TIME FOR ACTION

SPECIAL REPORT TO PARLIAMENT ON PAY EQUITY
FEBRUARY 2001

Cat. No. HR21-54/2001
ISBN 0-662-65445-5

This publication is available in multiple formats on request and on the Commission's web site at: http://www.chrc-ccdp.ca

TABLE OF CONTENTS

TIME FOR ACTION

SPECIAL REPORT TO PARLIAMENT ON PAY EQUITY

Introduction

The purpose of this report is to review the rationale for pay equity legislation, assess how federal pay equity provisions have worked up to now, and suggest how those provisions might be improved. The report reflects the Canadian Human Rights Commission's 23 years of experience with pay equity. We hope it will serve to dispel common misunderstandings regarding pay equity and inform the public about challenges associated with the present system for achieving pay equity at the federal level.

When the Commission proposed modernization of federal pay equity provisions in 1987, some observers felt — correctly, as it turned out — that government action on the issue was unlikely. That no longer appears to be true. The Ministers of Justice and Labour have recently appointed an independent expert to head a Task Force that will review federal pay equity legislation. The Commission welcomes this initiative and believes that such a review takes on added urgency in light of a recent Federal Court of Canada decision calling into question the institutional independence of the Canadian Human Rights Tribunal.[1]

Why Pay Equity?

Pay equity is a human right. Human rights are about respect for the equality and dignity of all people. They require that we treat others fairly and avoid actions which disadvantage people because of personal characteristics such as their sex, age, colour,

---

[1] *Bell Canada v. Canada (Human Rights Commission)*. Federal Court of Canada (Trial Division); Court file no. T-890-99: November 2, 2000. An appeal against the decision has been filed by the Canadian Human Rights Commission.

disability, or religion.

When the value of work done mainly by women is not appropriately recognized, the people performing it are not paid and treated equitably. This is a form of sex discrimination. If your income is low because you are in a job performed mostly by women, your fundamental rights to equality and dignity are not being respected. Pay equity is a way of identifying and eliminating such discrimination.

The principle of non-discrimination in wages is a well-established part of international human rights law, and is enshrined in several human rights instruments to which Canada has been a signatory for decades. The *Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Equal Remuneration Convention)*, adopted by the International Labour Organization (ILO) in 1951 and ratified by Canada in 1972, requires that governments take active measures to achieve equal pay for work of equal value. The *International Covenant on Economic, Social and Cultural Rights,* adopted by the United Nations (UN) in 1966 and ratified by Canada in 1976, lists equal pay for work of equal value as a fundamental right and stresses its importance to the achievement of fairness in conditions of work. The Covenant, it is worth noting, is one of the three core universal human rights documents — the other two being the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* — which together comprise the *International Bill of Rights*. The *Convention on the Elimination of All Forms of Discrimination against Women*, adopted by the UN in 1979 and ratified by Canada in 1981, commits signatories to removing employment discrimination against women, in part by ensuring equal pay for work of equal value.[2]

In line with these international instruments, many jurisdictions have attempted to implement equal pay for work of equal value through various pay equity initiatives. These jurisdictions include Canada, the European Union, Australia, and some 20 US state governments.

---

[2] Appendix I contains excerpts from these international instruments.

Pay equity builds on the older notion of equal pay for equal work. That notion was, and remains, unassailable: it goes without saying that two people doing the same job should get the same wage, regardless of their sex. However, equal pay for equal work has been of little use to the majority of Canadian women concentrated in low-paid, female-predominant fields. This occupational segregation makes it impossible for people doing low-paid “women’s work”, such as secretaries, nurses or telephone operators, to find the sorts of direct comparators required under equal pay for equal work legislation. Equal pay for work of equal value — pay equity — acknowledges this reality, allowing comparisons between different types of female- and male-predominant jobs in order to locate and remove wage discrimination.

The under-compensation of work done primarily by women can be traced back to an era when men were seen as the primary breadwinners for the family, and “women’s work” was treated as a source of secondary income. In addition, because many jobs performed by women built on their conventional roles in the home, they were not perceived as requiring any special effort. And because men were better organized, more powerful, and more vocal, they were better able to draw attention to the worth of their work. One striking result was the existence, under law, of a lower minimum wage for women than for men, a situation which continued in some parts of Canada into the early 1970s.

Attitudes about working women have, of course, changed substantially. However, wages for female-predominant work are still affected by traditional stereotypes and patterns of undervaluation that are embedded in compensation systems. Today, they are usually unintentional, but that does not make their effects any less real.

The gap in the average earnings of Canadian men and women working full-time is not entirely the result of ingrained undervaluation of “women’s work”. Pay equity does not concern itself with legitimate factors which shape wages, such as supply and demand, training, and seniority. Economists, however, have found that these are not the only factors that affect pay. Perceptions about what jobs are worth also play a role in establishing market rates, and fairness requires that we make efforts to ensure these

perceptions do not overlook aspects of work typically performed by women. It is differences resulting from biases, the “equity gap”, which pay equity seeks to rectify.

