *Canadian Human [page223] Rights Act* by paying employees in the male-dominated Postal Operations (PO) group more than employees in the female-dominated Clerical and Regulatory (CR) group for work of equal value. In dockets A-129-08 and A-139-08, the Public Service Alliance of Canada (PSAC) and the Canadian Human Rights Commission (CHRC) appealed the Federal Court's decision to set aside the Tribunal's decision. In docket A-130-08, PSAC appealed the Federal Court's dismissal of a judicial review of the Tribunal's decision to reduce the damages awarded against CPC by half.

In its 2005 decision upholding the complaint, the Tribunal examined four elements necessary to establish, on a balance of probabilities, a *prima facie* case of wage discrimination. It found that (1) the complainant occupational group, the CR group, is predominantly female, and the comparator occupational group, the PO group, is predominantly male, (2) the two groups are employed in the same establishment, (3) an assessment of the value of the work being compared between the two groups established that the work is of equal value, and (4) a comparison of the wages between the two groups demonstrated that the CR group was being paid a lesser wage than the PO group. The Federal Court examined whether the Tribunal applied the proper standard of review in regards to the third element, specifically the reliability of the job information from the occupational groups being compared. The Federal Court found that the Tribunal had recognized the balance of probabilities as the correct standard of proof required to establish the essential element of work of equal value, but had misapplied it by adopting a standard used to assess damages. The Federal Court also found that the Tribunal erred in law in applying a novel standard of proof, with respect to the reliability of the job information, that was lower than the balance of probabilities threshold and was more akin to a "reasonable basis in the evidence".

The principal issues were (1) whether the Tribunal failed to make a finding that the third element of a *prima facie* case of wage discrimination had been established and, if so, whether such a failure would vitiate the Tribunal's decision that such a case had been made out against CPC; and (2) whether the Federal Court erred in concluding that the Tribunal failed to apply the correct standard of proof with respect to its findings in relation to the elements required to establish a *prima facie* case of discrimination.

[page224]

Held (Evans J.A. dissenting), the appeals should be dismissed.

Per Sexton and Ryer JJ.A.: (1) The Tribunal failed to make the requisite finding that the third element, or "fact in issue", had been established. Specifically, the Tribunal terminated its analysis of the third element after considering the reliability of the evidence related to it. It failed to conclude that such element was established on a balance of probabilities. The Tribunal was required to follow three steps, or evidentiary matters, to satisfy each element: whether evidence relating to the particular element is admissible, what weight should be given to that admissible evidence, and whether the admissible evidence, taking into account its reliability, establishes the element on the appropriate standard of proof, herein the balance of probabilities. The Tribunal failed to interpret the phrase "work of equal value" for the purpose of determining whether a comparison of the CR and PO groups established that their work is equal in value, and to explain how it applies in the circumstances of the complaint.

Such an explanation was necessary before the Tribunal could make a determination that the third element had been established. Notwithstanding those failures, the Tribunal determined that the evidence relating to job information, the evaluation plan and the evaluation process was reliable. However, the presence of such reliable evidence does not automatically lead to the conclusion that the third element has been established, but is a necessary precondition. Instead of concluding that the third element had been established, the Tribunal conflated the requisite conclusion with the three evidentiary matters that must be present to permit that conclusion.

Regarding the Tribunal's assessment of the reasonable reliability of the job information, the use of the balance of probabili- ties standard as well as "sub-bands of reasonable reliability" is unusual. The Tribunal's findings with respect to the reliability of the evidence pertaining to the job information, the evaluation plan and the evaluation process are nothing more than findings that such evidence has some probative value and is worthy of consideration. Such findings do not necessarily lead to a conclusion that the third element has been established. The absence of such a conclusion was sufficient to dismiss the complaint.

(2) The presumption that the Tribunal applied the correct standard of proof was amply rebutted. First, the balance of [page225] probability standard requires the establishment of a "fact in issue". In the binary formulation, as described in *In re B (Children) (Fc)*, [2008] UKHL 35, the finding is either zero or one. The necessary finding cannot be "reasonably reliably one", or "almost one" or "closer to one than zero". Second, the Tribunal's adoption of the principle that when assessing damages the assessing body must do the best it can with the evidence that it has, indicates that the Tribunal had concerns with the evidentiary record before it. It is not acceptable for the Tribunal to rely upon that approach when making findings with respect to job information, the evaluation plan and the evaluation process where they constitute "facts in issue" that must be established on a balance of probabilities. Finally, by referring a number of times to the difficult, unusual or litigious circumstances of the case, the Tribunal seemed to justify a relaxation of the long-standing rules with respect to the burden of proof and the standard of proof in civil matters. This was amplified by the adoption of the "bands and sub-bands" of acceptability or reasonable reliability. The Tribunal thus failed to make the requisite finding that the third element had been established on a balance of probabilities.

Per Evans J.A. (dissenting): There were four issues herein: (1) Was the choice of the comparator group unreasonable because it included a substantial number of well-paid women? (2) Did the Tribunal apply the correct standard of proof when finding that members of the complainant and comparator groups were performing work of equal value? (3) Did the Tribunal commit a reviewable error in finding as a fact that the CR group was being paid less than the PO group for performing work of equal value? (4) Did the Tribunal err in law in awarding PSAC compensation in the amount of half of the CR group's lost wages?

(1) The Federal Court erred in law in concluding that the Tribunal had committed reviewable error in the exercise of its discretion over the selection of the PO comparator group. The presence of a substantial number of well-paid women in the comparator group did not undermine the CR group's complaint of systemic gender discrimination. The selection of the PO group is thus not contrary to the purpose of section 11 of the Act. The *Equal Wages Guidelines, 1986* (Guidelines) specifically contemplate the presence of women within a male-dominated comparator group. As well, the presence of well-paid women at CPC does not necessarily preclude the existence of systemic gender discrimination elsewhere in the corporation. Finally, no [page226] principle was referred to suggesting that some members of an occupational group from the comparator group may be removed. The Guidelines themselves do not suggest that only part of an occupational group may be used.

(2) The Tribunal did not dilute the standard of proof when it asked whether it is "more likely than not" that the job information, the evaluation system and the process employed are "sufficiently adequate" to enable a "fair and equitable conclusion" to be reached on whether there were wage differences for work of equal value. It was merely directing itself on its task of weighing the sufficiency of the evidence in order to reach a "fair and equitable conclusion". Nor can it be inferred that the Tribunal's reduction of the monetary award to 50 percent of the wages lost was an indication that the evidence fell short of the balance of probabilities.

(3) In order to determine the existence and extent of a wage gap, the Tribunal was presented with several methodologies, and chose the one proposed by the CHRC, which emphasized the content of the work performed. The choice of an appropriate methodology is within the discretion of the Tribunal and is entitled to a high degree of deference. It cannot be said that only CPC's proposed methodology was reasonably consistent

with the objectives of section 11 of the Act, or that only the CHRC methodology was unreasonable.

(4) Specialized tribunals are owed a particularly high degree of deference in their exercise of a broad statutory discretion to fashion an appropriate remedy. The Tribunal directed itself correctly in law when it stated that an award of compensation should aim to make the victims whole. However, it was also open to the Tribunal to extend by analogy principles used to take into account future uncertainties to uncertainties about the past, and on this basis to reduce the amount of compensation.

Statutes and Regulations Cited

Canadian Human Rights Act, R.S.C., 1985, c. H-6, ss. 11, 27(2) (as am. by S.C. 1998, c. 9, s. 20), 49(1) (as am. *idem*), 50(3) (as am. *idem*), 53(2)(*c*) (as am. *idem*, s. 27).

Equal Wages Guidelines, 1986, SOR/86-1082, ss. 12-15.

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Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1(3)(*b*) (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27), (4)(*d*) (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27), 52(*b*) (as am. *idem*, s. 50).

Ontario Human Rights Code, R.S.O. 1980, c. 340.

Cases Cited

Applied:

In re B (Children) (Fc), [2008] UKHL 35.

F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41, 297 D.L.R. (4th) 193, [2008] 11 W.W.R. 414.

Considered:

Public Service Alliance of Canada v. Canada (Department of National Defence), [1996] 3 F.C. 789, (1996), 27 C.H.R.R. D/3488, 199 N.R. 81 (C.A.).

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 323 N.B.R. (2d) 1, 291 D.L.R. (4th) 577.

Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans), 2006 FCA 31, [2006] 3 F.C.R. 610, 265 D.L.R. (4th) 154, 21 C.E.L.R. (3d) 175.

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al., [1985] 2 S.C.R. 536, (1985), 52 O.R. (2d) 799, 23 D.L.R. (4th) 321.

Canada (Public Service Alliance) v. Canada (Treasury Board), 1996 CanLII 1874 (C.H.R.T.).

Referred to:

Canada (Human Rights Commission) v. Canadian Airlines International Ltd., 2004 FCA 113, [2004] 3 F.C.R. 663, 238 D.L.R. (4th) 255, 318 N.R. 201.

Canada (Attorney General) v. Morgan, [1992] 2 F.C. 401, (1991), 85 D.L.R. (4th) 473, 135 N.R. 27 (C.A.).

Chopra v. Department of National Health and Welfare, 2004 CHRT 27, affd *sub nom. Chopra v. Canada (Attorney General)*, 2007 FCA 268, [2008] 2 F.C.R. 393, 283 D.L.R. (4th) 634, 60 C.C.E.L. (3d) 1.

Singh v. Statistics Canada, [1998] C.H.R.D. No. 7 (QL).

Telfer v. Canada (Revenue Agency), 2009 FCA 23, [2009] 4 C.T.C. 123, 2009 DTC 5046, 386 N.R. 212.

Bell Canada v. Canadian Telephone Employees Association, 2003 SCC 36, [2003] 1 S.C.R. 884, 227 D.L.R. (4th) 193, [2004] 1 W.W.R. 1.

Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1, 82 Admin. L.R. (4th) 1.

Canada (Human Rights Commission) v. Canadian Airlines International Ltd., 2006 SCC 1, [2006] 1 S.C.R. 3, 263 D.L.R. (4th) 1, 343 N.R. 308.

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Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed. *The Province of Administrative Law*, Oxford: Hart Publishing, 1997.

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History and Disposition:

APPEALS from a decision of the Federal Court (2008 FC 223, [2008] 4 F.C.R. 648) allowing two applications for judicial review of a decision by the Canadian Human Rights Tribunal (2005 CHRT 39) finding that Canada Post

Corporation had engaged in a discriminatory practice in violation of section 11 of the *Canadian Human Rights Act* by paying employees in a male-dominated group more than employees in a female-dominated group for work of equal value. Appeals dismissed, Evans J.A. dissenting.

Appearances

James G. Cameron, *David G. Yazbeck* and *Kim N. Patenaude* for appellant/respondent Public Service Alliance of Canada.

Philippe Dufresne and *Daniel Poulin* for respondent/ appellant Canadian Human Rights Commission.

Peter A. Gall and *Robert W. Grant* for respondent Canada Post Corporation.

Solicitors of record

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l., Ottawa, for appellant/respondent Public Service Alliance of Canada.

Canadian Human Rights Commission, Ottawa, for respondent/appellant Canadian Human Rights Commission.

Heenan Blaikie LLP, Montréal, for respondent Canada Post Corporation.

The following are the reasons for judgment rendered in English by

SEXTON and RYER JJ.A.

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I. INTRODUCTION

1 For convenience, these reasons are organized under the following headings:

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2 The Public Service Alliance of Canada (PSAC) filed a complaint (the complaint) against Canada Post Corporation (CPC) in 1983, alleging discrimination by CPC against "employees in the female-dominated Clerical and Regulatory Group" by paying "employees in the male-

dominated Postal Operations Group" more than the Clerical and Regulatory group employees for work of equal value, contrary to section 11 of the *Canadian Human Rights Act* [R.S.C., 1985, c. H-6].

3 In 2005, the Canadian Human Rights Tribunal (the Tribunal) finally released a decision upholding the complaint [*Public Service Alliance of Canada v. Canada Post Corp.*, 2005 CHRT 39].

4 In 2008, the Federal Court allowed an application for judicial review brought by CPC and directed that the complaint be dismissed.

5 In order for the complaint to be upheld, the Tribunal itself determined, and it was not disputed, that among other things, it was required to make findings that the four elements of a case of wage discrimination had been established. The Tribunal described all four of these elements in its reasons. The third element is a finding that a comparison of the work of the two groups reveals that they were performing work of equal value. Again, it is not disputed that PSAC must establish this on a balance of probabilities.

6 There are three steps that the Tribunal is required to take when determining whether each necessary element is satisfied. In the first step, the Tribunal must determine whether evidence relating to that element is admissible. In the second step, the Tribunal must determine the weight that should be given to that admissible evidence. This turns on the reliability of the admissible evidence. Finally, in the third step, the Tribunal must determine if that admissible evidence, taking into account its reliability, establishes the element on the appropriate standard of [page232] proof. The Tribunal erred in this case by failing to determine if the admissible evidence, taking into account its reliability, established the third element on a balance of probabilities. The Tribunal prematurely concluded its analysis of the third element at the second step after considering admissibility and weight.

7 Instead of considering whether the third element was satisfied on a balance of probabilities, the Tribunal purported to apply the balance of probabilities standard in deciding that the job information pertaining to the work being compared, an essential component of the work of equal value requirement, was [at paragraph 700] "reasonably reliable, albeit at the 'lower reasonably reliable' sub-band level." The Tribunal equated this to a 50 percent level of certainty. Even if the language used by the Tribunal could somehow be construed as being a finding of work of equal value, which we do not accept, the fact that the Tribunal used a 50 percent level of certainty means that whatever their conclusion was, it was something less than a balance of probabilities, which requires proof in excess of 50 percent.

8 This is not a case about fundamental jurisprudential pay equity concepts. Rather it is a case in which a tribunal has made a reviewable error by awarding damages without establishing liability. Specifically, liability was not established because the Tribunal, after stipulating that four elements were required to find a case of wage discrimination, only proceeded to find three of those elements.

9 We further note that the record and reasons of the Tribunal in this case are not adequate to permit an appellate court to properly resolve fundamental jurisprudential pay equity concepts. In addition to not making a finding on the third element, the Tribunal also erred by failing to define what work of equal value is and how the concept applied in this case. Such an explanation is necessary to [page233] arrive at a finding of liability and damages. An appellate court should not

be put in the position of determining the definition of "work of equal value" and its application to the present case when the decision makers below have not addressed the matter. Hence, the record in this case does not lend itself to the making of authoritative statements on these concepts.

10 Since the Tribunal has failed to make a finding on the third element of a case of wage discrimination and because both the Tribunal and this Court believe such a finding to be absolutely necessary in order to uphold the complaint, the appeals should be dismissed.

II. PROCEDURAL HISTORY

11 The three appeals (A-129-08, A-130-08 and A-139-08) before the Court relate to two applications for judicial review of a decision (the Tribunal decision, 2005 CHRT 39) of the Tribunal finding that the respondent, CPC, had engaged in a discriminatory practice, as defined by section 11 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the Act), by paying employees in the male-dominated Postal Operations (PO) group more than em- ployees in the female-dominated Clerical and Regulatory (CR) group. The two applications for judicial review were heard together by Justice Kelen (the applications Judge) in the Court below (*Canada Post Corp. v. Public Service Alliance of Canada*, 2008 FC 223, [2008] 4 F.C.R. 648).

12 In A-129-08 and A-139-08, PSAC and the Canadian Human Rights Commission (CHRC) appeal the applications Judge's decision (the Federal Court decision) that the Tribunal decision be set aside. In A-130-08, PSAC appeals the applications Judge's dismissal of PSAC's application for judicial review of the portion of the Tribunal decision that reduced the damages awarded against CPC by 50 percent.

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13 The three appeals were heard together by this Court. These reasons will apply to each of the appeals. A copy of these reasons will be filed as reasons for judgment in the Court file for each of the appeals.

III. RELEVANT STATUTORY PROVISIONS

14 The statutory provisions that are relevant to the appeals are section 11 and subsections 27(2) [as am. by S.C. 1998, c. 9, s. 20], 49(1) [as am. *idem*] and 50(3) [as am. *idem*] of the Act, paragraphs 18.1(3)(*b*) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] and 52(*b*) [as am. *idem*, s. 50] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)], sections 12 to 15 of the *Equal Wages Guidelines, 1986*, SOR/86-1082 (the 1986 Guidelines). These provisions are reproduced in the Appendix to these reasons.

IV. BACKGROUND

A. Investigation of the complaint

15 On August 24, 1983, PSAC filed a complaint with the CHRC which reads as follows:

> It is alleged that the 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 percent 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.

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Corrective Action:

1. That all employees within the CR Group employed by Canada Post Corporation receive wages, as defined in paragraph 11(6) [now section 11(7)] of the *Canadian Human Rights Act*, equal to the wages of employees within the PO Group performing work of equal value.
2. That this corrective action be made retroactive to October 16, 1981.

16 The CR group is made up of clerical and regulatory workers. Typical position titles for workers in the CR group include benefits clerk, accounting clerk and accounts payable clerk. The PO group consists of workers who sort and deliver mail. Typical position titles for workers in the PO group include letter carrier, mail handler and manual sortation clerk.

17 In essence, the complaint alleges that the employees in the male-dominated PO group were paid higher wages than the employees in the female-dominated CR group who were performing work of equal value to that which was performed by PO group employees. The determination of the equivalence of the value of the work that was performed by both groups requires an assessment of the value of that work having regard to the composite of skill, effort, responsibility and working conditions applicable to that work. Job evaluation is the field of expertise that deals with these types of assessments, which are called evaluations. The process of making these assessments is known as evaluating. Job evaluations are the product of a process in which a methodology, often called a plan, is applied to information about the content of jobs being evaluated.

18 Prior to the filing of the complaint, PSAC and CPC had been working together with respect to the development of a job evaluation system (System One) that was intended to permit an evaluation of the jobs of all the CPC employees represented by PSAC. Throughout 1984 and part of 1985, CHRC awaited the outcome [page236] of those efforts in the hope that System One could be of use with respect to the complaint.

19 Because of delays with respect to the development of System One, beginning in October 1985 the CHRC pursued its investigation of the complaint more actively. To this end, the CHRC developed a questionnaire (the Job Fact Sheet) to gather data from CR group and PO group employees about the skill, effort, responsibility and working conditions applicable to their jobs.

20 In the summer of 1986, the job fact sheets were given to somewhere between 246 and 355 CR group employees. The CHRC received 194 completed and usable job fact sheets. To clarify responses to the job fact sheets, the CHRC developed an interview guide (the Interview Guide). Follow-up interviews with the Job Fact Sheet respondents were completed by December 1986 in accordance with the Interview Guide. From April to September 1987, the CHRC evaluated the sample of the 194 CR group employees using System One based on the information in the job

fact sheets and the follow-up interviews, notwithstanding that it had not been completed and PSAC advised against its use. Ultimately, these evaluations were not used in the final investigative process.