We have all seen examples in our daily lives of how people feel jobs have a certain inherent value. When we talk about how much employees in a particular position ought to earn, we say things like “that job requires incredibly fine motor skills, so of course it gets paid well”, “he supervises a large number of people, so he deserves a higher salary”, or “they’re constantly lifting heavy objects and getting injured, so it’s only fair to give them a bonus”. We also sometimes hear statements such as “she’s only a secretary, so what sort of salary does she expect?”, “a librarian isn’t really a professional and shouldn’t get paid like one”, and “looking after kids comes naturally to women, so I don’t see why child care workers think they deserve a raise”. These sorts of “common sense” comments demonstrate how the perceived value of a job can shape pay — and distort it, if the perceptions reflect biased preconceptions rather than a fair assessment of what each job involves.

Time and again, when job values and wages in various organizations have been impartially examined, it has become clear that work done mostly by women has not, historically, been as well-documented and appreciated as work done mostly by men and thus, has not been fairly paid. This has been the finding when employers and unions have undertaken their own pay equity studies, and when tribunals and courts have examined the outcomes of studies initiated after the filing of claims under human rights or pay equity legislation.

Pay equity helps achieve non-discriminatory wages by requiring a fresh look at the content and worth of work done mainly by women, as well as work done mainly by men. To assess the relative value of work and ensure that the content of different jobs is not missed or minimized, pay equity relies on job evaluation systems. Such systems have been used for over 50 years by managers seeking to establish pay scales within their organizations which would be seen as reasonable. Today they are developed and marketed by leading management consulting firms. To rank different types of work, job evaluation uses the widely-accepted criteria of skill, effort, responsibility, and working

conditions — designed, in the pay equity context, to be "gender neutral" by providing balanced recognition of features typical of female-predominant work.[3]

Achieving pay equity can have a number of benefits for employers, in addition to the reduction of wage discrimination. It facilitates the rationalization of compensation systems, which frequently become convoluted and cumbersome over time. It also demonstrates to employees in female-predominant occupations that the organization is committed to the fair treatment of all employees performing different types of work. In these ways, pay equity can contribute to more efficient management and improved morale.

The Current Model at the Federal Level

There are a variety of ways of giving practical expression to the principle of pay equity. In this section, we will describe how the current system is administered at the federal level and identify some weaknesses in it.

Since 1977, section 11 of the *Canadian Human Rights Act* (*CHRA*) has specified that it is discriminatory to establish or maintain different wages for men and women doing work of equal value in the same establishment.[4] The *CHRA* allows parties — usually individual employees or unions — to submit wage discrimination allegations to the Commission for investigation. The Commission investigates the allegations and determines whether to dismiss the complaint, refer it to conciliation or refer it to the Canadian Human Rights Tribunal (a separate body). It may also approve a settlement reached by the complainant and respondent. Employers covered by the *CHRA* include the federal government, federal public sector organizations such as Crown Corporations, and private sector firms in federally regulated industries, the largest of which are banking, telecommunications, and interprovincial/international transportation.

---

[3] Appendix II provides additional information on job evaluation.

[4] See Appendix III: *Canadian Human Rights Act* (1977).

In 1986, following extensive consultations with interested parties, the Commission issued guidelines to assist in the interpretation of section 11. The current *Equal Wages Guidelines*[5] provide information on topics such as which work may be compared, how wage adjustments should be calculated, and what "reasonable factors" may justify wage differences that would otherwise be deemed discriminatory.

The inclusion of section 11 in the *CHRA* in 1977 reflected concerns about women's economic equality and Canada's international obligations. The Royal Commission on the Status of Women had recommended, in its landmark 1970 report, that Canada ratify the ILO *Equal Remuneration Convention* and women's organizations had strongly encouraged the government to incorporate equal pay for work of equal value provisions into the new human rights legislation when it was being developed. In the end, the *CHRA*, including the pay equity section, was approved unanimously by Parliament.

Since the Act came into force, the Commission has dealt with slightly more than 400 pay equity complaints, most of which were filed by individuals or small groups of employees. A majority of the complaints were dismissed by the Commission, while others were resolved through negotiated settlements totalling some $8 million and covering approximately 1500 employees.

In 1977, the filing and investigation of complaints was the accepted method for dealing with discrimination issues. The complaints-based approach continues to work reasonably well for small-scale cases involving comparison of, say, a single female-predominant job with a handful of male-predominant jobs, provided that an employee has the confidence to file a complaint and the patience to await the results.

However, experience since has shown that complaints are not particularly well-suited to addressing forms of discrimination that are subtle, largely unintentional and integrated into complex systems, — what is now termed "systemic discrimination". This is why, in 1995, the federal government opted for a different approach when it updated the

---

[5] See Appendix IV: *Equal Wages Guidelines* (1986).

Employment Equity Act (*EEA*). This legislation establishes clear steps and timetables for the identification and removal of barriers to the hiring and promotion of women, members of visible minorities, Aboriginal people, and persons with disabilities. All employers covered by the *EEA* must complete a review of their employment systems with an eye to ensuring fair treatment and representation of members of under-represented groups. Compliance with the *EEA* is verified through audits undertaken by the CHRC and is not dependent on the filing of complaints.

Difficulties associated with the present federal pay equity law were highlighted by the events surrounding one very large and highly-publicized case. A complaint brought against the federal Treasury Board by the Public Service Alliance of Canada was finally resolved in 1999 when the government agreed to pay some 3.5 billion dollars in back wages and interest to 200,000 current and former public servants — most of whom were clerks, secretaries, librarians, and health care workers — in order to correct long-standing wage discrimination.

Understandably, much attention was focussed on the enormous sums of money associated with the case. In large part, however, these costs were attributable to delays. The public service case continued for 15 years after wage discrimination allegations were filed by the Public Service Alliance of Canada on behalf of clerical workers. The first few years were spent on a joint pay equity study carried out by the government and public service unions. At the study's conclusion, the parties found common ground on the relative value of thousands of different jobs, but were unable to agree on a method for translating those results into wage adjustments. As a result, the matter came before the Commission, which determined that there was sufficient evidence of wage discrimination to warrant referring the case to a human rights tribunal. The tribunal spent close to seven years hearing evidence, weighing the case, and issuing rulings. In the end, after dealing with a large number of legal issues, it directed that a formula proposed by the Commission should be used to calculate wage adjustments for the period 1985 to 1998. The government challenged this decision in the Federal Court, but the Court rejected the government's arguments and ruled that the tribunal's decision was reasonable. That judgment led to the case finally being resolved.

The current system has proven ineffective in larger pay equity cases for several reasons. First, allegations of human rights violations tend, by their nature, to generate a defensive reaction and lead to litigation and delays. Secondly, the complaints-based approach produces uneven implementation, since employers not targeted by complaints often choose to keep a low profile and refrain from taking any initiatives on pay equity. This problem is exacerbated by the fact that it takes significant knowledge and resources to mount major pay equity complaints, which generally means they are only filed by unions. The end result is that people performing female-predominant work in non-unionized, federally-regulated settings have benefited little from the federal pay equity provisions.

This haphazard application of pay equity leads to the third difficulty with the complaints-based model: potential competitive disadvantages. If an employer voluntarily launches a pay equity study or is the only organization in its sector to be the focus of a complaint — perhaps because it is unionized while competitors are not — the result may be that it is the only player in the industry to pay the price of correcting wage discrimination. While competitive pressures are no excuse for maintaining discrimination, it does not seem sensible that a business should, in effect, be penalized for implementing pay equity.

The fourth challenge which confronts the federal, complaints-based provisions is ambiguity with respect to standards and concepts. While this problem can be dealt with to some degree through policy positions or guidelines issued by the Commission and, where necessary, by judicial decisions, more complete guidance on the meaning of terms and criteria for assessing compliance can usually be provided in the context of a proactive legal regime that is applicable to all employers.

When section 11 of the *CHRA* was adopted in 1977, few people realized how much debate would ensue because of the vagueness of various concepts. Countless days have been spent, for instance, debating the meaning of “establishment”, because section 11 limits pay equity comparisons to work performed “within the same establishment”. In fact, tribunal and court hearings about the definition of “establishment” have held up investigation of pay equity complaints against Air Canada

and Canadian Airlines for some eight years. Flight attendants have argued that they are underpaid relative to ground and cockpit crews, but the Commission has been unable to examine this claim because of legal actions by the airlines contending that flight attendants, ground crew, and cockpit crew each work in a different establishment. Similarly, lengthy delays in investigations and tribunal hearings have occurred in a range of cases because of disagreements over issues such as:

- the appropriate standards for determining whether a job evaluation system is gender neutral; that is, whether it assesses male- and female-predominant work in a fair and balanced fashion;
- the standards for assessing whether a job evaluation system is reliable enough to be used for determining if there is any wage discrimination;
- the meaning of the term “occupational group” which, under the *Equal Wages Guidelines*, is the unit of analysis for comparing wages;
- the methods to be employed when comparing the worth and wages of male- and female-predominant work; for example, whether it should rely on direct comparison of individual jobs or an averaging formula; and
- the start-date for payments to correct wage discrimination, and whether these payments should include simple or compound interest.

Taken together, the challenges noted above point to the final and greatest difficulty with the current approach to pay equity at the federal level: the built-in incentives and opportunities for delay. If a large, well-funded organization sees that the achievement of pay equity is piecemeal and notes statutory ambiguities, the temptation to contest pay equity requirements through legal actions can be strong. At a minimum, such actions defer the day of reckoning, allowing existing moneys to be spent on items other than wage adjustments. At best, from some respondents’ perspective, multiple, drawn-out legal proceedings may produce enough victories to gradually undermine the case against it and exhaust its opponents, who usually have fewer resources at their disposal.

Delay tends to perpetuate itself. When human rights complaints are found to have merit,

compensation is almost always calculated from an appropriate date in the past — for example, when the discriminatory acts commenced or when a complaint was filed. Any other approach would mean that victims of discrimination would be further penalized if it took a long time to resolve a case. The implication, however, is that the possible bill for a respondent grows with each passing year. In other words, the longer a case continues, the greater the potential cumulative liability — and the greater the potential liability, the greater the incentive for delay. The Commission's experience has been that once major pay equity cases at the investigation and litigation stages start getting tied up in procedural arguments, it becomes increasingly difficult to return the focus to substantive issues related to possible wage discrimination. Technical disputes multiply, months and years pass, positions harden, and frustrations mount.

A current pay equity case involving Bell Canada provides one example. It began back in 1988, when individual Bell employees filed complaints. This was followed by a joint pay equity study — carried out by the employer and unions representing clerks, sales staff, and operators — to try to address the individual complaints and achieve pay equity across the organization. Despite the joint study's success, Bell and the two unions were, unfortunately, unable to agree on the payouts required to redress wage discrimination. As a result, the unions filed additional systemic pay equity complaints. The Commission sponsored a mediation process in the hope of bringing about a mutually-acceptable settlement, but that process eventually failed. The systemic complaints were then referred to the Human Rights Tribunal while the individual complaints were put on hold pending the outcome of the Tribunal hearings.