21 Contrary to its original intention, the CHRC did not use the job fact sheets and the Interview Guide to collect data from the PO group employees similar to that obtained from the CR group employees. This was partially because CPC questioned the CHRC's proposed sample size and refused to permit PO group employees to complete the job fact sheets during normal working hours. Additionally, the PO group employees were represented by a union other than PSAC, the Canadian Union of Postal Workers (CUPW), and CUPW refused the CHRC's request that the PO group employees fill-out the job fact sheets outside normal working hours.

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22 To compensate for the lack of actual information with respect to the work performed by the PO group employees, from July to October 1991, the CHRC created 10 generic job specifications for PO group employees, using information provided by CPC in 1990 and 1991. While the CR group sample included supervisors at the CR-5 level, the generic job specifications did not include the PO supervisors sub-group (PO-SUP) because the CHRC decided that it would be too onerous to fit the wide range of tasks performed by PO-SUP employees into the generic job specifications.

23 In July 1991, using the 194 CR group responses, the CR group interviews and the PO group generic job specifications, the CHRC began an evaluation using an off-the-shelf plan, the XYZ Hay Plan, for evaluating jobs for the purpose of a pay equity analysis. This plan was selected, at least in part, because System One could only be used to evaluate positions held by employees represented by PSAC, and a number of employees in the PO group were represented by CUPW. As a result, the evaluation generated using this plan did not rely upon the earlier evaluation of the CHRC that utilized System One. In order to make the evaluation more manageable, the CHRC reduced the CR group sample to 93 employees in September 1991.

24 The CHRC's evaluation (the CHRC evaluation) was completed in November 1991. This evaluation formed the basis of the CHRC's Final Investigation Report (the Report), dated January 24, 1992, which concluded that there was a wage difference when comparing the wages and job evaluations of the CR and PO groups, as alleged in the complaint. After considering the Report, the commissioners of the CHRC referred the complaint to the Tribunal for an inquiry on March 16, 1992, pursuant to subsection 49(1) of the Act.

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B. The Tribunal inquiry

25 The Tribunal panel was struck on May 11, 1992 and hearings commenced on November 25, 1992. Written and oral submissions were completed on August 27, 2003. The Chair of the Tribunal retired in June 2004. Additional written submissions were made in August 2004. The Tribunal decision was released on October 7, 2005, over two years after the conclusion of the hearing.

26 After the Tribunal had begun hearing evidence, it became apparent that there were serious deficiencies in the CHRC evaluation. As a result, PSAC engaged three professional job

evaluators (the professional team), Dr. Bernard Ingster, Dr. Martin G. Wolf and Ms. Judith Davidson-Palmer. Dr. Wolf was the spokesperson of the group and the Tribunal qualified him as an expert in Hay-based job evaluation and Hay-based compensation. PSAC asked the professional team to review the CHRC evaluation and to undertake independent evaluations. Ultimately, both the CHRC and PSAC relied exclusively on the professional team's evaluations to substantiate the complaint.

27 In May and June of 1993, the professional team conducted its initial evaluation (the Phase 1 evaluation). To conduct this evaluation, the professional team supplemented the information used in the CHRC evaluation with information from its own interviews with CR group employees that it conducted in May 1993. Where a respondent could not be reached, the professional team tried to interview a stand-in. It is not clear how many of the professional team's interviews were conducted with stand-ins, but the Tribunal found that of a total of 93 possible telephone interviews, 59 were completed.

28 In September 1994, the professional team attempted to conduct interviews for 97 of the CR group positions that were omitted from the CHRC evaluation and 55 of [page239] these interviews were completed. The information obtained in these interviews, combined with information gathered by the CHRC, was used by the professional team in November and December 1994 to evaluate the 97 CR group positions that were omitted from the CHRC evaluation. This second evaluation was called the Phase 2 evaluation.

29 Based on its Phase 1 and Phase 2 evaluations, members of the professional team prepared two reports. The first report (the Professional Value Report), dated January 1995, was prepared by Dr. Wolf in consultation with Dr. Ingster and Ms. Davidson-Palmer. The Professional Value Report concludes at page 6:

> Based on the findings of the total evaluation process in Phases One and Two, the consultants concluded that the rigorous application of the Hay Guide Chart-Profile Method of job evaluation produced substantial evidence that 122 of the 194 incumbents (62.9%) holding CR positions included in this study were in jobs with content greater than one or more of the ten PO jobs covered by these analyses.

In light of further information provided by CPC, the professional team later revised the 62.9 percent figure to 34.2 percent.

30 The second report (the Professional Wage Gap Report), dated February 1995, was prepared by Dr. Wolf alone. The Professional Wage Gap Report calculates the relationships between the hourly rates of pay of PO group jobs and the value of PO group jobs, as determined by the professional team's evaluations for 1983, 1989 and 1995, using several different approaches. The Professional Wage Gap Report concludes that, under any of its approaches, there is "a significant gap between the wages paid to CR's and to PO's performing work of equal value".

31 To support its position that the methods of the CHRC and the professional team were insufficient to substantiate the complaint, CPC called three expert witnesses, Ms. Nadine Winter, Mr. Norman Willis and Mr. [page240] P. G. Wallace. The three experts' critiques of the professional team's method highlighted the failure of the professional team to follow the industry standard application of the Hay method and the inapplicability of the Hay method to clerical and

blue collar positions.

V. DECISIONS BELOW

A. Canadian Human Rights Tribunal

32 In its reasons, the Tribunal addressed the following four fundamental issues:

(a) Does the ability of the CHRC to issue Equal Wage Guidelines that are binding on the Tribunal create a reasonable apprehension of bias?

(b) Can the 1986 Guidelines be applied to the complaint, even though it was filed in 1983?

(c) Can factors other than those identified in the 1986 Guidelines be used to rebut the presumption that when men and women are paid different wages for work of equal value, that difference is based on sex?

(d) Has the complainant established a *prima facie* case of discrimination under section 11 of the Act on a balance of probabilities?

33 In view of our disposition of this appeal, it will only be necessary to consider the Tribunal's analysis with respect to the last issue.

34 In paragraph 254 of its reasons, the Tribunal determined that each element of section 11 of the Act had to be substantiated on a balance of probabilities in order to substantiate the complaint. In assessing the value of the work that is being compared, the Tribunal found, at paragraph 255 of its reasons, that the criterion in subsection 11(2) of the Act-the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed-was required to be used. The Tribunal went [page241] on to state, at paragraph 256 of its reasons, that discrimination based on sex will be presumed when a difference in wages has been found to exist between male and female employees, employed in the same establishment, performing work of equal value. At paragraph 257 of its reasons, the Tribunal set forth its determination of the four elements that were required to be proven, on a balance of probabilities, to establish a *prima facie* case of discrimination as alleged in the complaint:

(1) The complainant occupational group is predominantly of one sex and the comparator occupational group is predominantly of the other sex. In this Complaint, that means the complainant CR's must be predominantly female and the comparator PO's must be predominantly male.

(2) The female-dominated occupational group and the male-dominated occupational group being compared are composed of employees who are employed in the same establishment.

(3) The value of the work being compared between the two occupational groups 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. The resulting assessment establishes that the work being compared is of equal value.

(4) A comparison made of the wages being paid to the employees of the two occupational groups for work of equal value demonstrates that there is a difference in wages between the two, the predominantly female occupational group being paid a lesser wage than the predominantly male occupational group. This wage difference is commonly called a "wage gap".

In these reasons, these four elements are referred to as "element one", "element two", "element three" and "element four" respectively.

(a) Element one -- The comparator group

35 Relying on sections 12 and 13 of the 1986 Guidelines, the Tribunal held that the PO group was a [page242] male-dominated occupational group and the CR group was a female-dominated occupational group. The Tribunal found that in 1983, just over 80 percent of the 2 316 employees in the CR group were female. At the same time, just over 75 percent of the 50 912 employees in the PO group were male. In 1992, the time of the referral of the complaint to the Tribunal, the CR group was over 83 percent female and the PO group was over 71 percent male.

36 CPC challenged the selection of the PO group as a comparator on the grounds that the PO group employees should not be viewed as a single group. They opposed the use of a comparator group hand-picked by PSAC and featuring the highest paid group of women working for CPC. Instead, CPC suggested that the PO-4 level of the PO group should be used as the comparator since it was the most representative of the PO group. Since the PO-4 level was 53 percent male and 47 percent female in 1983, it was not male dominated under the 1986 Guidelines and hence CPC argued that the first element of the *prima facie* case of discrimination was not established. Furthermore, CPC argued that PSAC selected the PO group as a comparator because it was highly paid and that this was inappropriate "cherry picking".

37 The Tribunal rejected the argument that the PO group should not be viewed as a single group, because the federal government job classification inherited by CPC from the Post Office Department of the Government of Canada is important in the designation of an "occupational group" under the 1986 Guidelines. The Tribunal also rejected CPC's suggestion that the complainant was "cherry picking" the comparator group. It noted that the PO group represented approximately 80 percent of the CPC workforce and that by virtue of its size, its selection therefore could not have constituted "cherry picking". Additionally, the only other possibilities, the General [page243] Labour and Trades and General Services groups, represented only a small percentage of CPC employees, and the Tribunal found there was no evidence that their work was at all similar to that performed by employees in the CR group.

38 At paragraph 283 of the Tribunal decision, the Tribunal stated its conclusion with respect to this element of subsection 11(1) of the Act, as follows:

> 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 *Act* 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 *Act* has been met. [Emphasis added.]

(b) Element two -- Employment in the same establishment

39 The Tribunal next considered whether the CR and PO groups were both employed in the same establishment and in particular, whether a geographical or functional definition of establishment was applicable. In the Tribunal's view, employees are in the same geographical establishment where they work in the same building, municipality or district. In contrast, employees are in the same functional establishment where they are subject to a common set of personnel and wage policies. Relying on this Court's decision in *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2004 FCA 113, [2004] 3 F.C.R. 663, the Tribunal eschewed a geographical definition of establishment and adopted a functional one.

40 The Tribunal then determined that the evidence before it demonstrated that the CPC was a well integrated [page244] business with considerable corporate level policy direction, leading it to reach its conclusion with respect to this element. Specifically, at paragraphs 353 and 354 respectively of its reasons, the Tribunal stated:

> Therefore, the Tribunal finds that all employees of Canada Post have been, as applicable, subject to the various common corporate policy directives issued by the Corporation, including those respecting personnel and wage policies. As a result, the Tribunal finds that, for the purposes of section 11 of the *Act*, the employee groups representing the complainant and the comparator are employed in the same establishment.
>
> Accordingly, the second element necessary to the establishment of a *prima facie* case under section 11 of the *Act* has been met. [Emphasis added.]

(c) Element three-Work of equal value

41 The Tribunal framed the question with respect to this element as whether the comparison of the work of the complainant group and the comparator group establish that the work being compared is equal in value. Further, the Tribunal stated, at paragraph 355 of its reasons:

> To be able to come to a reasonable conclusion concerning the value of the work performed by the complainant and the comparator occupational groups, the evaluation process as a whole must be reliable, on a balance of probabilities.

42 The Tribunal accepted the importance of undertaking job evaluations with reliable job information and with a reliable job evaluation plan. At paragraph 358 of its reasons, the Tribunal reproduced a portion of a booklet, entitled "Implementing Pay Equity in the Federal Jurisdiction", that was put into evidence by the CHRC. The Tribunal accepted the booklet as a general guide with respect to the collection and processing of information that should, given an acceptable job evaluation plan and competent evaluators, result in the determination of reliable values of work being assessed and compared. [page245] The first sentence of the booklet that was reproduced by the Tribunal, in paragraph 358 of its reasons, reads as follows:

> Job evaluation plans are the key to determining what constitutes "work of equal value".

Later, the following sentence appears:

> Because pay equity is premised on the assumption that the worth of different positions across an organization should be compared, use of a single plan to evaluate all jobs is essential.

43 The Tribunal also noted that the booklet was not developed for use in a litigious context.

44 The Tribunal then specified, at paragraph 362 of its reasons, the issues that it intended to address with respect to this element of the requirements of subsection 11(1) of the Act:

> Consequently, the issues which will be addressed are as follows:
>
> 1. What job evaluation system, or plan, was used to undertake the evaluation of the CR and PO jobs/positions, and how reliable was it?
> 2. What process was used and how reliable was it in analyzing the collected job data/information for purposes of assigning values to the CR and PO jobs/positions considered?
> 3. What job data/information was collected, and from what sources, and how reliable was it?
> 4. What were the resulting values attributed to the various CR and PO jobs/positions, and how reliable were they?

45 The Tribunal turned its mind to the basis upon which it was required to approach the resolution of these issues, stating, at paragraph 410 of its reasons, that there is support for "a flexible case-by-case approach to the determination of how the concept of equal pay for work of equal value is to be effected".

[page246]

46 At paragraph 411 of its reasons, the Tribunal quoted from the decision of Justice Hugessen in *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.), which places the burden of proof in pay equity disputes at the ordinary civil burden of a balance of probabilities. At paragraph 412, the Tribunal framed the issue before it:

> These rulings support a call for a standard of reasonableness, 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. The 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 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 *Act*, there were differences in wages for work of equal value, between the complainant and comparator employees concerned?

47 In this paragraph, which is in the portion of the Tribunal's reasons dealing with the question of whether the work being compared is equal in value, the Tribunal frames the issue as whether four things, namely, the job information, the evaluation system, the process employed and the resulting evaluations are sufficiently adequate to permit a conclusion to be reached with respect to whether or not there are differences in wages for work of equal value. In particular, the Tribunal focuses on whether these four things are reasonably reliable.

48 At paragraph 555 of its reasons, the Tribunal reaffirms its focus on "reasonable reliability", stating:

> Each of the elements necessary in testing reasonable reliability should be examined. In other words, the job evaluation system chosen should be reasonably reliable, the process and methodology used in evaluating the relevant jobs/positions should be [page247] reasonably reliable, and the job information and its sources should be reasonably reliable. The findings of the Tribunal should be based on the civil standard of a balance of probabilities.

It is of note that the Tribunal did not refer to the fourth item that it referred to in paragraph 412 of its reasons, namely the "resulting evaluations".

49 The Tribunal went on to determine that reasonable reliability was present on a balance of probabilities.

50 With respect to the job evaluation system and the process, the Tribunal, at paragraphs 571 and 593 respectively, stated:

> Therefore, the Tribunal finds that, on a balance of probabilities, the Hay Plan, whether using the factor comparison method or other approaches, is, in the hands of competent evaluators as were the members of the Professional Team, a suitable overall job evaluation scheme which will address the issues of this "pay equity" Complaint in a reasonably reliable manner.
>
> ...
>
> Therefore, the Tribunal finds that it is more likely than not that the evaluation process which the Professional Team used in its work was reasonably reliable.

51 The Tribunal acknowledged that the determination of reasonable reliability with respect to the matter of job information was a daunting task and in paragraph 673, framed the question as follows:

> But, given the somewhat painful and prolonged circumstances of the case before this Tribunal, 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 there was a wage gap?

[page248]

52 To assist in its determination of whether the job information used by the professional team was reasonably reliable, at paragraph 679 of its reasons, the Tribunal referred to a passage from S. M. Waddams, *The Law of Damages*, loose-leaf ed. (Toronto: Canada Law Book Inc., 2004) at page 13-1:

> In Anglo-Canadian law ... 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. In *Ratcliffe* v. *Evans*, Bower L.J. said:
>
> > As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

53 Inspired by this idea of making the most of the evidence before the decision maker, the Tribunal arrived at a "spectrum" of reasonable reliability, with one end of the spectrum being very reliable and the other end being minimally reliable. Using this spectrum, at paragraph 683 of its reasons, the Tribunal asked "[w]hile 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?" The Tribunal then analysed the information before it and concluded at paragraph 689:

> The Tribunal must confess that navigating the job information through the straits of "reasonable reliability" has not been a relaxing passage. Yet, balancing the evidence presented by all parties and expert witnesses, and under the unique circumstances of this case in the realm of proscribed discrimination human [page249] rights legislation ... the job information, in the hands of the Professional Team, was more likely than not, "reasonably reliable", or "adequate" as that Team described it, despite certain imperfections.

54 Though it already appeared to have ruled that the claimants had met the burden of establishing reliability, the Tribunal then further elaborated on the meaning of "reasonable reliability". At paragraph 693 of its reasons, it defined "reasonable reliability" as "information that is consistently, moderately dependable or in which moderate confidence can be put." The Tribunal then stated that reliability generally should be viewed as a band, with no one fixed point always considered "reasonable". Rather, it posited three sub-bands of reasonable reliability: "upper reasonable reliability," "mid reasonable reliability" and "lower reasonable reliability" (Tribunal decision, at paragraph 696). According to the Tribunal, all three of these sub-bands meet the standard of "reasonable reliability," but the upper sub-band is preferred.

55 Working with these sub-bands, the Tribunal characterized the evidence before it as falling in the lower reasonable reliability sub-band. Thus, the Tribunal was able to reiterate the conclusion that it came to in paragraph 689 of its reasons, stating at paragraph 700 of its reasons:

> Hence, ... 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".

56 The Tribunal's reasons then progressed under a new heading, "**VII. WAGE GAP AND WAGE ADJUSTMENT METHODOLOGY**". At paragraph 701 of its reasons, the Tribunal stated the next questions that it intended to address:

> Having found that it is more likely than not, that the "off-the-shelf" Hay Plan being used in the traditional factor comparison methodology, the process followed and the job information utilized by the Professional Team in conducting its CR and PO positions/jobs evaluations were reasonably reliable, the next questions to be addressed are:
>
> > How reliable were the resulting job evaluation values attributed by the Professional Team to the CR positions and PO jobs concerned?
> >
> > Was a "wage gap" demonstrated between the female and male predominant groups performing work of equal value?

57 Given the first question posed by the Tribunal, it is apparent that, to this point in its reasons, the Tribunal had not reached a conclusion with respect to the third element referred to in paragraph 257 of its reasons, as it did in paragraphs 283 and 354 of its reasons, in relation to the first two elements referred to in paragraph 257 of its reasons.

58 Stating only that the credibility of the professional team had been established and that Dr. Wolf was an expert in relation to the Hay Plan, the Tribunal, at paragraph 703 of its reasons, reached the following conclusion:

> 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.

59 This conclusion was reiterated by the Tribunal at paragraph 798 of its reasons, in virtually identical language.

(d) Element four-Wage gap

60 The Tribunal determined, in paragraph 801 of its reasons, that the evidence presented to it was sufficient, on a balance of probabilities, to demonstrate a wage gap, [page251] thus concluding that the final element required by subsection 11(1) of the Act had been fulfilled.

61 With respect to the size of the wage gap, the Tribunal accepted the proposal that had been submitted to the CHRC. Then the Tribunal dealt with CPC's contention that this element could not have been satisfied because of insufficient evidence with respect to the non-wage forms of compensation that were received by the CR and PO groups.