Since the referral of the complaints in 1996, no fewer than eleven procedural motions have been launched by Bell. These motions have dealt with issues such as the timeliness of the complaints, the right of unions to file such complaints, statistical techniques used to identify wage discrimination, the right of an investigator to note new issues as they arise during investigation, the amendment of complaint particulars, the use of evidence deemed privileged by the employer, the binding nature of the *Equal Wages Guidelines,* the independence of the Tribunal, and the retention of a particular law firm to represent the Commission. Although Bell Canada is, of course, perfectly

within its rights in launching these actions, they have consumed tremendous resources while, for the most part, focusing on technical rather than substantive questions.[6]

A similar scenario of myriad legal actions has played itself out in a case involving the Government of the Northwest Territories (GNWT) and its employees in female-predominant occupations. In 1989, the Public Service Alliance of Canada filed a complaint on behalf of those employees alleging wage discrimination. As in the Bell case, the employer and union cooperated successfully on a joint pay equity study, but were unable to come to terms on wage adjustments to correct the wage discrimination they found. Here, too, the Commission sought to conciliate a resolution, but had to send the pay equity portion of the case for adjudication by the Tribunal when it became clear agreement would not be possible.

The GNWT initiated its first legal challenge in 1993, arguing that the appointment of a conciliator should be struck down because the *CHRA* allegedly did not apply to GNWT employees and because of an "apprehension of bias". Since referral of the case to the Tribunal in 1997, subsequent legal actions have raised issues such as the Commission's authority to send only one portion of a complaint to the Tribunal, the independence of the Tribunal, the review of documents the employer deems privileged, and the location of Tribunal hearings. Although these challenges have rarely addressed the substance of the case or been successful, they have taken up much time and have required the expenditure of large sums of money — all of which, in the final analysis, comes from the Canadian taxpayer.

Another large case, involving Canada Post, has seen less resort to the Federal Court, but has nonetheless been affected by the presentation of lengthy evidence and highly detailed legal arguments before the Tribunal. The case dates back to a 1983 pay equity complaint from the Public Service Alliance of Canada on behalf of administrative and clerical staff. Initially, the employer was given an opportunity to complete the design and

[6] Appendix V provides illustrative chronologies to two heavily-litigated cases: those involving Bell and the Government of the Northwest Territories.

implementation of a job evaluation system under development at the time, in the hope that this would address the PSAC's concerns. However, after several years of waiting and protests from the union over delay, the Commission conducted its own job evaluation study, finding discriminatory wage differences and, eventually, referring the complaint to the Tribunal for consideration. During the Tribunal hearings, Canada Post has contested virtually every component of the complaint investigation, data collection, job evaluation, and wage adjustment process. It has also raised legal challenges with respect to the Tribunal's independence and the issue of "establishment", and has presented extensive evidence on issues such as the risk that family pets pose to letter carriers. The Canada Post Tribunal process is now the longest in federal history: 348 hearing days, extending over a period of 7½ years, have already been spent on the case, and deliberations are not expected to conclude any time soon.

The Commission is tasked with representing the public interest in human rights complaints. Although pay equity cases represent less than 8% of all cases that are before tribunals or courts, they absorb about one half of the Commission's total spending on legal services. In 2000-2001 alone, the Commission anticipates having to spend almost 2 million dollars on lawyers, expert witnesses, and research necessitated by pay equity cases in litigation.

All this litigation has not been without its benefits: it has led to jurisprudence which has clarified important aspects of the law. A 1991 Tribunal decision in the *Hospital Services* case, which concerned the compensation of health care workers employed by the federal government, confirmed that pay equity requires the application of a gender neutral evaluation system. A 1996 Federal Court of Appeal ruling in the *Non-Public Funds* case, which dealt with salary adjustments for staff of a public agency linked to the Department of National Defence, emphasized that wage discrimination is a systemic problem and supported the practice of calculating wage adjustments from one year prior to the date of a complaint. A 1998 Federal Court of Appeal judgment stemming from several of Bell Canada's applications for judicial review rejected arguments aimed at nullifying the referral of complaints against Bell to the Tribunal, confirmed that unions may lodge pay equity complaints, upheld the fairness of the Commission's investigation

methods, and stressed that the Tribunal should be the primary interpreter of the *CHRA*. Bell's application to the Supreme Court for leave to appeal this judgment was rejected, with costs being awarded to the complainant unions.

The decisions in the federal public service case, discussed earlier, have also helped reduce some of the ambiguity around section 11. In 1996, the Human Rights Tribunal established a standard of "reasonableness" for assessing the neutrality of a job evaluation system, and in 1998, it confirmed that an averaging method should be used to calculate wage adjustments in cases involving large numbers of jobs. The Federal Court's 1999 ruling emphasized that wage discrimination is a systemic issue and that a purposive approach should be taken to addressing it.

The clarification of certain key issues through jurisprudence is welcome, and no one questions that parties to a human rights complaint have the right to launch court actions and raise legal arguments. When the challenges are continuous, however, this can result in serious repercussions: long delays in the resolution of many pay equity complaints, non-application of pay equity to large numbers of people doing female-predominant work, and significant administrative and legal costs as cases wind their way through various investigative and adjudicative processes. There is little the Commission can do, within the current legislative scheme, to accelerate cases.