62 The Tribunal accepted the evidence of Dr. Lee on behalf of the complainants to the effect that the levels of non-wage forms of compensation received by both groups of employees were more or less equivalent. In doing so, the Tribunal noted, at paragraph 926 of its reasons, that Dr. Lee was constrained by his late retention by PSAC, and that "[h]e did the best he could given the situation he faced."

63 At paragraph 927 of its reasons, the Tribunal found that Dr. Lee's report fell in the "lower reasonably reliable" band on its reliability spectrum. As a result, in the Tribunal's view, PSAC had succeeded in establishing that there was no non-wage compensation that needed to be included in determining whether there was a difference in wages between the CR and PO group

employees for the purposes of the analysis under section 11 of the Act.

(e) Remedy

64 The Tribunal then examined how the remedy ordered should reflect the magnitude of the wage gap. It began by comparing the role of damages in human rights law to the role of damages in tort law, noting that the objective in both is to make the victim whole. In this case, that means "restoring the victim to the position or status he or she would have been in had the substantiated discrimination not occurred" (Tribunal decision at paragraph 934).

[page252]

65 Relying on *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.); *Chopra v. Department of National Health and Welfare*, 2004 CHRT 27, affd *sub. Nom. Chopra v. Canada (Attorney General)*, 2007 FCA 268, [2008] 2 F.C.R. 393 and *Singh v. Statistics Canada*, [1998] C.H.R.D. No. 7 (QL), the Tribunal held that it could reduce the damages when the magnitude of the damages is uncertain. The Tribunal found that the magnitude of the damages was uncertain in this case because job information and evidence relating to non-wage forms of compensation was only "lower reasonably reliable".

66 With this in mind, the Tribunal held that where job information and evidence relating to non-wage forms of compensation is categorized in the "upper reasonable reliability" sub-band, the damages award should reflect 100 percent of the wage gap, where they fall in the "mid reasonable reliability" sub-band, the award should reflect 75 percent of the wage gap, and where they fall in the "lower reasonable reliability" sub-band, the award should be 50 percent or less of the calculated gap. Accordingly, the Tribunal discounted the award to the claimants by 50 percent.

67 Regarding the time period over which lost wages are to be awarded the Tribunal decided that the compensation period should begin on August 24, 1982, one year before the filing of the complaint and not October 16, 1981, as requested in the complaint. The time period ended on June 2, 2002, when the wage gap was eliminated.

B. Federal Court

68 The applications Judge heard two applications. In the first, CPC requested judicial review of the decision upholding the complaint. In the second, PSAC requested judicial review of the decision to discount the award of damages by 50 percent. In his reasons, the applications Judge considered five issues:

[page253]

(1) whether the Tribunal erred in applying the 1986 Guidelines;

(2) whether the Tribunal erred in applying an incorrect standard of proof;

(3) whether the Tribunal erred in determining the comparator group;

(4) whether the Tribunal erred in holding that once a wage gap has been established, the presumption of discrimination is only rebuttable by factors in the 1986 Guidelines; and

(5) whether the Tribunal erred in discounting the damages by 50 percent.

(a) Applicability of the 1986 Guidelines

69 The applications Judge held that the standard of review with respect to the issue of whether the Tribunal erred in retroactively applying the 1986 Guidelines was reasonableness *simpliciter*. (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, had not yet been decided.) In the circumstances, the applications Judge determined that their application by the Tribunal was reasonable and that they were not being applied retroactively.

(b) Standard of proof

70 The applications Judge also identified reasonableness *simpliciter* as the standard of review with respect to this issue.

71 The applications Judge held that the standard of proof that must be met in order to establish a discriminatory practice under subsection 11(1) of the Act is the ordinary civil burden of the balance of probabilities. He found that the Tribunal recognized this as the correct standard of proof but then misapplied that standard.

[page254]

72 The applications Judge referred to the four elements that were identified as essential to the establishment of a *prima facie* case of discrimination under subsection 11(1) of the Act. He stated that the parties before him agreed that the issue of whether the Tribunal applied the proper standard of review focused on the third element. At paragraph 122 of his reasons, the applications Judge further defined his focus, stating:

> 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.

73 The applications Judge referred to the evidence with respect to the issue of the job information and the Tribunal's findings with respect to that issue. At paragraphs 131 and 132 he stated:

> 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:

> ... 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?

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. [Emphasis added.]

[page255]

74 The applications Judge found that the Tribunal then veered off track by adopting the passage from Professor Waddams' book, reproduced in paragraph 133 of his reasons, with respect to the principle that when assessing damages, a tribunal must do the best it can with the evidence before it. The applications Judge also found that the Tribunal introduced ambiguity into its application of the standard of proof by its reference to the spectrum analysis.

75 At paragraph 155 of his reasons, the applications Judge reiterates the obligation of the complainant to prove, on a balance of probabilities, that there were differences in wages for work of equal value between the complainant and the comparator groups. He then stated, at paragraphs 156 to 158 respectively of his reasons:

> 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's 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's conclusion that the Tribunal did not find that the job information was reliable on the balance of probabilities is indirectly confirmed by the Tribunals 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:
>
> > 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.
>
> Accordingly, the Tribunal concludes that the finally determined award of lost wages for each eligible CR employee, by [page256] 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.
>
> 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.

76 The applications Judge rejected the arguments of PSAC and the CHRC that the Tribunal reached a conclusion that the balance of probabilities threshold had been met with respect to the work of equal value element. In that regard, the applications Judge rejected the assertion that the conclusion stated in paragraph 801 of the Tribunal's reasons was sufficient to cover this point. At paragraph 160 of his reasons, he refers to the conclusion of the Tribunal at paragraph 703 of its reasons, stating:

> For instance, at paragraph 703, the Tribunal identifies the issue before it - i.e., that the material facts are "reasonably reliable":
>
> > 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. [Emphasis added.]

77 Finally, the applications Judge noted that the standard of proof that was actually applied by the [page257] Tribunal was more akin to a "reasonable basis in the evidence" standard, which is lower than the required balance of probabilities standard.

(c) Comparator Group

78 The applications Judge then considered whether the Tribunal erred in finding that the PO group was an appropriate comparator group. His conclusion on this issue is set forth in paragraph 207 of his reasons:

> 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. [Emphasis in original.]

(d) Presumption

79 The applications Judge subsequently turned to the question of whether the Tribunal erred in holding that only factors in the 1986 Guidelines can be used to rebut the presumption of discrimination based on sex. He concluded that having regard to his conclusions with respect to

the issues of the standard of proof and the appropriateness of the comparator group, the issue of the legal presumption did not arise.

(e) Damages

80 The applications Judge determined that no damages should have been awarded since the complaint had not been established on a balance of probabilities. Finally, [page258] the applications Judge lamented the long duration of the proceedings.

(f) Disposition

81 The applications Judge ordered the complaint to be sent back to the Tribunal with the direction that the complaint be dismissed as not substantiated according to the legal standard of proof.

VI. ISSUES

82 In A-129-08 and A-139-08, PSAC and the CHRC appeal the applications Judge's decision to set aside the Tribunal's decision. In A-130-08, PSAC appeals the applications Judge's dismissal of PSAC's application for judicial review of the portion of the decision that reduced the damages awarded against CPC by 50 percent.

83 The following issues arise in these appeals:

(a) whether the Tribunal failed to make a finding that the third element of a *prima facie* case of wage discrimination had been established and if so, whether such a failure would vitiate the Tribunal's decision that such a case of wage discrimination had been made out against CPC;

(b) whether the applications Judge erred in concluding that the Tribunal failed to apply the correct standard of proof with respect to its findings in relation to the elements required to establish a *prima facie* case of discrimination;

(c) whether the applications Judge erred by showing insufficient deference to the Tribunal when determining whether the PO group was an appropriate comparator group;

[page259]

(d) whether the applications Judge erred by referring the complaint back to the Tribunal with the direction that it be dismissed; and

(e) whether the Tribunal erred by discounting damages.

We are of the view that this appeal can be disposed of by reference to the first two of these issues. For the reasons that follow, we are in agreement with the disposition of the applications Judge.

VII. ANALYSIS

A. The role of the Court in this appeal

84 It is now settled that when this Court hears an appeal from a decision of the Federal Court in an application for judicial review of a decision of an administrative tribunal, this Court's task is to determine whether the reviewing judge correctly identified the standard of review and applied it correctly in reviewing the tribunal's decision. (See *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123.) As stated by Rothstein J.A. (as he then was), in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at paragraph 14, "[i]n practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review." Consequently, we will now review the Tribunal's decision on the two issues identified above.

B. Whether the Tribunal erred by failing to make a necessary finding

85 In the hearings of these appeals, the Court requested the parties to make submissions with respect to whether the Tribunal made a finding that the third element of a *prima facie* case of wage discrimination had been established. It was common ground among the parties, and we agree, that such a failure would be sufficient to vitiate [page260] the Tribunal's decision. Since the applications Judge did not analyse this issue, we will undertake this analysis.

86 For the reasons that follow, we conclude that the Tribunal failed to make the requisite finding. Specifically, we are of the view that the Tribunal terminated its analysis of the third element after considering the reliability of the evidence related to that element and failed to conclude that such element was established on a balance of probabilities.

(a) Standard of review

87 The question of whether the failure to make a finding on each of the four elements of a *prima facie* case of wage discrimination would vitiate a conclusion that such a case has been made out against CPC would, in all likelihood, be a pure legal question that would be reviewed on the standard of correctness. However, that question is not in issue. Instead, the question is whether, upon a fair reading of the Tribunal's reasons, it can be said that the Tribunal actually failed to make the requisite finding with respect to the third element. Consideration of this question requires the interpretation of certain general legal principles and the applicable provisions of the Act and the 1986 Guidelines, as well as their application to the facts as found by the Tribunal. Thus, the question may be regarded as one of mixed fact and law. As such, it is to be reviewed on the standard of reasonableness, unless the legal component is readily extricable from the factual component. It may well be possible to extricate the legal component with the result that the standard of review of the extricated question would be correctness. However, in the circumstances, we decline to undertake the task of trying to extricate a discrete legal component from the question, with the result that the standard of reasonableness will be applied.

(b) The general approach to analysing elements of a case of wage discrimination

[page261]

88 The complainant alleges that CPC violated section 11 of the Act by paying employees in the male-dominated PO group more than employees in the female- dominated CR group for work of equal value.

89 The basis for the establishment that such a violation has occurred has been well summarized in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al.*, [1985] 2 S.C.R. 536, a case in which the Supreme Court of Canada found that a rule requiring all employees to work on Saturdays could be discriminatory under the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, even if there was no discriminatory intention on the part of the employer. At page 558, McIntyre J. stated:

> To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy-it will vary with particular cases-and it may not apply to one party on all issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding, to have available as a 'tie-breaker' the concept of the onus of proof. I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom, should it be assigned? 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. [Emphasis added.]

90 As previously indicated, in these appeals, it is common ground that in the circumstances of the complaint, [page262] the establishment of a *prima facie* case of wage discrimination requires the complainant to establish four elements on a balance of probabilities. The description of those elements that is contained in paragraph 257 of the Tribunal's reasons has not been challenged by any party.

91 With respect to the establishment of those elements, a portion of the reasons of Lord Hoffmann in *In re B (Children) (Fc)*, [2008] UKHL 35, at paragraph 2 (one of the U.K. decisions referred to by Justice Rothstein in *F.H.* [*infra*]) is apposite.

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

92 In this context, each of the requisite elements can be regarded as a "fact in issue" that must be proved on a balance of probabilities. Where the Tribunal finds that an element has been proved, such a finding would return a value of one in Lord Hoffmann's binary system. However, where the requisite degree of proof is not present, the "fact in issue" or element has not been proved and, to return to Lord Hoffmann's binary system, a value of zero would be returned.

93 In its fact-finding analysis with respect to the four elements or "facts in issue", the Tribunal was required to take the following three steps (the "steps required to find a 'fact in issue'").

94 In the first step, the Tribunal must determine whether evidence relating to the particular "fact in issue" is admissible. This depends on whether such evidence meets certain rules at common law, or rules developed by the Tribunal.

[page263]

95 In the second step, the Tribunal must determine the weight to be given to the admissible evidence with respect to the particular "fact in issue". At this point, the reliability of that evidence is central to the determination of the weight it should receive.

96 Finally, in the third step, the Tribunal must determine whether the overall standard of proof has been met with respect to the "fact in issue". In civil matters, the standard of proof is the balance of probabilities. In our view, this standard has been definitively settled by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, wherein, at paragraphs 40 and 49 respectively, Justice Rothstein stated:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.
>
> ...
>
> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

Justice Rothstein continued at paragraph 54:

> Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied.

97 Because all four elements are essential to the establishment of a *prima facie* case of wage discrimination, a value of one must be returned with respect to each of those elements. In other words, if the requisite [page264] level or standard of proof is not met with respect to any element, the complaint must be dismissed as not proved.

(c) The Tribunal's approach to finding elements of a case of wage discrimination

98 Before addressing the question of whether the Tribunal failed to make the requisite finding

with respect to the third element, we wish to consider the Tribunal's treatment of the first two elements. Given our disposition of these appeals, it is unnecessary for us to give any consideration to the Tribunal's treatment of the fourth element.

(i) Element one -- The comparator group

99 The Tribunal considered the evidence that was before it in the context of sections 12 and 13 of the 1986 Guidelines and found that the complainant occupational group, the CR group, was a female-dominated group and the comparator occupational group, the PO group, was a male-dominated occupational group for the purposes of those provisions. Having reached this conclusion, the Tribunal went on to conclude, at paragraph 283 of its reasons, that these two groups

> ... are appropriately designated under section 11 of the *Act* 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 *Act* has been met. [Emphasis added.]

100 We emphasize this conclusion, without commenting upon its reasonableness, to illustrate that the Tribunal addressed the requirements of this element and found that they had been met. We also note that using Lord Hoffmann's binary system, this finding would return a value of one in relation to the establishment of this element.

[page265]

(ii) Element two -- Employment in the same establishment

101 In a manner similar to that in which the Tribunal dealt with element one, the Tribunal ascertained the requirements of this element, considered the evidence that was tendered in relation to it and made a finding that the employee groups representing the complainant and the comparator were employed in the same establishment. Then, at paragraph 354 of its reasons, the Tribunal stated, "Accordingly, the second element necessary to the establishment of a *prima facie* case under section 11 of the *Act* has been met" (emphasis added).

102 Again, we emphasize the clearly stated conclusion of the Tribunal with respect to this element. Also, we reiterate that under Lord Hoffmann's binary system, this finding would return a value of one in relation to the establishment of this element.

(iii) Element three -- Work of equal value

103 The Tribunal's description of elements 3 and 4, as stipulated in paragraph 257 of its reasons, is reproduced for convenience:

> (3) The value of the work being compared between the two occupational groups 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. The resulting assessment establishes that the work being compared is of equal value.

(4) A comparison made of the wages being paid to the employees of the two occupational groups for work of equal value demonstrates that there is a difference in wages between the two, the predominantly female occupational group being paid a lesser wage than the predominantly male occupational group. This wage difference is commonly called a "wage gap". [Emphasis added.]

104 After reaching its conclusion with respect to element two, the Tribunal addressed the third element, posing the following two questions to itself [at paragraph 354]:

[page266]

D. Does the comparison of the work of the Complainant group and the Comparator group establish that the work being compared is equal in value?

Are the jobs/positions data and the process comparing the work of the Complainant and the Comparator groups reliable?

105 The first of these questions makes it clear that the Tribunal considered the establishment of this element requires a conclusion that a comparison of the work of the two groups reveals that they were performing work of equal value in the same establishment. However, the Tribunal failed to provide any explanation with respect to the substance of this element or any interpretation of the phrase "work of equal value" for the purposes of the question that it posed to itself.

106 In addition to this failure, the Tribunal also failed to explain how the phrase "work of equal value" applies in the circumstances of the complaint. Such an explanation would be necessary before the Tribunal could make a determination that the third element had been established.

107 Without these explanations, the Court is put in the position of having to speculate on what the Tribunal may have thought about the meaning of "work of equal value" or attempting to undertake the analysis itself. In our view, the former alternative is impermissible and the latter is unfeasible having regard to the record before us. That said, we would venture to suggest that a fulsome analysis of the proper interpretation of "work of equal value", conducted on the basis of an adequate record and the application of the criterion in subsection 11(2) of the Act, would permit the conclusion that in cases involving comparisons of the work of occupational groups, the equality of the compared work could be determined on a relative basis. In other words, it would be possible that the work of the occupational groups could be compared, for the purposes of subsection 11(1) of the Act, even if the value of that work was different in absolute terms. For example, the third element might be said to have been established by a finding that two units of the work [page267] done by the complainant occupational group equates in value to one unit of work done by the comparator occupational group.

108 Notwithstanding its failure to provide any explanation of the requirements of the third element, the Tribunal found that to reach a conclusion with respect to the value of the work performed by the complainant and comparator occupational groups, the Tribunal must have

evidence with respect to:

(a) the jobs that are being done in the two groups (the job information);

(b) the plan or methodology that is to be used to examine and evaluate the job information (the evaluation plan); and

(c) the process under which the evaluations are actually undertaken (the evaluation process).

109 The Tribunal then determined that the evidence with respect to the job information, the evaluation plan and the evaluation process must be reliable.

110 We take no issue with this determination by the Tribunal. However, we are of the view that the presence of reliable evidence with respect to these three matters does not automatically lead to a finding that the third element has been established. Assessing reliability is only the second of the steps required to find a "fact in issue". In our view, the presence of such evidence is a necessary precondition to a finding that this element had been established. Indeed, a portion of the booklet upon which the Tribunal placed reliance (see Tribunal reasons, paragraph 358) states, "job evaluation plans are the key to determining what constitutes 'work of equal value'."

111 Thus, once this necessary precondition has been fulfilled, the Tribunal would then be in a position to reach [page268] a conclusion that element three had been established. Unfortunately, we have been unable to discern any portion of the Tribunal's reasons in which a conclusion with respect to this element has been reached.

112 In our respectful view, the Tribunal became confused, and therefore fell into error, when it conflated the requisite conclusion with respect to the third element-that the work of the two groups that was being compared was of equal value on a relative basis-with the three evidentiary matters that must be present to permit that conclusion to be reached. This confusion is evident in paragraph 362 of the Tribunal's reasons, wherein it framed four issues that it wished to consider. For ease of reference, paragraph 362 is reproduced:

Consequently, the issues which will be addressed are as follows:

1. What job evaluation system, or plan, was used to undertake the evaluation of the CR and PO jobs/positions, and how reliable was it?
2. What process was used and how reliable was it in analyzing the collected job data/information for purposes of assigning values to the CR and PO jobs/positions considered?
3. What job data/information was collected, and from what sources, and how reliable was it?
4. What were the resulting values attributed to the various CR and PO jobs/positions, and how reliable were they?

113 In our view, the determinations in relation to the first three issues specified by the Tribunal-the existence of evidence with respect to the evaluation plan, the evaluation process and the job information and the reliability of such evidence-are essential inputs that must be present before a conclusion can be reached with respect to whether, on a relative basis, the work being

compared is of equal value. However, we believe that the "resulting values", referred to as the fourth issue, are the actual conclusion that the Tribunal is required to make with respect to the third element. It is these values that permit the determination that, on a relative basis, the work of the two groups that is being performed is of equal [page269] value. And, as has been stated earlier, the conclusion with respect to this element or "fact in issue" must be established on a balance of probabilities.

114 A further indication of this conflation on the part of the Tribunal can be found in paragraph 412 of its reasons, in particular, the following sentence:

> The 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 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 *Act*, there were differences in wages for work of equal value, between the complainant and comparator employees concerned? [Emphasis added.]

In our view, the "resulting evaluations" are the conclusion that the Tribunal is required to make with respect to this element and should not be intertwined with findings of reliability. In other words, a finding by the Tribunal that the evidence tendered with respect to the determination of the relative value of work that is being compared is reliable is not the equivalent of a finding by the Tribunal, after considering all of the evidence before it, that, on a relative basis, the work being compared is of equal value, as required by subsection 11(1) of the Act.

115 At paragraph 555, the Tribunal concludes that it must test, assess or weigh the reasonable reliability of the job information, the evaluation plan and the evaluation process using the "civil standard of a balance of probabilities". It then goes on to make these determinations with respect to the evaluation plan and the evaluation process stating at paragraphs 571 and 593 respectively:

[page270]

> Therefore, the Tribunal finds that, on a balance of probabilities, the Hay Plan, whether using the factor comparison method or other approaches, is, in the hands of competent evaluators as were the members of the Professional Team, a suitable overall job evaluation scheme which will address the issues of this "pay equity" Complaint in a reasonably reliable manner.
>
> ...
>
> Therefore, the Tribunal finds that it is more likely than not that the evaluation process which the Professional Team used in its work was reasonably reliable. [Emphasis added.]

116 The Tribunal then considered the "daunting task" of testing the reasonable reliability of the job information evidence. Acknowledging the difficulty in assessing this evidence, the Tribunal found it helpful to consider the approach espoused by Professor Waddams (reproduced at paragraph 679 of the Tribunal's reasons) with respect to proof of damages, namely that the court must make the most of, or do the best it can with, the available evidence.

117 In addition, the Tribunal determined that, for the purposes of assessing the reasonable reliability of the job information, it was appropriate to consider "three sub-bands of reasonable reliability". Using this construct, the Tribunal determined that the job information evidence was nonetheless reasonably reliable, stating at paragraph 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.

118 With respect, we find that the use of the balance of probabilities standard in relation to the assessment of the reliability of evidence with respect to intermediate facts to be unusual and the use of "sub-bands of reasonable reliability" for that purpose to be even more unusual. [page271] In our view, the Tribunal's findings with respect to the reliability of the evidence pertaining to the job information, the evaluation plan and the evaluation process are nothing more than findings that such evidence has some probative value and is worthy of consideration by the Tribunal. However, findings that evidence is reliable or worthy of consideration do not necessarily lead to the conclusion that such evidence has sufficient probative value to establish the third element, the "fact in issue" in respect of which such evidence was tendered. Again, in our view, the Tribunal has failed to reach the third of the steps required to find a "fact in issue" and has terminated its analysis at the second step.

119 Having made its finding that the evidence with respect to the job information was reasonably reliable, the Tribunal, at paragraph 701 of its reasons, asked itself the following question, "How reliable were the resulting job evaluation values attributed by the Professional Team to the CR positions and PO jobs concerned?"

120 The Tribunal then answered this question in paragraph 703 of its reasons, stating:

> 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.

121 The applications Judge concluded that the Tribunal's finding of reasonably reliable job values in this paragraph fell short of a finding that the third element had been established on a balance of probabilities. We are in agreement with his conclusion in that regard.

122 To reiterate, the establishment of the third element requires a finding that the assessment of the value of the work performed by the two groups proves, on a balance [page272] of probabilities, that on a relative basis, the work being compared is of equal value. With respect, a finding that the value attributed to the work being compared is reasonably reliable cannot reasonably be said to be a finding that the work that is being compared is of equal value.

123 We accept that because the Tribunal has correctly stated the standard of proof, it is entitled to the presumption that it has applied the correct standard of proof. However, the presumption cannot reasonably be considered to turn a finding that the value attributed to the work being compared is reasonably reliable into a finding that the work that is being compared is of equal value. At most, the presumption suggests that the Tribunal has found that the value attributed to

the work being compared is reasonably reliable on a balance of probabilities, which is sufficient only to complete the second step required to establish a "fact in issue". Accordingly, we are unable to conclude that paragraph 703 of the Tribunal's reasons can reasonably be considered to contain a finding that the third element has been established. Certainly, it is not written in the same clear manner as paragraphs 283 and 354 of the Tribunal's reasons, which stipulate that each of elements one and two has been established.

124 Similarly, we do not accept that the first sentence of paragraph 801 of the Tribunal's reasons can reasonably be considered to establish that the third element has been met. That sentence reads as follows:

> 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.

Fairly interpreted, that sentence addresses no more than the acceptance by the Tribunal that the fourth element, [page273] which relates to the wages paid to employees in the two groups, has been established. Furthermore, paragraph 801 is found in section VII of the Tribunal's reasons entitled "**VII. WAGE GAP AND WAGE ADJUSTMENT METHODOLOGY**", which follows the section of the reasons in which a conclusion with respect to the third element would have been expected to have been reached.

125 It is apparent that the Tribunal was aware of the requirement to make findings with respect to each of the four elements of a *prima facie* case of wage discrimination. Indeed, in paragraphs 283 and 354 of its reasons, the Tribunal made such findings in relation to the first and second elements in clear and unequivocal terms. The failure to make a clear and unequivocal finding that the third element had been established is as clear to us as are the Tribunal's findings that the first two elements had been established.

126 No reasons were given by the Tribunal for its failure to make a finding that the third element had been established. And, in our view, no justifiable, transparent or intelligible reasons could be offered to support that failure. Moreover, given the Tribunal's awareness of the requirement to make such findings with respect to all four of the elements and the fact that it made two such findings in clear and unequivocal terms, we are hard pressed to conclude that the failure to make a finding that this important element was established was due to inadvertence or that such a finding should be considered to be implicit in its reasons.

127 In the result, we are of the view that the Tribunal cannot reasonably be considered to have made a finding that the third element of a *prima facie* case of wage discrimination has been established. It follows, in our view, that in the absence of such a finding, it is a sufficient basis upon which to dismiss the complaint. To return to Lord Hoffmann's binary system, the failure of the Tribunal to find that this element had been established leads to a value of zero being returned.

[page274]

C. Whether the Tribunal applied the incorrect standard of proof

128 The applications Judge found that the Tribunal correctly stated that the standard of proof with respect to the four elements is the balance of probabilities. No party takes issue with this finding. In addition, having regard to the presumption referred to by Rothstein J. in *F.H.*, the Tribunal is presumed to have applied the correct standard of proof. The issue then becomes whether it can be said that this presumption has been rebutted having regard to the reasons of the Tribunal read as a whole.

129 The applications Judge addressed this issue in the context of the third element and that will be our focus as well.

(a) Standard of review

130 The question of whether the Tribunal applied the correct standard of proof is a question of mixed fact and law that contains no readily extricable legal issue. Accordingly, the standard of review of this question is reasonableness.

(b) Did the Tribunal apply the correct standard of proof?

131 Earlier in these reasons, we concluded that the Tribunal erred to the extent that it held that the establishment of the third element would automatically result from findings that reasonably reliable evidence had been adduced with respect to the job evaluations, the evaluation plan and the evaluation process.

132 To the extent that the Tribunal's view has any validity, each of the three evidentiary matters would have to be characterized as an essential element or "fact in issue", which would have to be established on a balance of probabilities, rather than an intermediate fact. On that basis, the complaint would still be doomed to fail. In our view, the findings that the Tribunal made with respect to each of these matters, in paragraphs 571, 593 and 700 of [page275] its reasons, to the effect that these matters were "reasonably reliable", constitute findings that fall short of the requisite standard of proof on a balance of probabilities.

133 Having made a finding, at paragraph 700 of its reasons, that the evidence with respect to the job information was reasonably reliable, the Tribunal, at paragraph 701 of its reasons, asked itself the following question, "How reliable were the resulting job evaluation values attributed by the Professional Team to the CR positions and PO jobs concerned?"

134 The Tribunal then answered this question, at paragraph 703 of its reasons, stating:

> 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.

135 The applications Judge concluded that the Tribunal's finding of reasonably reliable job values in this paragraph fell short of a finding that the third element had been established on a balance of probabilities. We are in agreement with his conclusion in that regard.

136 In addition, we note that the Tribunal found, at paragraphs 699 and 941 of its reasons, that

the job information used in evaluating the CR positions and the PO positions was "lower reasonably reliable". This led the Tribunal to conclude that there was a "significant degree of uncertainty" in the job information. The Tribunal then made the following comments in paragraphs 943, 944, 948 and 949:

> 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 [page276] more accurately reflected reality. In other words, the greater the reliability of the job information and the non-wage benefits, the greater the accuracy of the wage gap determination. This determination is seminal to the extent of the award of damages.
>
> 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 the Alliance and endorsed by the Commission.
>
> ...
>
> Following the spectrum analysis already completed for the two elements of uncertainty, [job information, paragraph 941, and non-wage compensation, paragraph 942] 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.
>
> 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.

137 Thus, at paragraph 949 of its reasons, the Tribunal reduced the award of lost wages by 50 percent so as to be "in line with the lower reasonable reliability status of the relevant job information and non-wage forms of compensation." In doing so, it is our view that the Tribunal has thus equated the "lower reasonable reliability status" of the job information to 50 percent certainty. In our view, this conclusion of the Tribunal clearly demonstrates that a standard of proof lower than the balance of probabilities was applied by the Tribunal with respect to the third element.

138 In our view, the presumption that the Tribunal applied the correct standard of proof has been amply rebutted. This is apparent for a number of reasons. First, the balance of probability standard requires the establishment of a "fact in issue". In the binary formulation, the [page277] finding is either zero or one. The necessary finding is not "reasonably reliably one", or "almost one" or "closer to one than zero".

139 Second, the Tribunal's reliance on Professor Waddams' urging that in the assessment of damages, the assessing body must do the best it can with the evidence that it has, indicates to us that the Tribunal had concerns with the evidentiary record before it. It is not necessary for us to consider whether it may have been appropriate for the Tribunal to rely upon Professor Waddams' approach when attempting to determine the reliability of evidence with respect to job information, the evaluation plan and the evaluation process where those matters constitute

intermediate facts upon which findings of "facts in issue" are based. However, in our view, it is not acceptable for the Tribunal to rely upon that approach when making findings with respect to those matters, where they constitute "facts in issue", which must be established on a balance of probabilities.

140 Third, the Tribunal referred a number of times (see paragraphs 573, 574, 581, 673 and 683 of the Tribunal's reasons) to the particular circumstances of the case being difficult or unusual or litigious, as if to justify some sort of relaxation of the long-standing rules with respect to the burden of proof and the standard of proof in civil matters. This theme is amplified by the adoption of the "bands" and "sub-bands" of acceptability or reasonable reliability to which the Tribunal resorted.

141 All of these justifications by the Tribunal demonstrate to us that it failed to make the requisite finding that the third element had been established on a balance of probabilities. In our view, they clearly rebut the presumption that such a finding was made. As such, we agree with the disposition of the applications Judge on this issue and conclude that it is a sufficient basis upon which to dismiss the appeal.

[page278]

VIII. CONCLUSION AND DISPOSITION

142 We have concluded that the Tribunal has made two errors, each of which is sufficient to vitiate the decision of the Tribunal. With respect to the first issue, which was not directly considered by the applications Judge, we have concluded that the Tribunal cannot reasonably be considered to have made a finding that the third element of a *prima facie* case of discrimination has been established. As a result, the absence of this essential finding makes it impossible for the complaint to be upheld.

143 With respect to the second issue, we are in agreement with the applications Judge that the findings made by the Tribunal in relation to the third element of a *prima facie* case of wage discrimination fall short of proof of the level required by the balance of probabilities standard. As such, it was unreasonable for the Tribunal to uphold the complaint when the requisite level of proof of this essential element was not present.

144 For the reasons previously given, we agree with the applications Judge that the level of proof with respect to at least one of the four elements failed to exceed 50 percent and therefore failed to attain the required level of proof of greater than 50 percent. As a result, we are of the view that the applications Judge was correct when he determined that the matter should be remitted to the Tribunal with a direction that the complaint should be dismissed as not having been substantiated. We are also of the view that it would be of no use to remit the matter to the Tribunal for reconsideration, given our conclusion that the Tribunal's findings with respect to each of the four elements failed to meet the necessary level of proof on a balance of probabilities.

145 Like the applications Judge, we also note the exceptional amount of time and resources consumed by this case. The length of the Tribunal hearing alone was 11 years, and it has now been 26 years since the complaint was filed. As the applications Judge noted at paragraph 274, "A legal hearing without discipline and timelines both delays and denies justice." However, this

exceptional [page279] consumption of time and resources does not influence our choice of remedy.

146 For the foregoing reasons, we would dismiss the appeals without costs.

APPENDIX

RELEVANT STATUTORY PROVISIONS

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

Equal wages

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.

Assessment of value of work

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

Separate establishments

(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.

Different wages based on prescribed reasonable factors

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

Idem

(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

[page280]

No reduction of wages

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

Definition of "wages"

(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

(*a*) salaries, commissions, vacation pay, dismissal wages and bonuses;

(*b*) reasonable value for board, rent, housing and lodging;

(*c*) payments in kind;

(*d*) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and

(*e*) any other advantage received directly or indirectly from the individual's employer.

...

27. ...

Guidelines

(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.

...

Request for inquiry

49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

...

50. ...

Additional powers

(3) In relation to a hearing of the inquiry, the member or panel may

[page281]

(*a*) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint;

(*b*) administer oaths;

(*c*) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

(*d*) lengthen or shorten any time limit established by the rules of procedure; and

(*e*) decide any procedural or evidentiary question arising during the hearing.

Federal Courts Act, R.S.C., 1985, c. F-7

18.1 ...

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refusd to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

...

Powers of Federal Court

52. The Federal Court of Appeal may

...

(*b*) in the case of an appeal from the Federal Court,

[page282]

(i) dismiss the appeal or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded,

(ii) in its discretion, order a new trial if the ends of justice seem to require it, or

(iii) make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration ...

Equal Wages Guidelines, 1986, SOR/86-1082

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.

[page283]

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 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.

* * *

The following are the reasons for judgment rendered in English by

EVANS J.A. (dissenting)

A. INTRODUCTION

147 This case concerns a pay equity claim filed 27 years ago. Its investigation and adjudication must have involved the expenditure of vast quantities of money and time, both public and private. For members of the appellant, the Public Service Alliance of Canada (PSAC), the resolution of a complaint of long-standing gender discrimination in the workplace is at stake. For Canada Post Corporation (CPC), the financial implications of the decision by the Canadian Human Rights Tribunal (Tribunal) are no doubt considerable.

148 This appeal raises three important questions for the implementation of the legal principle that an employer may not pay men and women differently for work of equal value. First, in a pay equity claim by a predominantly female occupational group, may the Tribunal select a [page284] predominantly male comparator group that includes a significant number of relatively well-paid women? Second, when the Tribunal states that it is applying the civil standard of proof, what weight must be given to the presumption that this is the standard that it in fact applied? Third, after the jobs of members of the complainant and comparator groups have been evaluated, what findings must be made before their wages can be compared in order to determine if they are being paid differently for performing work of equal value?

149 I have had the benefit of reading the reasons of my colleagues, Sexton and Ryer JJ.A. I regret that I am unable to agree that the appeals of PSAC and the Canadian Human Rights Commission (CHRC) in Court files A-129-08 and A-139-08 should be dismissed. In my opinion, the Tribunal made no error warranting judicial intervention when it upheld the pay equity claim by PSAC on behalf of the predominantly female Clerical and Regulatory (CR) occupational group of employees of CPC in respect of the period August 24, 1982 to June 2, 2002.

150 On June 2, 2002, CPC implemented a new job evaluation plan and awarded a 15 percent wage increase to the CR group, while limiting other groups to wage increases of approximately 1.5 percent. PSAC regarded the new job evaluation plan and the 15 percent wage increase as prospectively removing any violation of section 11 of the Act. However, CPC denies that the CR

group had previously been paid less than the comparator group in the pay equity claim, the Postal Operations occupational group (PO), for performing work of equal value.

151 In my respectful opinion, when the reasons of the Tribunal are read holistically, and against the background of the expert evidence on which it relied, it found on a [page285] balance of probabilities that members of the CR group were paid less than members of the PO group for work of equal value.

152 In order to establish a breach of section 11 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (Act) in a group pay equity claim, the Tribunal must find on a balance of probabilities that the jobs performed by members of the groups have been properly evaluated. In my view, the Tribunal was entitled to infer this from its conclusions that the evidence on the nature of the jobs was reasonably reliable, that the Hay method evaluation plan was a reasonably reliable tool for evaluating the job data (the methodology issue), and that it had been applied in a reasonably reliable manner by the evaluators (the process issue).

153 After the jobs performed by members of the two groups have been evaluated, the values attributed to the various positions are compared. If a substantial portion of the positions in the complainant group have a value equal to or greater than one or more of the positions in the comparator group, their wages can be compared in order to determine if the complainant group is being paid less than the comparator group for performing work of equal value.

154 In 1993, PSAC retained three professional job evaluators, Dr. Wolf, Dr. Ingster and Ms Davidson-Palmer, referred to as the professional team, to provide an expert review of the evaluations undertaken by CHRC in 1991 and, on the basis of an independent evaluation of the jobs, to identify any difference in the wages paid to members of the two groups for performing work of equal value.

155 Having evaluated the CR and PO positions by the Hay method, the professional team reported that a substantial portion of the CR positions were at least equal in value to one or more of the PO positions, or, in other [page286] words, fell within the PO value line. Hence, the wages of the two groups could properly be compared to determine if the complainant group had established the existence of a wage gap for work of equal value in breach of section 11. The Tribunal (at paragraphs 799 and 801) accepted the professional team's conclusions.

156 Like my colleagues, I would dismiss PSAC's appeal in Court File No. A-130-08 from Justice Kelen's dismissal of its application for judicial review of the amount of compensation awarded to it by the Tribunal. However, because I would allow PSAC's appeal on the breach of section 11, I have had to consider the appeal on the amount of compensation on its merits. I am not persuaded that the Tribunal's award was unreasonable.