The preceding analysis certainly raises the question of whether the present approach is the best way to reduce wage discrimination. Many people, both on the employee and employer sides, are understandably frustrated and are asking how, after more than two decades of experience, we might improve matters. The issue is not pay equity itself, which is a fundamental right, but how to best realize the principle in practice. The Commission is of the view that alternative approaches can provide greater certainty and achieve equal pay for work of equal value more broadly and more efficiently.

Goals and Guiding Principles for Improved Pay Equity Provisions

If we include federal and provincial legislation, Canada has more extensive and varied

experience with pay equity than any other country. The federal pay equity provisions were among the first to be passed and have not been amended since 1977. At the provincial level, the most far-reaching laws are Ontario's 1987 *Pay Equity Act* and Quebec's 1997 *Loi sur l'équité salariale*, both of which outline steps and timetables for the achievement and maintenance of pay equity in the public and private sectors. The proactive model has the advantage of ensuring broad implementation, removing the need for complaints, fostering management-union cooperation, reducing ambiguity, making non-discriminatory wages a priority, and achieving pay equity at a clear point in time.

Drawing upon the federal and provincial experience, and upon tribunal and court decisions, the Commission suggests that revised pay equity legislation should reflect the following objectives:

- achievement of pay equity for people performing female-predominant work in the federal jurisdiction in a comprehensive and timely fashion;
- minimization of unnecessary administrative burdens and costs for those implementing pay equity;
- encouragement of cooperation rather than confrontation in the implementation of pay equity; and
- maintenance of pay equity once achieved.

What provisions will best advance these goals? The Commission proposes five guiding principles.

First, it is essential to recognize that pay equity is a fundamental human right, and reflect this recognition in the legislation. Practically speaking, this means vesting the authority for overseeing implementation of the law with an independent agency. This could be the Commission, which has played this role to date, or an independent pay equity agency, as in Ontario and Quebec. The key point is that programs to protect and promote fundamental rights are most effective, and most credible, when they are handled by bodies operating at arms-length from government and from any political

considerations. In order to carry out its mandate, the oversight agency will need to be furnished with sufficient resources and expertise, receive information from employers on actions taken to achieve pay equity, and have the authority to audit compliance.

Secondly, there should be a transition to a uniform implementation scheme. This approach would not be dependent upon complaints but would apply pay equity consistently across the federal jurisdiction. This would also eliminate any competitive disadvantages stemming from uneven compliance, and prevent the extended delays and high legal expenditures that have characterized some cases under the current provisions. The law should list the steps organizations are required to take to achieve and maintain pay equity, and stipulate time frames for each step.

Thirdly, the law should provide clear, purposive standards and definitions with respect to what work may be compared, how it is to be compared, how any wage adjustments are to be calculated, and how adjustments are to be integrated into wages. Clarity in the statute will help reduce the complexities of implementation and ensure that people performing female-predominant work are not denied pay equity on technical grounds.

Fourthly, the constructive involvement of employees and their bargaining agents in the pay equity process should be ensured. Pay equity should be a collaborative undertaking based on a shared commitment to eliminating wage discrimination. Unions can best be engaged in pay equity as partners, not complainants, and employees in non-unionized workplaces should also have a voice in the achievement of pay equity in the workplace. Union and employee participation enhances the breadth of knowledge among those guiding pay equity implementation — thereby making the process more reliable — and improves the odds of wider employee support for the final results.

Finally, the updated provisions should mandate information and training programs, both by the oversight agency and organizations covered by the law. Pay equity can appear more complicated than it really is, fuelling confusion and suspicion. The provision of user-friendly material and tools by the oversight agency will facilitate pay equity activities and keep down administrative costs, reducing, for example, the need to rely on

external consultants. More generally, good information and communications will help demystify pay equity, leading to a higher quality, smoother implementation process and fewer misunderstandings.

In the 1999 ruling which prompted resolution of the federal public service case, Federal Court Justice John Evans wrote that, in line with the quasi-constitutional status of the *Canadian Human Rights Act*, it makes sense to interpret its pay equity provisions in ways that reflect growing experience. When the *CHRA* was passed, he wrote:

> Parliament was aware that section 11 represented more a statement of principle than a complete prescription. It is consistent with Parliament's intention that the "living tree" of the Act should be nourished by the experience of other jurisdictions in dealing with the social injustice at which section 11 is aimed: systemic wage discrimination for work of equal value resulting from the historical segregation of the labour world by gender, and the undervaluation of women's work.

The Commission believes that it is now possible, through legislation, to elaborate and enhance federal pay equity provisions, building on a range of experience and jurisprudence, and recognizing the fundamental nature of the issues at stake. Updated provisions based on the goals and principles outlined above will, in the Commission’s view, make an important contribution towards the removal of gender bias in compensation, the fair treatment of people doing typically “female” work, the reduction of economic inequalities, and the fulfilment of Canada’s obligations under international human rights instruments. Getting there will require both thoughtful reflection and a clear commitment on the part of the government to address the social injustice of which Mr. Justice Evans spoke. Canadian women, men employed in female-predominant fields, and the many families affected by wage discrimination deserve no less.

Appendix I: Excerpts from International Instruments on Human Rights

Equal Remuneration Convention (1951)

Article 1

For the purpose of this Convention:

(a) The term "remuneration" includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

(b) The term "equal remuneration for men and women workers for work of equal value" refers to rates of remuneration established without discrimination based on sex.