157 On the other hand, I need not determine if, as PSAC and CHRC allege, the applications Judge erred in law when he set aside the Tribunal's decision and did not remit the matter for redetermination, on the ground that, in the Judge's view, the evidence did not establish a breach of section 11 on a balance of probabilities.

B. CONTEXTUAL BACKGROUND

158 I gratefully adopt my colleagues' description of the factual background to this litigation and

the history of the judicial proceedings leading to this appeal. I would add only the following by way of context to my reasons.

159 First, this is yet another example of the marathon litigation that has plagued the resolution of pay equity claims at the federal level. The timelines of the proceedings are so extraordinary that they bear repeating.

> *** August 24, 1983:** PSAC files a pay equity claim under section 11 of the Act on behalf of the CR group employed by CPC, a Crown corporation created in 1981 to take [page287] over the functions previously performed by the Post Office;
>
> *** March 16, 1992:** CHRC refers PSAC's complaint to the Tribunal for adjudication;
>
> *** November 25, 1992 to August 2003:** Tribunal hearing, comprising 410 hearing days spread over more than 10 years;
>
> *** October 7, 2005:** Tribunal renders its decision;
>
> *** February 21, 2008:** Federal Court sets aside Tribunal's decision;
>
> *** February 22, 2010:** Federal Court of Appeal dismisses appeal.

160 Second, PSAC and CPC were unable to work together on a joint union-management study to produce an agreed evaluation of the work performed by members of the CR group and the occupational group that it identified for wage comparison purposes, the PO group. As a result, the information available to the Tribunal about both the nature of the work performed by members of these groups and the non-monetary components of their wages had some significant limitations.

161 Responsibility for these deficiencies is attributable to, among other things, the fact that: the parties were operating in litigation mode from relatively early in the process; the CHRC did not require CPC to produce all relevant documents; and the underlying rivalry between, on the one hand, PSAC, the bargaining agent for the CRs and for two small, predominantly male occupational groups at Canada Post, the General Labour and Trades, and General Services groups, and, on the other, the Canadian Union of Postal Workers, the bargaining agent for most of the POs.

162 Third, courts never intervene lightly in the administrative process, both out of deference to the expertise of specialized tribunals and in recognition of the limitations of reviewing courts' perspectives on the problem before the agency. Further, setting an administrative decision [page288] aside, whether or not the matter is remitted to the tribunal for rehearing, inevitably results in a waste of resources.

163 These considerations are particularly apt in this case: the subject-matter of these proceedings is complex and has some highly technical aspects, and, as already noted, the public and private resources already spent on this dispute must be enormous. In the course of the 1016 paragraphs of its reasons, the Tribunal is not always as clear as it might have been, as it struggled to come to terms with the mass of technical detail, evidence, and analysis before it. As already noted, the Tribunal's task was particularly challenging because the parties failed to produce a joint study on the values of the jobs and the total wages paid over the period of the complaint. However, perfection is not the standard and, when read in light of the evidence

before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision.

164 In my opinion, the Tribunal's reasons make it clear that it understood the relevant law and approached the complex evidential issues before it in a careful and thoughtful manner. Its reasons sufficiently demonstrate "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraph 47. The Court in *Dunsmuir* (at paragraph 48) also endorsed the view of Professor Dyzenhaus ("The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279, at page 286) that, when reviewing a decision on the reasonableness standard, a court must pay "respectful attention to the reasons offered or which could be offered in support of a decision" (emphasis added). The underlined words avoid an unduly formalistic approach to judicial review. Thus, to the extent that the Tribunal does not fully explain aspects of its [page289] decision, the Court may consult evidence referred to by the Tribunal in order to flesh out its reasons. However, I do not regard the Court in *Dunsmuir* as inviting a reviewing court to usurp the tribunal's responsibility for justifying its decisions.

165 The resolution of pay equity claims involves a mix of art, science, human rights, and labour relations. It can be difficult to fit multi-disciplinary inquiries of this nature within a legal framework: social scientists and management consultants do not always express themselves in the same terms as lawyers, on questions of evidence and proof, for example.

166 Fourth, the underlying purpose of section 11 of the Act is to eliminate the financial consequences of systemic gender discrimination in the labour market resulting from occupational segregation. However, with the benefit of hindsight, it now seems to have been a mistake for Parliament to have entrusted pay equity to the complaint-driven, adversarial, human rights process of the *Canadian Human Rights Act*.

167 There is now much to learn from the experience of provincial pay equity regimes, which seem not to have been plagued with the same problems of protracted litigation as the federal scheme. In the interests of all, a new design is urgently needed to implement the principle of pay equity in the federal sphere. For criticisms of the present arrangements, and recommendations for reform, see the Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (Ottawa: Public Works and Government Services Canada, 2004).

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C. ISSUES AND ANALYSIS

168 The standard of review applicable to the various issues in dispute in this case is common ground: correctness governs the Tribunal's choice of standard of proof, and reasonableness (appropriately contextualised in its application) the Tribunal's findings of fact and discretionary decisions, including its choice of comparator group and remedy. As my colleagues point out, the task of this Court on appeal is to decide if the applications Judge selected the appropriate standard of review and applied it correctly.

169 The three principal areas of inquiry explored by counsel in this appeal concern the Tribunal's choice of the PO group as the comparator, the standard of proof that it applied to reach its conclusion that members of the CR group were paid lower wages than members of the

PO group for performing work of equal value, and the remedy that it awarded. More particularly, argument focussed on whether the Tribunal applied the balance of probabilities standard of proof when accepting the professional team's evaluation of the jobs performed by the complainant and comparator groups, and the adequacy of the evidence on which the Tribunal based its finding of a wage gap.

170 In addition, counsel for CPC argued that the *Equal Wages Guidelines, 1986* (Guidelines) did not apply to the complaint from 1983 until the Guidelines were issued, because to do so would give them retroactive effect. For substantially the reasons given by the applications Judge, I agree that this argument cannot succeed. I need only add the following.

171 First, when the Supreme Court of Canada stated that CHRC's power to issue guidelines could not validly be exercised retroactively, it gave as an example a guideline issued while a matter was being prosecuted before a [page291] Tribunal: *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884, at paragraph 47. However, that is not our case: the Guidelines were issued while CHRC was in the relatively early stages of its investigation of PSAC's complaint, and long before it was referred to the Tribunal.

172 Second, there is no evidence that the issuance of the Guidelines altered the basis of CHRC's investigation. For the most part, the Guidelines seem simply to have codified existing CHRC policy on, among other things, the percentages required for occupational groups of various sizes to be treated as predominantly of one sex.

173 Third, the Guidelines amended the law by specifying the manner in which a breach of section 11 of the Act is established, not by changing the definition of discriminatory conduct. They did not remove CPC's vested rights.

ISSUE 1: Was the choice of the comparator group unreasonable because it included a substantial number of well-paid women?

174 PSAC proposed to compare the complainant CR group, which numbered about 2 300 employees over the period of this dispute, with the PO group, which comprised approximately 40 000 employees and constituted 80 percent of CPC's workforce. This large occupational group, which contains employees engaged in internal and external postal work, as well as in supervisory duties, dates from the time when, as a department of the federal government, the Post Office was responsible for the mail. All its employees who dealt with mail were grouped together within the larger institution of the federal public service. Other Post Office employees, including the CRs, whose work was not peculiar to the Post Office, were in occupational groups found also in other departments of the federal government. These occupational groups were continued by the employer after 1981, when the functions of the Post Office were transferred to CPC, a newly created Crown corporation.

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175 CPC argued in this Court that the Tribunal had unreasonably exercised its discretion to select a comparator group when it included mail sorters (PO-4, internal level), a level of internal workers within the larger PO group. Employees in the PO-4 internal level, numbering about 20 000, or 40 percent of the total PO group, were relatively well paid, and included approximately 10 000 women.

176 Mail sorting was traditionally "women's work". CPC said that PSAC had "cherry-picked" its proposed comparator group in order to include relatively well-paid jobs and thus artificially to create, or widen, a wage gap. Further, the presence of a large number of relatively well-paid female employees demonstrated that there was no systemic gender discrimination at CPC. Counsel also argued that PSAC had deliberately omitted from the comparator group two smaller, predominantly male occupa- tional groups, which it represented, and whose members were relatively low-paid.

177 There is little law on the selection of a comparator group in a pay equity claim. Two legal requirements must be met: the comparator must be an occupational group (section 12 of the Guidelines) and must be predominantly of the opposite sex from that of the complainant group. Section 13 of the Guidelines defines when a group is predominantly of one sex for the purpose of the Guidelines. If a group has less than 100 members, 70 percent of them must be of one sex; if there are between 100 and 500 members, 60 percent suffices; if the group has more than 500 members, then 55 percent is enough.

178 Apart from the requirement that a comparator group must constitute an occupational group, and be [page293] predominantly of the opposite sex from the complainant group, as defined in section 13, there are no statutory criteria that must be considered in the selection of a comparator. The choice is left to the discretion of CHRC and the Tribunal.

179 It was suggested in argument that the PO group was not an occupational group because its members performed different kinds of work: internal (mostly mail sorting), external (mostly mail delivery), and supervisory.

180 However, even if this is right, it does not take matters much further. Section 14 of the Guidelines provides that when a complainant occupational group compares itself to more than one other occupational group, those groups are to be treated as a single group. Accordingly, if the PO group cannot be a comparator group for the purpose of a pay equity complaint, the three separate occupational groups (internal, external, and supervisory employees) that it comprises are to be treated as one. It is undisputed that both the PO group as a whole and each of the three sub-groups meet the requirement of being predominantly male.

181 The question to be decided is whether the Tribunal abused its statutory discretion in its selection of the POs as the comparator group. A reviewing court should approach this issue with great caution. In determining whether the choice of comparator group in this case was unreasonable, the Court must consider both the Tribunal's reasons and the outcome: *Dunsmuir*, at paragraph 47.

182 The application of the unreasonableness standard requires a consideration of context: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 59. In the present case, the context includes the fact that the Tribunal's statutory discretion is broad: it is not subject to any express constraints. Further, the Supreme Court of Canada has held that the function of selecting a suitable comparator group [page294] lies at the heart of the expertise of CHRC and the Tribunal: *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1, [2006] 1 S.C.R. 3, at paragraph 42. In these circumstances, a high degree of judicial deference is owed to the Tribunal's exercise of discretion.

183 The PO-4 internal level (the mail sorters) within the internal workers group comprised approximately equal numbers of men and women, and was therefore predominantly neither male nor female. However, this does not in itself disqualify members of the PO-4 internal level from being included as part of a larger comparator group, that is, either the internal workers or the PO group as a whole.

184 Rather, CPC argued, since the PO-4 internal level comprised 40 percent of the PO occupational group, and its members were relatively highly paid, it was unreasonable for the Tribunal to include the PO-4s in the comparator group because their presence would artificially create or widen an apparent wage gap between men and women. Further, the inclusion of the PO-4 internal level would be contrary to the purpose of section 11, namely, the elimination of systemic gender discrimination. How, it was asked, could there be systemic discrimination against CPC's female employees when so many are well paid?

185 The 1986 Guidelines explicitly recognize that a predominantly male comparator group may contain a minority of women. The female members of a comparator group are not thereby "masked" or treated as males. The assumption of the Guidelines is that a female minority in an occupational group may receive higher wages because of the male predominance. Conversely, a male minority may be disadvantaged by being part of a predominantly female occupational group.

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186 In upholding the PO occupational group as the comparator, as proposed by PSAC and endorsed by CHRC, the Tribunal noted (at paragraph 281) that it comprised approximately 80 percent of CPC's total workforce. Larger occupational groups provide a more reliable basis than smaller groups for determining the existence of a wage gap between men and women performing work of equal value. Moreover, the Tribunal stated, the duties of some members of the PO group were similar to those of some members of the CR group. The work performed by some members of the groups was also similar in terms of skill, effort, responsibility and working conditions.

187 Having thus found good reasons for selecting the POs as the comparator group, the Tribunal rejected CPC's argument that PSAC had "cherry-picked" the PO group in order to skew the comparison by selecting a relatively highly paid group of employees. In my opinion, the Tribunal's reasons provide a rational basis for its exercise of discretion and that judicial intervention is not warranted.

188 Nor am I persuaded that the inclusion of the PO-4 internal level within the sub-group of internal workers vitiated the Tribunal's choice of comparator on the ground that the presence of a substantial number of relatively well-paid women in CPC's workforce effectively undermined the CR group's complaint of systemic gender discrimination. I do not agree that, because the PO group includes a substantial number of well-paid women (the PO-4s), the selection of the POs as the comparator is contrary to the purpose of section 11, namely the elimination of systemic gender discrimination in the labour market.

189 First, the Guidelines specifically contemplate the presence of women within a male-dominated comparator group, and *vice versa*. The presence of well-paid women in the PO group

is not being "masked". And, as already [page296] noted, both the PO group as a whole and the PO internal sub-group are predominantly male as defined by the Guidelines.

190 Second, the fact that some women at CPC were relatively well paid does not necessarily preclude the existence of systemic gender discrimination elsewhere in the corporation. Systemic gender discrimination means that work performed by women tends to be undervalued, not that this is necessarily the case in every situation. The fact that the PO-4 internal level has become gender-neutral, so that mail sorting has lost its character as "women's work", and is performed within a predominantly male occupational group, may well explain why women in the PO-4 internal level are relatively well paid.

191 Third, counsel referred us to no principle that requires the removal of some members of an occupational group from the comparator group. While the Guidelines contemplate the use of more than one occupational group as a comparator, they do not suggest that part of an occupational group may be used.

192 CPC has also argued that the PO-4s should themselves constitute the comparator. There are several difficulties with this argument. First, although the PO-4 internal level comprised approximately 80 percent of the internal workers sub-group, and over 40 percent of the PO group as a whole, it is not an employer-designated occupational group, but merely one level within the sub-group of internal workers in the PO group. "Levels" connote wage differentials within an occupational group. Since wages for one level are set in relation to others, the wages of one level cannot be considered in isolation from those of the rest of the occupational group which, as already noted, was in this case predominantly male.

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193 Second, the PO-4 internal level comprised roughly equal numbers of men and women, and was thus "gender neutral". It therefore could not be a comparator, because it was not predominantly of the opposite sex from the predominantly female CR group.

194 The Tribunal also rejected the argument that the General Labour and Trades, and General Services occupational groups, which were represented in collective bargaining by PSAC, were more appropriate comparators. These groups represented only a small percentage of CPC employees and did not perform work similar to that of any members of the CR group.

195 For these reasons, I am not persuaded that the Tribunal's choice of comparator group was unreasonable or contrary to the purpose of the Act. In my respectful view, the applications Judge erred in law in concluding that the Tribunal had committed reviewable error in the exercise of its broad discretion over the selection of a comparator group.

ISSUE 2: Did the Tribunal apply the correct standard of proof when finding that members of the complainant and comparator groups were performing work of equal value?

(i) Facts in issue

196 When determining whether members of a complainant group are paid less than those of the comparator group for performing work of equal value, a Tribunal must make two findings about their jobs.

197 First, the value of the jobs performed by the members of the groups must be assessed. Subsection 11(2) of the Act prescribes that the value of work must be assessed on the basis of a composite of the skill, effort, and responsibility required, and the conditions under which the work is performed. The Tribunal must weigh [page298] the evidence before it on these aspects of the work and determine whether it is sufficiently cogent to enable the Tribunal to conclude on a balance of probabilities that the jobs had been properly evaluated.

198 Because it may be impractical to collect the necessary data for all the jobs performed by members of the groups, it is sufficient to evaluate the work performed by representative samples of the groups. The Tribunal will normally have before it job evaluations submitted on behalf of the parties as a result of a joint union-management study. In this case, however, job evaluations were submitted on behalf of the complainants alone. The Tribunal relied on the reports of the professional team retained by PSAC and on the *viva voce* evidence of the "spokesperson" of the team, Dr. Wolf, in adopting the team's evaluation of the work performed by members of the groups.

199 Second, on the basis of an evaluation of the work, the Tribunal must then decide if enough members of the complainant group were performing work of at least equal value to that of members of the comparator group to enable it to determine if there was a gender-based wage gap in breach of section 11. As already indicated, the evidence of the professional team was that if a substantial portion of the CR positions were at least equal in value to one or more of the PO positions, the wages of the two groups could be compared to determine if they were being paid differently for performing work of equal value.

200 In a report submitted in 1995 (PSAC-29), the professional team found that 62.9 percent of the jobs of the CR group were of equal or greater value than the least valuable job in the PO group. However, in its report of June 2000 (PSAC-180), the professional team reviewed its earlier evaluations in the light of evidence subsequently produced by CPC, mainly related to the PO positions.

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201 In this latter report, the professional team found that, while the new information made relatively little difference to most evaluations, it did significantly affect the value previously attributed to two PO generic jobs: the value of one job, relief mail services courier, was revised down, while the value of the other, counter clerk, was raised. As a result of the increase in the evaluation of the generic job of counter clerk, the number of CR positions falling within the PO value line was reduced by nearly a half.

202 Nonetheless, the professional team obviously regarded 34 percent as a "substantial portion" of members of the complainant group who come within the comparator group's value line so as to enable the wages of the two groups to be compared for the purpose of determining whether the CR group was being paid less than the PO group for performing work of equal value. CPC did not argue that 34 percent was too small a number for this determination to be made.

203 Of course, if the jobs are not reliably evaluated in accordance with the statutory criteria, it cannot be established on a balance of probabilities that members of the complainant group were paid less than the comparator group for work of equal value.

204 However, I should also add this. Historically, women in predominantly female occupations have generally been paid less than men for work of equal value, including in the federal public service. Hence, a finding that the CR group was paid less than the PO group for performing work of equal value would hardly be a surprise, especially since clerical work has traditionally been "women's work" and women comprised more than 80 percent of the CR group. Indeed, the surprise would have been a finding that CPC did not fit the historic pattern of undervaluing "women's work". Nonetheless, this does not relieve PSAC and CHRC from having to adduce evidence to prove to the Tribunal on a balance of probabilities that CPC was in breach of section 11.

[page300]

(ii) Standard of proof

205 The relevant law on this issue is clear and not in dispute in this appeal. Complainants before the Canadian Human Rights Tribunal have the burden of proving that the respondent has *prima facie* discriminated against them contrary to the Act: see, for example, *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.) (*Department of National Defence*), at paragraph 33. Absent some special legislation, a balance of probabilities is the standard of proof applicable to civil proceedings in Canada: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (*McDougall*). "Civil proceedings" include proceedings before human rights tribunals: *Department of National Defence*, at paragraph 33.

206 After noting that there was some judicial authority for the proposition that the civil standard of proof varies according to the seriousness of the outcome for the parties and the importance of the interests at stake, Justice Rothstein said in *McDougall* (at paragraph 44):

> In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

In addition, he noted (at paragraph 54):

> Where the trial judge expressly states the correct standard of proof, it will be presumed that it was being applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied.