Article 2.1

Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

Article 3.1

Where such action will assist in giving effect to the provisions of this Convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

International Covenant on Economic, Social and Cultural Rights (1966)

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the

ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights...

Agree upon the following articles...

Article 2.1

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures...

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant...

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

***Convention on the Elimination of All Forms of Discrimination against Women* (1979)**

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights...

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist...

Have agreed on the following...

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women...

Article 11.1

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular...

(d) The right to equal remuneration, including benefits, and to equal treatment in respect

of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

Appendix II: Job Evaluation

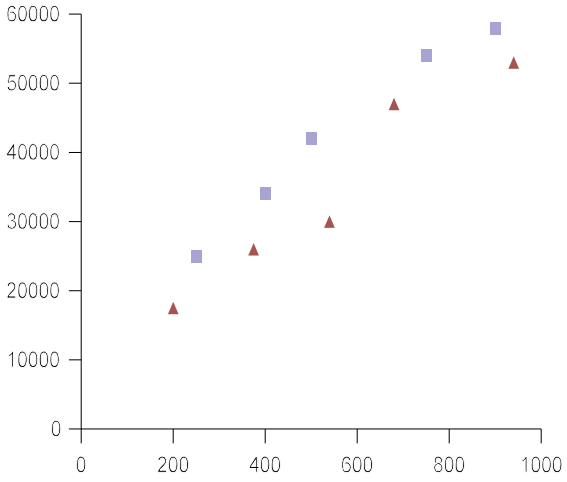
Job evaluation is an integral element of the pay equity process. It allows for the comparison of different kinds of jobs, and thus for the identification of wage discrimination against female-predominant work.

Job evaluation assesses the comparative worth of jobs by rating them against a common set of factors, such as analytical abilities, physical exertion, accountability for budgets, and unpleasant working environments. Evaluation factors cluster into four broad categories: the skills required to do the job, the effort needed for the job, the job's responsibilities, and the working conditions under which the job is done.

Ratings, which are normally done by a committee, result in point scores against the different factors. A job's value is simply the composite of these scores. Once job evaluation is complete, it becomes easy to compare different jobs on the basis of their values, in total points, and wages, in dollars. The table below provides an illustration:

Job	Skill Score	Effort Score	Responsibility Score	Working Conditions Score	Total Value (Points)	Wages
Receptionist	120	30	150	20	320	$28,000
Warehouse Worker	90	60	130	40	320	$33,000

Results can also be presented using a graph, where the horizontal axis lists job values and the vertical axis, wages. Graphs are especially helpful when a large number of jobs are evaluated, since they make it easier to spot patterns and calculate average differences. On the following page is an example, with five male-predominant jobs represented by squares, and five female-predominant jobs represented by triangles.



In the past, job evaluation was usually conducted using generic “off-the-shelf” systems. These sometimes reflected a tendency to undervalue work performed mainly by women. That is why, for pay equity purposes, it is important to check that a job evaluation system is “gender neutral”. This means the system must:

- be carefully designed to reflect the specific context in which it is to be applied, including the mission of the organization and its mix of jobs,
- incorporate and give fair weight to rating criteria which reflect the sorts of work women typically do, as well as the sorts of work men do,
- be clear, comprehensible, and non-sexist in its language, so that when people carry out ratings, they have sufficient guidance and do not just fall back on familiar, sometimes discriminatory, hierarchies, and
- be applied in a rigorous, balanced fashion which avoids bias by using complete job information, including women in the process, providing appropriate training to raters, and so on.

Job evaluation systems do not produce totally “objective” assessments of the absolute worth of different positions. However, they are the most systematic method available for ranking jobs and determining whether work done primarily by women is being equitably recognized and compensated.

Appendix III: *Canadian Human Rights Act* (1977)

Section 11

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

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

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

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

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

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

Appendix IV: *Equal Wages Guidelines*

EQUAL WAGES GUIDELINES, 1986

The Canadian Human Rights Commission, pursuant to subsections 11(3) and 22(2), S.C. 1977-78, c. 22 of the Canadian Human Rights Act, S.C. 1976-77, c. 33 hereby revokes the Equal Wages Guidelines, made on September 18,1978, SI/78-155, and makes the annexed Guidelines respecting the application of section 11 of the Canadian Human Rights Act and prescribing factors justifying different wages for work of equal value, in substitution therefor.

Dated at Ottawa, November 18, 1986

GUIDELINES RESPECTING THE APPLICATION OF SECTION 11 OF THE CANADIAN HUMAN RIGHTS ACT AND PRESCRIBING FACTORS JUSTIFYING DIFFERENT WAGES FOR WORK OF EQUAL VALUE

Short Title

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

Interpretation

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

ASSESSMENT OF VALUE

Skill

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

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

Effort

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

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

Responsibility

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

Working Conditions

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

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

Method of Assessment of Value

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

(a) operates without any sexual bias;
(b) is capable of measuring the relative value of work of all jobs in the establishment; and
(c) assesses the skill, effort and responsibility and the working conditions determined in accordance with sections 3 to 8.

Employees of an Establishment

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

Complaints by Individuals

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

(2) In the case of a complaint by an individual, where at least two other employees of the establishment perform work of equal value, the weighted

average wage paid to those employees shall be used to calculate the adjustment to the complainant's wages.