I take it that, like the standard of proof itself, this presumption applies to decisions of the Canadian Human Rights Tribunal.

[page301]

207 Whether the Tribunal in the present case committed a reviewable error in its application of the balance of probabilities standard of proof to the material before it is, of course, a different question. I need only say at this point that, when it comes to fact-finding, especially on difficult technical issues such as those involved in this pay equity dispute, the Tribunal is operating at the heart of its specialized jurisdiction, and its findings of fact are owed a high degree of deference, as the wording of paragraph 18.1(4)(*d*) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c.

8, s. 27] of the *Federal Courts Act* indicates: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 46.

208 Facts in issue are facts that are legally necessary for a plaintiff to win its case. They must be proved on a balance of probabilities. In this case, the facts in issue are the value of the jobs and, if the distribution of the values of the work performed by the complainant and comparator groups permits, the wages paid for work of equal value. However, establishing the value or, more accurately perhaps, the relative value of work, is not a purely scientific exercise, admitting of a uniquely correct answer. It calls for the exercise of judgment; not all evaluators would necessarily adopt the same methodology for assessing work, or place the same value on given jobs. Those assessing the value of work must be afforded a margin of appreciation in applying the appropriate methodology to the job data.

209 Facts in issue should be distinguished from the evidence or intermediate facts on which findings of the facts in issue are based. It is unnecessary and, in my view, unhelpful for an adjudicator to introduce the notion of a balance of probabilities when weighing items of evidence to determine their probative value. "Balance of probabilities" is best reserved as the standard to be used [page302] by a fact-finder when determining whether, when all the evidence is weighed, a fact in issue has been proved.

210 However, this is not to say that the weight attached to evidence is unrelated to the question of whether a fact in issue has been proved on a balance of probabilities. An adjudicator cannot conclude that a fact in issue has been proved on a balance of probabilities if the only evidence is unreliable. Conversely, I cannot imagine that an adjudicator would describe evidence as reliable unless it was more likely than not to be true, or would describe evidence as "reasonably reliable" that she thought was no more likely to be correct than to be wrong.

211 In the present case, the Tribunal had before it three kinds of evidence from which to determine if the professional team had accurately assessed the value of the work performed by the CR and PO groups. First, it considered job information on the nature of the work and the wages paid for that work. Second, it considered whether the Hay method evaluation plan used by the professional team was an appropriate methodology for assessing the value of the work performed by the CR and PO groups by reference to the statutory criteria of skill, effort, responsibility, and working conditions. Third, it considered whether the evaluators had adopted a proper process in applying the methodology to the data.

212 Having found that the only three items of evidence on which it could assess the professional team's evaluation of the jobs were reasonably reliable, the Tribunal could conclude on a balance of probabilities that the jobs had been properly evaluated.

213 In the course of its reasons, the Tribunal did at times refer to a balance of probabilities or its equivalent, "more likely than not", when assessing the reliability of items of evidence. To ask, as it did, whether it is more likely than not that certain evidence was reasonably [page303] reliable may be redundant. It does not in my view, however, amount to an error of law by demonstrating that the Tribunal deviated from the task that it had set itself: to assess the reliability of each of these items of evidence and to ask whether, taken as a whole, they established on a balance of probabilities that the professional team had properly evaluated the work.

(iii) Tribunal's reasons

214 I turn now to the reasons of the Tribunal to determine if it applied the balance of probabilities standard of proof when making findings of the facts in issue. The first fact in issue is the proper evaluation of the jobs. If the Tribunal was satisfied of this on a balance of probabilities, and if a substantial portion of the CR jobs were at least as valuable as the lowest valued PO job, it could then determine whether the complainants were being paid less than the comparator group for performing work of equal value contrary to section 11. In its memorandum of fact and law, CPC did not challenge that this was an appropriate basis for being able to compare the wages of the two groups in order to determine if the CR group had been paid less than the PO group for performing work of equal value.

215 In its overview of the legal principles governing a human rights complaint, the Tribunal correctly stated (at paragraph 69) that a *prima facie* case of discrimination must be established on "the civil standard, a balance of probabilities." Turning later to the question of whether there was a *prima facie* case of discrimination contrary to section 11, the Tribunal provides the reader with a road map of its task (at paragraph 257):

> Therefore, when addressing section 11 in the context of the Complaint before this Tribunal, each of the following elements must be proven, on a balance of probabilities. The elements are taken from section 11 of the *Act* and from the guidance which is offered concerning the particularizing of the section through guidelines promulgated by the Commission pursuant to its mandate under section 27 of the *Act*.
>
> [page304]
>
> (1) The complainant occupational group is predominantly of one sex and the comparator occupational group is predominantly of the other sex. In this Complaint, that means the complainant CR's must be predominantly female and the comparator PO's must be predominantly male.
>
> (2) The female-dominated occupational group and the male-dominated occupational group being compared are composed of employees who are employed in the same establishment.
>
> (3) The value of the work being compared between the two occupational groups 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. The resulting assessment establishes that the work being compared is of equal value.
>
> (4) A comparison made of the wages being paid to the employees of the two occupational groups for work of equal value demonstrates that there is a difference in wages between the two, the predominantly female occupational group being paid a lesser wage than the predominantly male occupational group. This wage difference is commonly called a "wage gap". [Emphasis added.]

216 In my view, the Tribunal correctly identified in this paragraph the facts in issue and the applicable standard of proof. I shall focus on element three because this is where my colleagues say that the Tribunal erred. Nor can I fault the Tribunal's statement that the complainants must prove on a balance of probabilities that the value of the work had been "reliably" assessed.

217 The Tribunal's statement that the assessments establish that the work performed by members of the groups being compared is of equal value is also correct. Since a substantial portion of CR jobs were more valuable than the lowest valued PO job, it was possible to compare the wages paid to the PO and CR groups to determine if they were being paid differently for performing work of equal value.

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218 Later in its reasons, the Tribunal repeats that it has identified a balance of probabilities as the standard to be applied to the proof of facts in issue, this time to the proof of a wage gap (at paragraphs 801 and 803):

> 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.
>
> ...
>
> Having accepted that there is a wage gap, and, consequently, there is proof, on a balance of probabilities, that there has been systemic discrimination in this "pay equity" complaint, the next step is to select the most appropriate wage adjustment methodology to use to calculate an award of lost wages and to eliminate the gap. [Emphasis added.]

219 In my view, these passages amply demonstrate that the Tribunal has identified a balance of probabilities as the standard of proof of the facts in issue. It is therefore entitled to the benefit of the *McDougall* presumption that this is the standard that it in fact applied. The question to be decided, therefore, is whether other aspects of the Tribunal's reasons are so wayward as to rebut the presumption and to lead to the conclusion that, contrary to its clear assertion to the contrary, the Tribunal in fact applied some lower standard.

220 Without going through the Tribunal's reasons in undue detail, I shall refer to paragraphs that seem to have caused most concern as to whether the Tribunal applied the balance of probabilities standard to the facts in issue, namely, whether the wage comparison of the CR and PO groups related to work of equal value (at paragraph 412):

> These rulings [in the three cases cited above] support a call for a standard of reasonableness, there being no such thing as absolute reliability. The application of such a standard will [page306] depend very much on the context of the situation under examination. The 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 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 *Act*, there were differences in wages for work of equal value, between the complainant and comparator employees concerned?

221 The difficulty with this paragraph, my colleagues say, is that by focussing on the reliability

of the job information, and the methodology and process used to evaluate the jobs, the Tribunal deviated from its task of deciding whether it had been established on a balance of probabilities that the CR group was being paid less than the PO group for performing work of equal value.

222 In particular, it can be argued that the Tribunal in this paragraph was diluting the standard of proof when it asked whether it is "more likely than not" that the material is "sufficiently adequate" to enable a "fair and equitable conclusion" to be reached on whether there were wage differences for work of equal value. I do not agree.

223 In my opinion, this paragraph is not sufficient to rebut the presumption that the Tribunal applied the standard of proof that it stated it was applying. At this stage of its reasons, the Tribunal is merely directing itself on its task of weighing the sufficiency of the evidence in order to reach a "fair and equitable conclusion" on whether there were differences in wages for work of equal value. It was not formulating the standard of proof.

224 Indeed, in the previous paragraph, the Tribunal had quoted a passage from the reasons of Hugessen J.A. writing for the Court in *Department of National Defence*, at paragraph 33, where he reiterated that, in proceedings [page307] before the Canadian Human Rights Tribunal, a balance of probabilities is the standard of proof , a standard, he noted, which is "a long way from certainty". In my opinion, it is very unlikely that, in writing in paragraph 412 that the evidence must be adequate to enable a fair and equitable conclusion to be reached on whether there had been a breach of section 11, the Tribunal intended to contradict the statement that it had just quoted on the standard of proof that it must apply.

225 The words "fair and reasonable conclusion" in paragraph 412 of the Tribunal's reasons have their origin in the reasons in an earlier pay equity decision, *Canada (Public Service Alliance) v. Canada (Treasury Board)*, 1996 CanLII 1874 (C.H.R.T.) (*Treasury Board*), which is quoted at paragraph 409 by the Tribunal in the present case. The Tribunal opined in *Treasury Board* (at paragraph 187) that, since perfect gender neutrality is probably unattainable and pay equity is not susceptible to precise measurement, "one should therefore be satisfied with reasonably accurate results based on what is, according to one's good sense, a fair and equitable resolution" (emphasis added) of a wage gap between men and women performing work of equal value.

226 When read in context (including a discussion by the Tribunal of a balance of probabilities as the governing standard of proof), the reference to "a fair and equitable conclusion" in the present case is more akin to a statement of the general goal of those implementing pay equity legislation than to an articulation of the narrower legal question of the applicable standard of proof. This does not, in my opinion, establish that the Tribunal had lost sight of its ultimate task, namely, deciding on a balance of probabilities whether there had been a breach of section 11. In any event, who could disagree that the Tribunal's aim should be to strive to reach "a fair and reasonable conclusion" to a dispute?

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227 My colleagues also rely on the following paragraphs of the Tribunal's reasons as indicative of its failure to apply the correct standard of proof to the facts in issue (at paragraph 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.

The Tribunal repeats this conclusion in the following at paragraph 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 *Act*.

228 It is said that the fact that the evidence before the Tribunal was such as to produce "reasonably reliable job evaluations" is not the same as concluding that on a balance of probabilities the work being compared was of equal value. However, if the evaluation of the jobs was "reasonably reliable" and a substantial portion of the CR group was performing work at least equal in value to the least valuable PO job, I cannot see what else needs to be proved, or what finding made, in order to establish that the wage comparison related to work of equal value. As already noted, the Tribunal accepted the evidence of the professional team that "a significant portion of the CR positions were of a value equal to or greater than that of the PO jobs": paragraph 799.

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229 The Tribunal's creation of sub-bands of the reasonable reliability of the evidence on which the job values were assessed has also raised a question as to whether the Tribunal reduced the standard of proof below that of a balance of probabilities. While the elaboration of these "sub-bands" may have been unnecessary, it indicates that the Tribunal was well aware of the limitations of the evidence, and weighed it with great care. As already noted, problems with the evidence resulted, in large part, from the failure of the parties to produce a joint pay equity study evaluating the work performed and determining the wages paid, CHRC's failure to exercise its powers to require CPC to produce information, and the adversarial context in which the exercise was conducted.

230 In my opinion, the Tribunal eschewed "reliable" as the standard for evaluating the evidence, and the assessment of the value of the work because it equated "reliable" with "absolute correctness", the standard proposed by Ms Winter, one of CPC's witnesses, and properly rejected by the Tribunal. It concluded that, for all practical purposes, such a standard was unattainable, and opted instead for "reasonably reliable" as a standard connoting less than certainty or correctness-a standard which, it rightly said, is not demanded by a balance of probabilities.

231 The Tribunal does not spell out explicitly what it understands by "reasonably reliable". However, evidence, or a finding of a fact in issue, can surely only be called "reasonably reliable" if it is more likely than not to be true, regardless of the point on the "reliability spectrum" that particular evidence or the evaluation of a job may be located. "Low-level reasonable reliability" is still "reasonable reliability". While the Tribunal would clearly have preferred the evidence in a pay equity case to meet an upper "sub-band" of reasonable reliability, it was also of the view

that evidence that met only the lower sub-band was still reasonably reliable. It said (at paragraph 698): "Thus, while all three sub-bands meet the test of 'reasonable reliability'". The Tribunal made the same point at paragraph 700.

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232 Equally instructive as to how the Tribunal viewed the relationship between "a balance of probabilities" and "lower sub-band reasonable reliability" is its discussion (at paragraphs 919 and 927-930) of the value of the non-monetary components of the wages of the CR and PO groups. While the Tribunal regarded the report of an expert as having only "lower sub-band reasonable reliability", it nonetheless concluded that the report demonstrated on a balance of probabilities an equivalence between the value of the non-monetary components of the wages of the two groups.

233 Similarly, having found the evidence, methodology, and process to be reasonably reliable, the Tribunal could infer that on a balance of probabilities the jobs had been properly evaluated. Because a substantial portion of the CR jobs fell within the PO value line, a determination could then be made, again on a balance of probabilities, as to whether the CRs were being paid less than the POs for performing work of equal value contrary to section 11.

234 Nor am I satisfied that it can be inferred from the Tribunal's reduction of the monetary award to 50 percent of the wages lost according to the wage gap identified by the professional team that the Tribunal must have believed that the evidence fell short of a balance of probabilities. In my view, it is equally plausible that the Tribunal was satisfied on a balance of probabilities that the CR group was paid less for work of equal value, but was not satisfied that, given the limitations of the evidence and the dispute over the methodology appropriate for measuring the wage gap, it should accept the accuracy of the professional team's measurement of the wage gap. The 50 percent reduction is better seen, in my opinion, as merely a "rounding down" figure. That the Tribunal chose a reduction of 50 percent rather than, say, 49 percent, seems to me inconsequential as far as the standard of proof being applied is concerned.

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235 CPC also says that another indication that the Tribunal reduced the standard of proof required to evaluate the work, a fact in issue, is its reference to the passage in S. M. Waddams, *The Law of Damages*, loose-leaf ed. (Toronto: Canada Law Book, 2004) at paragraph 13-30, where the author states that when the amount of a loss is difficult to assess, "the tribunal must simply do its best on the material available". I do not share this view. The Tribunal says (at paragraph 680) only that the passage in question "may be analogous to what the Tribunal considers to be the spectrum of reasonable reliability" [emphasis added]. The Tribunal was not, in my opinion, thoughtlessly transposing comments on evidential difficulties respecting the calculation of damages to proof of liability. Rather, the Tribunal's point was simply that its adoption of a "reasonableness" standard of reliability of the evaluations was appropriate, not Ms. Winters' insistence that nothing less than correctness would suffice.

236 To summarize, I am not persuaded that CPC has rebutted the presumption that the Tribunal applied the standard of proof, a balance of probabilities, which it clearly identified as the applicable standard. In my view, having found that the professional team had evaluated the jobs reasonably reliably, and having accepted the professional team's evidence respecting the necessary degree of "overlap" between the job value lines of the CR and PO groups, the

Tribunal made the necessary findings of the fact, and concluded on a balance of probabilities that the wages compared were with respect to work of equal value.

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ISSUE 3: Did the Tribunal commit a reviewable error in finding as a fact that the CR group was being paid less than the PO group for performing work of equal value?

(i) Overview

237 Having allowed CPC's application for judicial review on the issues considered above, the applications Judge did not have to decide whether, if the Tribunal had applied a balance of probabilities standard of proof, it would have committed a reviewable error by concluding that the standard had been met. Hence, PSAC does not address this issue in its memorandum of fact and law.

238 At the hearing of the appeal, however, both parties dealt at some length with the probative value of the evidence on which the Tribunal based its decision. In view of my colleagues' conclusion that the appeal must be dismissed on the ground that the Tribunal did not apply the correct standard of proof, I shall endeavour to deal relatively briefly with whether the Tribunal committed reviewable error in its application of the civil standard of proof to the evidence.

239 CPC submits in its memorandum of fact and law (at paragraph 118) that the Tribunal erred in law in concluding that the evidence satisfied a balance of probabilities standard of proof. I do not agree. Whether a standard of proof has been met is essentially a question of fact, on which the Tribunal is entitled to a high degree of deference. Reviewing findings of fact for unreasonableness precludes the Court from making independent findings of fact, reweighing the evidence, or preferring what it thinks is the better evidence. As long as there was evidence on which the Tribunal could reasonably base its conclusion, the Court's inquiry is at an end.

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240 Three aspects of the evidence before the Tribunal in this case assist in contextualizing the application of the unreasonableness standard.

241 First, much of the extensive evidence, both oral and written, regarding the evaluation of the jobs and the measurement of the wage gap is highly technical, controversial, and difficult to assess because it was not of the quality normally seen in pay equity cases where there has been a joint union-management study.

242 Second, in the course of the more than 400 days of hearings, and the more than two years that the Tribunal took to examine the evidence and produce its reasons, the Tribunal would have acquired an understanding, which no reviewing court can hope to match, of the beguilingly simple principle of equal pay for work of equal value and the dauntingly difficult task of implementing it in the present case.

243 Third, the Tribunal made important findings of credibility which permeate its factual conclusions, setting out (at paragraph 419) seven criteria it used to "examin[e] the evidence of the expert witnesses" in a very systematic manner.

244 Thus, the Tribunal was impressed by the evidence of PSAC's professional team and, in particular, that of its "spokesperson", Dr. Martin Wolf, who had extensive experience in job evaluations in many different employment settings, including office clerical and blue collar work. He made no bones about the problematic features of aspects of the evidence, especially the job data. For instance, he agreed that the information was not complete and had been gathered at different times. For this reason, Dr. Wolf said, he had adopted a very rigorous approach to his evaluation of the jobs and, when in doubt had erred on the side of valuing a PO job generously, and a CR position conservatively. As a result, he said (at paragraph 487), the professional team's evaluation of the jobs

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> ... certainly at least meets, and in my opinion probably exceeds, the typical commercial standard, if you will, what consultants from Hay or other consulting firms are doing for their clients.

245 However, after frankly acknowledging the evidentiary limitations, Dr. Wolf concluded that, in his opinion as an experienced job evaluator, the data were adequate to enable him to provide a professional assessment of the relative values of the jobs in question. Indeed, he testified that the quantity of the information to which he had access exceeded what would normally be available in such an exercise.

246 The Tribunal found Dr. Wolf to be highly credible, even though, as CPC noted, the professional team had no "hands-on" knowledge of postal work. In contrast, the Tribunal was relatively unimpressed by CPC's expert witnesses. One, Ms Winter, it found to be rigid and unduly definitive in her opinions; she also seemed to the Tribunal unnecessarily adversarial. It discounted her evidence. The Tribunal noted that the other two experts, Mr. Wallace and Mr. Willis, had not seen all the relevant documents and had not themselves attempted to evaluate the jobs with the data available.