Complaints by Groups

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

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

(a) 70 per cent of the occupational group, if the group has less than 100 members;
(b) 60 per cent of the occupational group, if the group has from 100 to 500 members; and
(c) 55 per cent of the occupational group, if the group has more than 500 members.

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

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

Reasonable Factors

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

(a) different performance ratings, where employees are subject to a formal system of performance appraisal that has been brought to their attention;
(b) seniority, where a system of remuneration that applies to the employees provides that they receive periodic increases in wages based on their length of service with the employer;
(c) a re-evaluation and downgrading of the position of an employee, where the wages of that employee are temporarily fixed, or the increases in the wages of that employee are temporarily curtailed, until the wages appropriate to the downgraded position are equivalent to or higher than the wages of that employee;
(d) a rehabilitation assignment, where an employer pays to an employee wages that are higher than justified by the value of the work performed by that employee during recuperation of limited duration from an injury or illness;
(e) a demotion procedure where the employer, without decreasing the employee's wages, reassigns an employee to a position at a lower level as result of the unsatisfactory work performance of the employee caused by factors beyond the employee's control, such as the increasing complexity of the job or the impaired health or partial disability of the employee, or as a result of an internal labour force surplus that necessitates the reassignment;
(f) a procedure of gradually reducing wages for any of the reasons set out in paragraph *(e)*;
(g) a temporary training position, where, for the purposes of an employee development program that is equally available to male and female employees and leads to the career advancement of the employee who take part in the program, an employee temporarily assigned to the position receives wages at a different level than an employee working in such a position on a permanent basis;
(h) the existence of an internal labour shortage in a particular job classification;
(i) a reclassification of a position to a lower level, where the incumbent continues to receive wages on the scale established for the former higher classification; and
(j) regional rates of wages, where the wage scale that applies to the employees provides for different rates of wages for the same job depending on the defined geographic area of the workplace.

17 For the purpose of justifying a difference in wages on the basis of a factor set out in section 16, an employer is required to establish that the factor is applied consistently and equitably in calculating and paying the wages of all male and female employees employed in an establishment who are performing work of equal value.

18 In addition to the requirement of section 17, for the purpose of justifying a

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

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

(a) since the reclassification, no new employee has received wages on the scale
established for the former classification; and
(b) there is a difference between the incumbents receiving wages on the scale established for the former classification and another group of employees, predominantly of the same sex as the first group, who are performing work of equal value.

EXPLANATORY NOTE

(This note is not part of the Guidelines.)

These guidelines prescribe

(a) the manner in which section 11 of the *Canadian Human Rights Act* is to be applied; and
(b) the factors that are considered reasonable to justify a difference in wages between men and women performing work of equal value in the same establishment.

Appendix V: Chronologies of Two Major Cases

The chronologies below detail how two of the more heavily-litigated pay equity cases have unfolded. They help to illustrate some of the challenges associated with the existing federal provisions.

Canadian Telephone Employees Association, the Communications, Energy, and Paperworkers Union, and Femmes-Action v. Bell Canada

1988	• Pay equity complaints filed by individual Bell employees.
1991-92	• Bell and unions undertake a joint pay equity study. • Commission agrees, at the parties' request, to use the joint study as the basis for assessing the pay equity complaints. • Final Report of the joint study finds that female-predominant work is underpaid.
1993	• Commission reviews joint study results. • Bell and unions agree to an initial payment to begin correcting wage discrimination.
1994	• Systemic pay equity complaints filed by the unions and an ad hoc employee group called Femmes-Action, alleging that wage discrimination identified by the joint study remains. • Commission attempts, without success, to mediate a settlement.
1995	• Commission circulates a final investigation report. • In its comments on the report, Bell casts doubt, for the first time, on the joint study results. • Commission circulates a revised final investigation report.
1996	• Commission refers systemic complaints to the Human Rights Tribunal for adjudication, while keeping the individual complaints to the side pending the outcome of the Tribunal hearings.

- Bell applies to the Federal Court for judicial review of the referral to the Tribunal.
- Bell applies to the Federal Court for judicial review of the Tribunal's decision to begin hearing the case.
- Bell brings a motion before the Federal Court asking to have the hearings stayed. The motion is rejected by the Federal Court, Trial Division and the Federal Court of Appeal.
- Bell brings preliminary motions before the Tribunal requesting: a stay of proceedings pending Federal Court decisions; the removal of one Tribunal member because of an "apprehension of bias"; an end to hearings because the Tribunal is allegedly not impartial or independent; and cancellation of the complaints because of alleged vagueness.
- All four motions brought before the Tribunal are rejected. Bell makes four applications to the Federal Court for judicial review in respect of each of the motions. The Court hears only the application in respect of the motion regarding the Tribunal's independence and the remaining three applications are stayed.

1997

- Federal Court hearings into Bell's applications for judicial review.

1998

- Federal Court, Trial Division rules in favour of Bell's first application, and quashes referral of the complaints to the Tribunal.
- Federal Court of Appeal overturns this decision, restoring the referral of the complaints to the Tribunal, confirming that unions have the right to file complaints, and upholding the fairness of the Commission's investigation. Bell's request for leave to appeal this decision is rejected by the Supreme Court, with costs awarded to the complainants.
- Federal Court, Trial Division issues its ruling on the independence of the Tribunal and finds that the Tribunal is insufficiently independent. The government amends the

1999

Canadian Human Rights Act to address concerns raised by the Court.