247 The Tribunal's findings of the credibility of the various expert witnesses go a long way to explaining why it adopted much of the professional team's analysis, and not that of CPC's experts, in reaching its conclusion that CPC was in breach of section 11.

248 As the Tribunal candidly stated, evaluating the evidence, and the conflicting views of it that the experts provided, presented a considerable challenge. However, it is not the role of the Court conducting a judicial review to probe deeply into the evidence or to revisit the Tribunal's findings of credibility. It must merely ensure that there was a reasonable basis in the evidence for the Tribunal's findings.

249 One final feature of the evidence should be mentioned in order to appreciate the nature of the Tribunal's [page315] task. CPC elected, as was its right, not to adduce before the Tribunal evidence of its own on the value of the jobs. Rather, its experts mostly confined themselves to challenging the work of the professional team and of the other expert witnesses retained by PSAC and CHRC. The Tribunal was thus offered no alternative version of the facts to consider. The only question for it to decide was whether it was satisfied on a balance of probabilities that the professional team had established the value of the jobs and accurately measured any difference in the wages paid to members of the two groups for performing work of equal value.

(ii) Methodology

250 Dr. Wolf pithily described what all job evaluation plans measure: what you know, what you do, and what you have to put up with. Both PSAC and CPC questioned the suitability of the Hay method evaluation plan as a tool for evaluating the work of the two groups, principally on the ground that, because it tended to put too little weight on the working conditions factor, it was not an appropriate plan for evaluating blue collar or clerical work. There was also debate over the appropriateness of the factor comparison approach to the Hay method used by the professional team.

251 The evidence before the Tribunal on the methodology issue was that the Hay method evaluation plan was the most widely used job evaluation tool and in its earlier years had been used to evaluate blue collar work. Dr. Wolf stated that he had used it extensively in many different work settings and, in the hands of experienced evaluators, it could be appropriately used in a clerical or blue collar context, such as here, especially with a "strengthened working conditions factor" (at paragraph 563).

252 Noting (at paragraph 566) Dr. Wolf's extensive experience with and knowledge of the Hay job evaluation [page316] method and of its development over time, the Tribunal concluded (at paragraph 571):

> ... on a balance of probabilities, the Hay Plan, whether using the factor comparison method or other approaches, is, in the hands of competent evaluators as were the members of the Professional Team, a suitable overall job evaluation scheme which will address the issues of this "pay equity" Complaint in a reasonably reliable manner.

253 In my view, the Tribunal's finding that the selected methodology was reasonably reliable was not unreasonable in view of the evidence before it.

(iii) Process

254 CPC was also critical of aspects of the professional team's process, that is, its application of the Hay method evaluation plan to the material. In particular, CPC expressed concerns about the lack of an adequate "audit trail" that would enable the team's work to be monitored, the professional team's lack of direct experience with postal operations, and a certain lack of discipline in the team's review of the evaluation results.

255 The Tribunal concluded that, although not of the quality normally expected in job evaluations produced by a joint union-management study, the process was nonetheless reasonably reliable. First, one member of the Team, Ms Davidson-Palmer, had at one time worked in CPC management and organization development, and therefore had some prior knowledge of the Corporation. Second, the unusual circumstances facing the professional team, especially the litigious environment in which the evaluations had to be conducted and the short period of time available to the team, required it to adjust its normal process. Third, for reasons given earlier, it found the professional team more credible than CPC's experts. Fourth, in accordance with standard practice, the professional team worked as a unit and made its decisions on the value of jobs either unanimously or by consensus.

256 On the basis of the material before it, and in light of the reasons that it gave, the Tribunal's conclusion that the process was reasonably reliable cannot, in my opinion, be characterized as unreasonable.

(iv) Job information

257 CPC argued that the evidence on which the professional team based its evaluation of the work of the CR and PO groups was so flawed that it could not reasonably support the Tribunal's conclusion that it was reasonably reliable. Accordingly, it said, the Tribunal's decision that, on a balance of probabilities, the jobs had been properly evaluated cannot be sustained.

258 The aspects of the evidence which particularly concerned CPC were: the use of the job fact sheets for gathering information about the CR group; the techniques used for sampling the CR positions; the comparison of 10 generic PO jobs and the 194 actual CR positions; and the fact that the job data for the two groups were not all gathered at the same time.

259 Two preliminary points bear repeating before I turn to the specific issues raised by CPC. First, it is not the role of this Court to retry the facts; CPC had put to the Tribunal the points outlined above, but the Tribunal had not accepted them. An applicant for judicial review who argues that an administrative tribunal erred in its findings of fact has a heavy burden to discharge: it must establish that there was no evidence on which the tribunal could reasonably base a finding of material fact. Second, a reviewing court should not second guess a tribunal's reasoned findings of credibility. The credibility findings made by the Tribunal in this case respecting the expert witnesses that it heard in the course of this mammoth hearing are an important part of the basis of its findings of fact.

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(a) Job fact sheets

260 In CHRC's investigation of PSAC's pay equity complaint during the years 1984 to 1992, it developed a "Job Fact Sheet", a questionnaire designed to collect information from members of the PO and CR groups about the nature of their positions. It is common ground that these job fact sheets did not meet professionally accepted standards for evaluating jobs. For example, instead of simply asking employees for information about their jobs, they also asked respondents to evaluate their jobs. Further, the information was intended for analysis by a method other than Hay.

261 When it became apparent that there were problems with the data collected through the job fact sheets, PSAC retained the professional team to supplement the data and to re-evaluate the jobs. Dr. Wolf agreed that the quality of the job fact sheets was "abominable" and not suitable for evaluating the jobs, largely because employees were asked to evaluate, as well as to describe, their jobs. Accordingly, the professional team conducted interviews with 114 members of the CR group. It re-evaluated the CR and PO positions on the basis of both the data collected through the job facts sheets (excluding the employees' self-evaluation of their jobs), and the additional information obtained through the interviews and supplied by CPC.

262 While not glossing over problems with respect to the accuracy, consistency and

completeness of the data, Dr. Wolf testified that, based on his extensive experience with the Hay method evaluation plan, he was of the view that the data were adequate to enable the professional team to evaluate the jobs in question.

[page319]

263 The Tribunal concluded that, although not of the same quality as the data typically generated by a joint union-management pay equity study, the job information in the present case was nonetheless "reasonably reliable", but only at the "lower sub-band". For reasons already considered, the Tribunal regarded Dr. Wolf as a highly credible expert, but was much less impressed with CPC's experts. The Tribunal noted that the professional team had been prepared to adapt to the deficiencies in the data by, for example discarding job information which it regarded as unreliable. The Tribunal also noted that the professional team's reconsideration of the evaluations in 2000 in light of the additional information supplied by CPC had, with two exceptions in the PO jobs, little impact on the results that it had reached earlier.

264 In my opinion, it was reasonably open to the Tribunal on the evidence before it to conclude that the information collected through the job fact sheets, as supplemented by interviews and analysed by experienced professionals, was adequate to enable the work of the CR and PO groups to be evaluated in a reasonably reliable manner.

(b) Sampling techniques

265 CHRC did not seek job information from all of the approximately 2 300 members of the CR occupational group, nor from all of the much larger PO group. Instead, it sent questionnaires to about 400 members of the CRs and received responses from 194 or 45 percent, and gathered information on the 10 PO generic jobs.

266 CPC's witness, Dr. David Bellhouse, an expert in statistics with a specialization in survey sampling, was critical of CHRC's sampling techniques, pointing out that the sample had originally been drawn by a CHRC officer who lacked relevant expertise, and was not supervised [page320] by a suitably qualified person. In Dr. Bellhouse's opinion, both the design of the CR sample and the low response rate were likely to introduce biases into the results. Mr. Willis was generally supportive of Dr. Bellhouse on this issue.

267 CHRC called as a witness, Dr. John Kervin, a sociologist with an expertise in data collection and the use and analysis of statistics in the context of industrial relations, including gender bias and pay equity. He testified that, in his opinion, there was no basis for concluding that the sampling was flawed in design or response, or that the results were biased; he found the CR sample to be sufficiently representative for its purpose. He further stated that Dr. Bellhouse had overlooked the pay equity context in which the data were being collected and the qualitative nature of some of the analysis of the jobs. Instead, Dr. Kervin said, Dr. Bellhouse had approached the question strictly from the perspective of a statistician who was seeking scientific accuracy, without regard to the "art" aspect of pay equity inquiries.

268 After considering at some length the conflicting evidence given by these two experts, who brought to bear somewhat different perspectives on the issues, the Tribunal concluded that Dr. Kervin's evidence was more germane to the issues before it. It was entitled to accept his

evidence.

(c) Comparing PO "jobs" and CR "positions"

269 It was argued that any comparison of the work of the two groups was invalidated because of differences in what was being compared. In particular, CPC said, job information collected about actual CR positions could not be compared with information collected about the 10 generic or composite PO jobs which, the Tribunal stated (at paragraph 472), were "an amalgam of functions for 10 commonly held job[s]" in the PO group.

[page321]

270 CHRC had proceeded on the basis of generic jobs because members of the PO group had not completed the job fact sheets. CPC would not allow them to complete the questionnaires on CPC's time and their union refused to allow them to be completed, without remuneration, outside work hours. These generic jobs were evaluated through the use of job descriptions and job profiles, some of which may have been outdated or incomplete.

271 Dr. Bellhouse gave his opinion that because the CR group had been evaluated on the basis of actual positions and a description of the work done by incumbents, and the PO group had been evaluated on the basis of a selection of job titles, a proper comparison of the value of their work could not be made.

272 Dr. Kervin disagreed. He testified that, while not a random sample, the 10 generic PO jobs were likely to provide a reasonably accurate basis for the purpose of making a pay equity comparison. He also stated that the fact that the information for the PO group was based on job titles, rather than positions was not a significant problem, especially since the job specifications used for the PO jobs were similar in some respects to the CR job fact sheets. Dr. Kervin regarded the disparity between the PO jobs and the CR positions as "a difference in the unit of analysis and not as a difference in measurement" (at paragraph 470), and one that was easily remedied.

273 Despite this disagreement between the experts, the Tribunal never makes a finding of which view it accepts and why. While the Tribunal stated that it prefers the evidence of Dr. Kervin on the sampling issue, largely, it would seem, because his expertise was more directly relevant to a pay equity context, the Tribunal does not reach a similar conclusion on the "jobs v. positions" issue.

[page322]

274 Perhaps the Tribunal comes closest to addressing this issue when it refers (for example, at paragraph 660) to the enrichment of the professional team's understanding of the content of the PO jobs after it received the additional information from CPC, as outlined in its report of June 2000. Otherwise, one must infer from the Tribunal's finding that the job information was reasonably reliable that it adopted Dr. Kervin's view on the "jobs v. positions" issue as well as on sampling.

(d) Timing

275 CPC argued that the fact that the job information pertaining to the CR and PO groups was not collected at the same time undermined its reliability in a pay equity context. The nature of jobs may change over time, as a result, for example, of the introduction of new technology which may have an impact on the skill required for the job, as well as the working conditions. Mr. Willis testified that a valid comparison should be based on contemporaneous information about the work being performed.

276 This issue seems not to have been addressed expressly and specifically before the Tribunal by PSAC or CHRC. However, they may have done so indirectly by attacking the credibility of CPC's experts, Mr. Willis and Mr. Wallace, on the ground that they had neither read all the relevant documentation nor attempted to evaluate the jobs on the basis of the information available.

277 Nor does the Tribunal itself make a finding on the timing issue. Rather, it seems to have rolled it up in its overall acceptance of the professional team's analysis, and its relatively less favourable view of CPC's experts.

(e) Conclusion

278 To conclude this review of the Tribunal's finding that the professional team's evaluation of the jobs of the complainant and comparator groups was reasonably [page323] reliable, I acknowledge that the Tribunal does not always explain as fully as it might why it accepted one view of the evidence rather than another, especially on the issue of the timing of the collection of data and the difficulty of comparing PO jobs and CR positions. However, deficiencies in the Tribunal's reasons in this regard do not, in my opinion, render its decision unreasonable on the ground that it is not sufficiently transparent.

279 It can be inferred from the Tribunal's careful and full explanation of the conflicting views of the experts that it understood the issues and appreciated the strengths and weaknesses of each. To the extent that the Tribunal does not make a definitive and reasoned finding on one or more of the issues considered above, the Tribunal can be taken to have adopted the view of the relevant expert and the underlying reasoning. I have already emphasized the importance of the Tribunal's findings of credibility of the parties' principal expert witnesses.

280 Nor am I persuaded that the Tribunal's decision to uphold PSAC's pay equity claim is vitiated by its findings of fact. There was, in my opinion, a reasonable basis in the evidence, when viewed overall, to support its conclusions.

(v) Wage gap

281 Having concluded that the wages of the CRs and the composite or "generic" PO positions could be compared because a substantial portion of the CR positions fell within the PO value line, the Tribunal proceeded to determine if there was a wage gap between the two groups for performing work of equal value. Subsection 11(7) of the Act defines "wages" broadly, so as to include both monetary and non-monetary elements. Thus, after listing specific benefits that are to be included as "wages", subsection 11(7) contains in paragraph (*c*) the following "catch-all" provision:

[page324]

11. ...

Definition of "wages"

(7) For the purpose of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

...

(*c*) payments in kind;

282 The Tribunal thus had to determine three issues with respect to the wage gap: (i) the amount of the monetary component of the wages; (ii) the value of the non-monetary components of the wages; and (iii) the methodology for identifying and measuring any wage gap with respect to work of equal value. Since there appears to have been relatively little dispute on the first issue, I shall focus on the other two.

(a) Non-monetary components of wages

283 Valuing non-monetary items, such as benefits, raises some difficult technical issues. As with the evaluation of the jobs, difficulties in determining the value of the non-monetary elements of the "wages" also stem from evidentiary problems caused by the absence of a joint study by the parties.

284 In 1995, PSAC retained Dr. Don Lee, an expert in contract analysis and non-wage compensation valuation, to compare the non-monetary components of the wages from 1983, when the complaint was filed, to 1995. Dr. Lee based his report on a review of 14 collective agreements covering this 12-year period, as well as on a number of employee benefit plans of the federal government that had not been incorporated into these collective agreements. He was able also to conduct a detailed valuation analysis of benefits for 1995, including the extent to which employees had actually used the benefits.

285 However, in calculating the non-monetary value of benefits, Dr. Lee did not include job security for either group, or the uniform and protective clothing allowances [page325] for the POs. He concluded that what differences there were between the value of the benefits of the two groups were either non-existent or minor, and were not significant for pay equity purposes. He discounted as insignificant differences of less than 0.1 percent of wages.

286 Dr. Lee was unable to conduct such a detailed analysis for the years 1983 to 1994, but simply examined the terms of the collective agreements for those years. He concluded from this examination that any differences in the value of the benefits provided to employees were minor and temporary. He did not think it necessary for this purpose to attempt to obtain from CPC a complete file for each employee. He also stated that, when in doubt, he had overstated the value of the differences favouring the CR group's non-monetary benefits and understated those of the PO group.

287 Dr. Lee's report was challenged by Mr. Robert Bass, an expert in costing compensation,

retained by CPC for this purpose. Mr. Bass identified flaws in Dr. Lee's methodology, which he considered "fatal". In particular, he argued: the analysis should have been based on benefits provided in 1983, not 1995; it was an error to ignore individual differences in non-monetary benefits of less than 0.1 percent of wages, because several such differences could be cumulatively significant; and the generous job security provisions in collective agreements were sufficiently important that they should have been valued. However, Mr. Bass did not offer his view on the value of the non-monetary element of the employees' wages, in either 1995 or earlier.

288 The Tribunal carefully considered these criticisms. First, it tended to agree that, as a matter of theory, it would have been better to use 1983 as the baseline; however, some of the relevant evidence was apparently not available. Second, it noted that Mr. Bass had provided [page326] no evidence to indicate what impact the inclusion of a non-monetary difference in benefits of less than 0.1 percent of wages would have had and therefore gave little weight to this aspect of his report. Third, on the basis of the credibility of the two experts and the "nebulous nature of costing job security" (at paragraph 910), the Tribunal concluded that there was not likely to be any significant difference in the value of job security between the POs and the CRs.

289 The Tribunal found (at paragraph 918) that Dr. Lee's report showed on a balance of probabilities that the value of the non-monetary benefits for the two groups were equivalent and were "tied, in a negotiated pattern, to the value of the wages paid to the two groups." The absence of the data needed to make more precise calculations, the Tribunal concluded (at paragraph 919), did not mean that Dr. Lee had failed to establish on a balance of probabilities that the non-monetary component of the wages of the two groups was equivalent. The Tribunal accepted Dr. Lee's conclusion that, on a balance of probabilities, the value of benefits to which the CR and PO groups were entitled over the period covered by the complaint was generally equivalent. However, the Tribunal concluded that Dr. Lee's report was "lower band reasonably reliable".

290 In my opinion, in view of the findings that Dr. Lee was able to make on the basis of the information available to him, it was not unreasonable for the Tribunal to conclude that if additional data for the years before 1995 were available, it would not reveal that the benefits were significantly more valuable for one group than the other.

(b) Methodologies

291 The Tribunal was presented by the parties with an array of methodologies for determining the existence and extent of any wage gap. Suffice it to say that PSAC and CPC proposed methodologies that seemed likely to [page327] be most favourable to their respective positions. CHRC's preferred approach seems likely to produce a result between the two extremes. It proposed grouping the sample 194 CR positions into jobs with similar characteristics, which, it said, would make it easier to compare with the "composite" or generic PO positions, which included internal and external, but not supervisory, operational functions.

292 After describing the rationales provided by CPC for its proposed methodology, the Tribunal opted for CHRC's, on the ground that it was appropriate in a pay equity context to emphasize the content of the work performed, rather than the definition of the position occupied by the employee. However, it did not accept as conclusive the monetary values provided by the parties,

holding that access to individual employee records, in consultation with CPC, was required in order to reach a final conclusion.

293 In my view, the choice of an appropriate methodology for determining the existence and extent of a wage gap is within the discretion of the Tribunal, and is reviewable for unreasonableness. Given both its technical aspects and the absence of statutory criteria, the Tribunal's selection is entitled to a high degree of deference. I am not persuaded that only the methodology proposed by CPC can reasonably be said to be consistent with the objectives of section 11 of the Act or that the methodology proposed by CHRC, and adopted by the Tribunal, was unreasonable.

ISSUE 4: Did the Tribunal err in law in awarding PSAC compensation in the amount of half of the CR group's lost wages according to the identified wage gap?

294 PSAC applied for judicial review of the Tribunal's decision to compensate the complainants by awarding them half the amount of the wages that they had lost [page328] according to the wage gap indicated by the measuring methodology proposed by CHRC and accepted by the Tribunal. PSAC says that the decision is not supported by the evidence before the Tribunal. The Federal Court dismissed the application for judicial review for mootness, since it allowed CPC's application for judicial review and set aside the Tribunal's decision that CPC had been in breach of section 11 of the Act.