- A new tribunal is named to adjudicate the Bell complaints.
- Bell brings another motion challenging the independence of the Tribunal, arguing that the *CHRA* amendments were inadequate. The motion is dismissed by the Tribunal. Bell applies for judicial review.
- Bell brings procedural motions before the Tribunal asking it to reject the complaints because they were allegedly not filed in a timely manner, are too vague, and were filed by unions which, it is claimed, do not have the right to lodge such complaints. The Tribunal rejects these motions, and Bell applies for judicial review.
- Bell brings a procedural motion before the Tribunal asking it to reject the complaints on the grounds that they are made in bad faith, since they concern bargained wages. This motion is eventually deferred to the end of the Tribunal hearings.
- Bell brings a procedural motion before the Tribunal requesting the exclusion of joint study evidence it deems confidential.
- Bell brings a procedural motion before the Tribunal asking that the other parties be compelled to disclose how the Commission obtained joint study evidence. This motion is eventually withdrawn.

2000

- Bell and the two unions attempt to reach a settlement of the complaints. Tentative agreements are rejected in voting by the members of both unions.

- The Tribunal dismisses Bell's procedural motion concerning allegedly confidential evidence. Bell applies for judicial review.
- The Federal Court, Trial Division dismisses Bell's applications for judicial review of the Tribunal's decisions concerning timeliness, vagueness, the role of unions, and confidentiality. Bell appeals the dismissal of its application on confidentiality to

the Federal Court of Appeal.

- The Commission asks to amend two complaint forms. The Tribunal refuses the request, and the Commission applies for judicial review.
- Bell brings a procedural motion asking that the Commission be prohibited from retaining the services of a law firm which has previously litigated pay equity cases for bargaining agents. The Tribunal refuses the request.
- The Federal Court, Trial Division accepts Bell's argument that the Tribunal is still insufficiently independent, and hearings into the complaints are again suspended. The other parties appeal this decision to the Federal Court of Appeal. Case to be argued in Spring 2001.

Public Service Alliance of Canada v. Government of the Northwest Territories

1989
- Complaint filed by union under *CHRA* sections 7, 10, and 11.
- Union and GNWT agree to a pay equity initiative termed the Joint Equal Pay Study (JEPS).
- Commission decides to attend JEPS meetings and use the study results as part of its investigation.

1989-91
- JEPS is carried out.

1992
- JEPS Final Report is issued.
- Commission reviews JEPS results and provides the parties with an analysis of sex-based wage differences, encouraging settlement negotiations.

1993
- Commission investigation report is completed, and a conciliator appointed.
- GNWT applies to the Federal Court for judicial review of the referral to a conciliator, arguing that the Commission lacks the

jurisdiction to deal with the complaint and alleging an "apprehension of bias" because Commission investigators are represented by the PSAC.

1996

- Federal Court, Trial Division accepts GNWT's argument on apprehension of bias and quashes the referral to conciliation. The Commission appeals.

1997

- Federal Court of Appeal reverses the Trial Division ruling, restoring the referral to conciliation. Supreme Court subsequently denies GNWT leave to appeal this decision.
- Commission refers pay equity portions of complaint to the Tribunal (sections 7 and 11), while continuing to examine a portion dealing with the GNWT's classification system (section 10).
- GNWT applies for judicial review of the decision to "sever" the complaint in this fashion.

1998

- GNWT files a procedural motion asking that the Tribunal not adjudicate the complaint because it lacks the necessary independence. The Tribunal rejects the motion, and GNWT applies for judicial review.

1999

- Federal Court, Trial Division rules that the Commission's decision to "sever" the complaint against GNWT is not reviewable. GNWT appeals.
- Commission decides to take no further proceedings on the portion of the complaint dealing with the GNWT's classification system, as that system has been superceded by another. Neither party objects, and the GNWT discontinues its appeal on "severing".
- GNWT brings three procedural motions before the Tribunal: a motion for particulars, a request that hearings be held in Yellowknife, and a motion to have the complainant union added

as a respondent to the complaints. All are rejected by the Tribunal, and the GNWT applies for judicial review.

- The Tribunal agrees, at the request of the union, to discontinue the section 7 part of the complaint. GNWT unsuccessfully applies for judicial review of this decision.
- Federal Court, Trial Division decides that the GNWT, as part of the federal Crown, cannot legally challenge the independence of

2000 the Tribunal.

- GNWT appeals the Trial Division decision that it cannot legally challenge the Tribunal's independence.
- Tribunal orders GNWT to produce for its inspection documents over which GNWT claims cabinet privilege. GNWT successfully applies for judicial review of this decision. Federal Court rules that the Tribunal had no jurisdiction to review the documents over which Cabinet privilege is claimed. The Commission and the complainant bring a joint application pursuant to Section 37 of the *Canada Evidence Act*. Then Federal Court removes some portions of the documents and then forwards them for the Tribunal's review to determine whether there are other valid grounds of privilege.
- Federal Court, Trial Division dismisses the GNWT's applications for judicial review of Tribunal decisions on particulars, location of hearings, and the addition of the union as a respondent.
- The Commission and the Public Service Alliance of Canada brought a motion before the Tribunal challenging a great many documents claimed to be privileged by the GNWT. The GNWT brought a similar motion challenging relatively few of the documents claimed to be privileged by the Public Service Alliance. The Tribunal reviewed the documents as well as those documents referred to it by the Federal Court following the Section 37 application. The Tribunal found that almost all documents were privileged.