295 The remedial powers of the Tribunal relevant to this appeal are contained in the *Canadian Human Rights Act*, paragraph 53(2)(*c*) [as am. by S.C. 1998, c. 9, s. 27], which provides as follows:

> **53.** ...
>
> Complaint substantiated
>
> (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:
>
> ...
>
> (*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;

It is common ground that this provision governs the award of compensation for a breach of section 11.

296 The Tribunal has considerable statutory discretion in fashioning an appropriate remedy. Thus, subsection 53(2) provides that if the complaint is substantiated, the panel or member hearing the matter "may ... make an order ... and include in the order" [emphasis added] any of the listed terms that the panel or member "... considers appropriate". Paragraph (*c*) provides that the panel may order the person found to have committed a discriminatory practice to

"compensate the victim for any or all of the wages" [emphasis added] lost as a result of the discriminatory practice.

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297 Like other discretionary decisions, the Tribunal's award of compensation is reviewable on a standard of unreasonableness: *Dunsmuir*, at paragraph 53. While the Tribunal's reasons provide the principal basis for a reviewing court to determine whether an exercise of administrative discretion is unreasonable, the court may also consider the reasonableness of the outcome: *Dunsmuir*, at paragraph 47.

298 The Tribunal held that compensation should be awarded for wages lost between August 24, 1982 (that is, one year after CPC was created and one year before PSAC filed its complaint with CHRC) and June 2, 2002, when the wage increase awarded to the CRs, by CPC, and the implementation of a new job evaluation plan, eliminated any wage gap between the CR group and the PO group.

299 The Tribunal stated that the objective of an award of compensation under paragraph 53(2)(*c*) of the Act is to make whole the victims of discrimination. However, it also noted that courts had reduced damages awards in order to take into account uncertainties in determining the precise amount of loss. While there were no uncertainties about future events that could affect the amount of wages already lost by the CR group, the Tribunal came back to its finding that the evaluation of the jobs and the non-monetary component of the wages had met only the "lower sub-band" of reasonable reliability. On this basis, it reduced by 50 percent the amount represented by the wage gap identified by CHRC.

300 PSAC argues that the Tribunal's reduction of the compensation was unreasonable. First, it submits, the same data and the same methodology proved both the existence and the extent of a wage gap. Having accepted that the evidence established a wage gap, the Tribunal could not logically find that it did not also establish the extent of the gap. Second, if the Tribunal could factor in uncertainties in the evidence when determining the amount of compensation payable, it had no basis for concluding that the evidence over-estimated, rather than [page330] under-estimated, the extent of the actual wage gap. Counsel noted that Dr. Wolf had testified that the professional team had taken the limitations in the evidence into account when evaluating the jobs: when in doubt, they had evaluated a PO position up and a CR position down, and had thus underestimated the extent of the wage gap.

301 I do not agree. Specialized tribunals are owed a particularly high degree of deference in their exercise of a broad statutory discretion to fashion an appropriate remedy. The Tribunal directed itself correctly in law when it stated that an award of compensation should aim to make the victims whole. However, it was, in my view, also open to the Tribunal to extend by analogy principles used to take into account future uncertainties to uncertainties about the past, and on this basis to reduce the amount of compensation. Indeed, this was done in somewhat similar circumstances where it was uncertain whether a person would have obtained a job if he had not been denied it because of the unlawful discriminatory conduct of the employer: *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.), at page 412.

302 Nor was it unreasonable for the Tribunal to conclude that, while the evidence was good enough to establish the existence of a wage gap, it was not good enough to measure it precisely. PSAC had the burden of proving on a balance of probabilities both the existence and

the extent of any wage gap. Accordingly, if the Tribunal was not satisfied that PSAC had discharged its evidential burden by proving the amount of the wages lost on a balance of probabilities, it could reasonably award less than the amount indicated by the evidence that PSAC had adduced.

[page331]

303 The following sentence from the passage in Professor Waddams' text, *The Law of Damages* (at paragraph 13-30), is particularly apt in this context:

> If the amount [of a loss] 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.

As I have already noted, neither PSAC nor CHRC was without some responsibility for the state of the evidence.

304 For these reasons, I am not persuaded that the Tribunal's award of compensation should be set aside as unreasonable.

D. CONCLUSIONS

305 For all these reasons, I would allow the appeals of PSAC and CHRC in A-129-08 and A-139-08, set aside the decision of the Federal Court except on costs, and dismiss CPC's application for judicial review. The Federal Court awarded no costs and I would not disturb that finding. I would award PSAC its costs in the appeal. CHRC has not sought costs and none is awarded. I would dismiss PSAC's appeal in A-130-08 with costs.

TAB 9

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé JJ.

1987: May 6 / 1987: July 29.

File Nos.: 19326, 19344.

[1987] 2 S.C.R. 84 | [1987] 2 R.C.S. 84 | [1987] S.C.J. No. 47 | [1987] A.C.S. no 47

Bonnie Robichaud and the Canadian Human Rights Commission, appellants; v. Her Majesty The Queen, as represented by the Treasury Board, respondent.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Civil rights — Infringement — Liability — Female employee sexually harassed by male supervisor — Whether or not employer liable for supervisor's actions — Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 3, 7(a), (b), 41(2), (3).

Mrs. Bonnie Robichaud filed a complaint with the Canadian Human Rights Commission dated January 26, 1980 that she had been sexually harassed, discriminated against and intimidated by her employer, the Department of National Defence, and that Dennis Brennan, her supervisor, was the person who had sexually harassed her. The Human Rights Tribunal appointed to inquire into Robichaud's complaint found that a number of sexual encounters had taken place between her and Brennan, but dismissed the complaint against Brennan and against the employer. A Review Tribunal found, on appeal, that Brennan had sexually harassed Robichaud and that the Department of National Defence was strictly liable for the actions of its supervisory personnel. Assessment of damages, however, was postponed until further argument had been heard. The Federal Court of Appeal dismissed Brennan's application for judicial review but allowed that of The Queen. The Court set aside the decision of the Review Tribunal, and referred the matter back to it on the basis that Robichaud's complaint against the Crown was not sustainable. The latter decision was appealed to this Court. At issue here is whether or not an employer is responsible for the unauthorized discriminatory acts of its employees in the [page85] course of their employment under the Canadian Human Rights Act.

Held: The appeal should be allowed.

Per Dickson C.J. and McIntyre, Lamer, Wilson, La Forest and L'Heureux-Dubé JJ.: The Canadian Human Rights Act contemplates the imposition of liability on employers for all acts of their employees "in the course of employment". This expression must, in view of the purposes of the Act, be interpreted as meaning job-related. No label need be attached to this type of liability; it is purely statutory, though it serves a purpose somewhat similar to that of vicarious liability in tort by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, the motives or intentions of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. Theories of employer liability developed in the context of criminal or quasi-criminal conduct are therefore completely beside the point as being fault oriented. The liability of an employer, too, ought not be based on vicarious liability, as developed under the law of tort, which was confined to activities done within the confines of a person's job, but rather in terms of the purpose of the Act. The remedial objectives of the Act would be stultified if its remedies, especially those set out in ss. 41 and 42, were not available as against the employer. The Act is concerned with the effects of discrimination rather than its causes (or motivations): only an employer can remedy undesirable effects and only an employer can provide the most important remedy -- a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, supports making the Act's carefully crafted remedies effective. If the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.

[page86]

Per Le Dain J.: The appeal should be allowed for the reasons of La Forest J. The Act contemplates in ss. 4 and 41(2) that relief will be available against the person found to be engaging or to have engaged in a discriminatory practice. It is an implication of the word "indirectly" in s. 7 and the nature of the relief available under s. 41(2) that a discriminatory practice by the employee is to be considered a discriminatory practice by the employer as well, whether or not authorized or intended by the latter.

Cases Cited

Applied: Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536; referred to: Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145; Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561; Meritor Savings Bank FSB v. Vinson, 106 S.Ct. 2399 (1986); Re Nelson and Byron Price & Associates Ltd. (1981), 122 D.L.R. (3d) 340.

Statutes and Regulations Cited

Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 3, 4, 7(a), (b), 39, 41(2), (3), 42, 63(1).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.

APPEAL from a judgment of the Federal Court of Appeal, [1984] 2 F.C. 799, (1985), 57 N.R. 116, setting aside a judgment of the Review Tribunal which had allowed an appeal from a judgment of a Human Rights Tribunal appointed under the Canadian Human Rights Act, and referring the matter back to that Tribunal. Appeal allowed.

Michael L. Phelan and K. Scott McLean, for the appellant Bonnie Robichaud. Russell Juriansz

and James Hendry, for the appellant the Canadian Human Rights Commission. Graham Garton, Q.C., for the respondent.

Solicitors for the appellant Bonnie Robichaud: Osler, Hoskin & Harcourt, Ottawa. Solicitors for the appellant the Canadian Human Rights Commission: Blake, Cassels & Graydon, Toronto. Solicitor for the respondent: Frank Iacobucci, Ottawa.

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The judgment of Dickson C.J. and McIntyre, Lamer, Wilson, La Forest and L'Heureux-Dubé JJ. was delivered by

LA FOREST J.

1 The issue in this case is whether an employer is responsible for the unauthorized discriminatory acts of its employees in the course of their employment under the Canadian Human Rights Act, S.C. 1976-77, c. 33, as amended, as it stood before the enactment in 1983 of ss. 48(5) and (6) of the Act which now deal specifically with the issue; see S.C. 1980-81-82-83, c. 143, s. 23.

Background

2 The facts, so far as necessary for the disposition of this appeal, may be briefly stated. Mrs. Bonnie Robichaud filed a complaint with the Canadian Human Rights Commission dated January 26, 1980 that she had been sexually harassed, discriminated against and intimidated by her employer, the Department of National Defence, and that Dennis Brennan, her supervisor, was the person who had sexually harassed her.

3 Robichaud began employment with the Department of National Defence at the Air Defence Command base in North Bay, Ontario, as a cleaner in 1977. She was later promoted to the position of lead hand effective November 20, 1978, subject to a six-month probationary period lasting until May 20, 1979. Throughout the period, Brennan was Foreman of the Cleaning Department on the Base and had full responsibility for the cleaning operation. He supervised two Area Foremen who in turn supervised the lead hands including Robichaud. Robichaud's Area Foreman assigned her geographic workplace, workload and the cleaning staff she supervised. Brennan had the principal input into the employer's decision with respect to the satisfactory completion of Robichaud's probation period. Brennan was supervised by the Base [page88] Administrative Officer and ultimately the Base Commanding Officer.

4 A Human Rights Tribunal was appointed under s. 39 of the Canadian Human Rights Act to inquire into Robichaud's complaint. The Tribunal found that a number of encounters of a sexual nature had occurred between her and Brennan, but dismissed the complaint against Brennan and against the employer. However, an appeal to a Review Tribunal was allowed. The Review Tribunal found that Brennan had sexually harassed Robichaud and that the Department of National Defence was strictly liable for the actions of its supervisory personnel. However, it postponed the assessment of damages until further argument was heard.

5 Both Brennan and The Queen, as represented by the Treasury Board (for the Department of National Defence), filed applications under s. 28 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, requesting the Federal Court of Appeal to review and set aside the decision of the Review Tribunal. Both applications were heard at the same time. Brennan's application was dismissed, but that of The Queen was allowed, MacGuigan J. dissenting. The court set aside the decision of the Review Tribunal, and referred the matter back to it on the basis that Robichaud's complaint against the Crown was not sustainable. The latter decision was appealed to this Court.

Preliminary Observations

6 As is well-known, the Canadian Human Rights Act prohibits discriminatory practices in, among other activities, employment on a number of grounds, including sex (s. 3). Specifically, the present case is alleged to fall under s. 7 of the Act which reads as follows:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> [page89]
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination. [Emphasis added.]

In this Court, it was not questioned that sexual harassment in the course of employment constituted discrimination on the ground of sex or that the actions of Brennan amounted to sexual harassment. The sole question for this Court, therefore, is whether such actions can be attributed to the employer, here the Crown, to which the Act applies by virtue of s. 63(1).

Analysis

7 In the Court of Appeal and in the arguments before this Court, considerable attention was given to various theories supporting the liability of an employer for the acts of its employees, such as vicarious liability in tort and strict liability in the quasi-criminal context. As Thurlow C.J. notes, however, the place to start is necessarily the Act, the words of which, like those of other statutes, must be read in light of its nature and purpose.

8 The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons Sears Ltd., [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, per Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it [page90]

incorporates certain basic goals of our society. More recently still, Dickson C.J. in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (the Action Travail des Femmes case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of ,the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

9 It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in O'Malley at p. 547:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

10 Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. O'Malley makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation" (at p. 547). This legislation creates what are "essentially civil remedies" (p. 549). McIntyre J. there explains that to require intention would make the Act unworkable. He has this to say at p. 549:

> To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier [page91] in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create, as in Griggs v. Duke Power Co., 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal (Dennis v. United States, 339 U.S. 162 (1950), at p. 184).

The foregoing remarks were made in the context of a provincial human rights code, but they are equally applicable to the federal Act; see Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, at p. 586, per McIntyre J. In the latter case, similar views to those of McIntyre J. in O'Malley were expressed, albeit in dissent, by Dickson C.J., at pp. 569 and 571. The same approach is again inherent in the Chief Justice's judgment in Canadian National Railway Co. (Action Travail des Femmes), supra.

11 The interpretative principles I have set forth seem to me to be largely dispositive of this case. To begin with, they dispose of the argument that one should have reference to theories of employer liability developed in the context of criminal or quasi-criminal conduct. These are completely beside the point as being fault oriented, for, as we saw, the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them.

12 The last observation also goes some way towards disposing of the theory that the liability of an employer ought to be based on vicarious liability developed under the law of tort. On this

issue, counsel for the Crown placed considerable reliance on the requirement in s. 7(b) that the act complained of must have been done in the course of employment. It is clear, however, that that limitation, as developed under the doctrine of vicarious liability in tort cannot meaningfully be applied to the present statutory scheme. For in torts what is [page92] aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual harassment, that is not really referable to what he or she was employed to do. The purpose of the legislation is to remove certain undesirable conditions, in this context in the workplace, and it would seem odd if under s. 7(a) an employer would be liable for sexual harassment engaged in by an employee in the course of hiring a person, but not be liable when that employee does so in the course of supervising another employee, particularly an employee on probation. It would appear more sensible and more consonant with the purpose of the Act to interpret the phrase "in the course of employment" as meaning work- or job-related, especially when that phrase is prefaced by the words "directly or indirectly". Interestingly, in adding "physical handicap" as a prohibited ground of discrimination in the workplace (s. 3), the phrase used is "in matters related to employment".

13 Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.

14 What then are the remedies provided by the Act? Section 4, after providing that a discriminatory practice may be the subject of a complaint under the Act, goes on to say that anyone who is found to be engaging or to have engaged in such a practice may be made subject to an order under ss. 41 and 42. Subsections 41(2) and (3) are particularly relevant; they read as follows:

[page93]

> 41. ...
>
> (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:
>
> (a) that such person case such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;
>
> (b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;
>
> (c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or

> accommodation and any expenses incurred by the victim as a result of the discriminatory practice.
>
> (3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that
>
> (a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or
>
> (b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,
>
> the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine. [Emphasis added.]

15 It is clear to me that the remedial objectives of the Act would be stultified if the above remedies were not available as against the employer. As MacGuigan J. observed in the Court of Appeal, [1984] 2 F.C. 799, at p. 845:

> The broad remedies provided by section 41, the general necessity for effective follow-up, including the cessation of the discriminatory practice, imply a similar responsibility on the part of the employer. That is most [page94] clearly the case with respect to the requirement in paragraph 41(2)(a) that the person against whom an order is made "take measures, including the adoption of a special program, plan or arrangement... to prevent the same or a similar practice occurring in the future". Only an employer could fulfil such a mandate.

MacGuigan J.'s comment equally applies to an order to make available the rights denied to the victims under para. (b). Who but the employer could order reinstatement? This is true as well of para. (c) which provides for compensation for lost wages and expenses. Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy -- a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective. It indicates that the intention of the employer is irrelevant, at least for purposes of s. 41(2). Indeed, it is significant that s. 41(3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i.e., intentional). In short, I have no doubt that if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.

16 Not only would the remedial objectives of the Act be stultified if a narrower scheme of liability were fashioned; the educational objectives it embodies would concomitantly be vitiated. If, as was suggested by the Court of Appeal, society must wait for a Minister (who is already subject to public scrutiny) to discriminate before the Act comes into operation, how effective can the educational function of the Act be? More importantly, the interpretation I have proposed makes [page95] education begin in the workplace, in the micro-democracy of the work environment, rather than in society at large.

17 Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the

purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. I agree with the following remarks of Marshall J., who was joined by Brennan, Blackmun and Stevens JJ., in his concurring opinion in the United States Supreme Court decision in Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986), at pp. 2410-11 concerning sexual discrimination by supervisory personnel:

> An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.
>
> . . .
>
> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or [page96] with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.

18 In the light of these conclusions, it is unnecessary for me to examine the allegations that the Crown would, in any event, be directly liable for management's failure to adequately investigate Robichaud's complaints, thereby perpetuating the poisoned work environment. At all events, this, too, involves the acts of employees.

19 I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.

20 Finally, it was argued that the Act, as it existed when the incidents complained of occurred, should be interpreted so as to conform to subs. 48(5) and (6) enacted in 1983. These expressly impose liability upon an organization for the conduct of its employees, subject to a defence of due diligence on its part. I do not see the relevance of these provisions to the pre-existing situation. They were obviously [page97] enacted to redress the prevalent approach of the courts (see, for example, Re Nelson and Byron Price & Associates Ltd. (1981), 122 D.L.R. (3d) 340 (B.C.C.A.)). In subsequently taking legislative action to correct this approach, Parliament was free to adjust liability in any way it wished, whether by imposing a greater or lesser burden on an

employer than would have been the case before the amendments. Precisely what balance was achieved by these new provisions, I need not consider. They do not operate retrospectively and all we are concerned with here is the law as it existed when the activities complained against took place.

21 Finally, we were advised that a settlement has been reached with Mrs. Robichaud, but this may not provide a full corrective to the problem identified.

Disposition

22 For these reasons, I would allow the appeal, reverse the decision of the Federal Court of Appeal and restore the decision of the Review Tribunal.

The following are the reasons delivered by

LE DAIN J.

23 I agree that the appeal should be allowed for the reasons given by Justice La Forest. As held by the majority in the Federal Court of Appeal, the Act contemplates in ss. 4 and 41(2) that relief will be available against the person found to be engaging or to have engaged in a discriminatory practice, but I think it is an implication of the word "indirectly" in s. 7 and the nature of the relief available under s. 41(2) that a discriminatory practice by an employee is to be considered to be a discriminatory practice by the employer as well, whether or not authorized or intended by the latter.
