Case Name:

Reid v. Vancouver (City)

Between
Janet Reid et al., petitioners, and
The City of Vancouver, The Vancouver Police Board, and The British Columbia Human Rights Tribunal, respondents

[2003] B.C.J. No. 2043
2003 BCSC 1348
Vancouver Registry No. L013262

British Columbia Supreme Court
Vancouver, British Columbia
Garson J.

Heard: May 5 - 9 and 12 - 16, 2003.
Judgment: September 3, 2003.
(200 paras.)

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A. Background

GARSON J.:—

I. INTRODUCTION

¶ 1 Section 12 of the Human Rights Code, R.S.B.C. 1996, c. 210 (the "Code"), prohibits an employer from paying an employee of one sex a lesser amount than an employee of the other sex for the same or similar work. In this case, Janet Reid and the other Petitioners, who are all female communications operators at the Vancouver Police Department, alleged before a Human Right Tribunal, appointed to hear the Petitioners' complaints, that they were paid less than male communications operators doing the same work at the Vancouver Fire Department. The Tribunal's decision to dismiss their complaint turned on the finding that the police communications operators were employed by the Vancouver Police Board, whereas the Fire Department communication operators were employed by the City of Vancouver and accordingly they had different employers. This is an application for judicial review of that decision.

¶ 2 The Petitioners' claims of employment discrimination under s. 13 of the Code were also dismissed by the Tribunal. The Petitioners also apply for judicial review of the Tribunal's decision under s. 13.

II. THE TRIBUNAL DECISION - BACKGROUND AND OVERVIEW

¶ 3 In 1986, the communication operators at the Vancouver Police Department ("Com Ops") filed a grievance in an attempt to obtain pay equity with dispatchers at the Vancouver Fire Department, ("Fire Dispatchers"). At arbitration, the Com Ops alleged that the City of Vancouver (the "City") and the

Vancouver Police Board (the "Board" or the "Police Board") had discriminated against them on the basis of their sex. The Com Ops asserted that Fire Dispatchers, who are almost exclusively male, performed the same function as they did and were paid at a higher rate.

¶ 4 On August 15, 1990, the Arbitrator, Mr. Larson, ruled that the Com Ops were entitled to reclassification up the pay-grade scale, but declined to rule on the issue of discrimination.

¶ 5 Beginning in November 1990, each of the Petitioners filed complaints at the British Columbia Human Rights Tribunal (the "Tribunal"), alleging discrimination contrary to ss. 7 and 8 of the Human Rights Act, S.B.C. 1984, c. 22 (the "Act"), which are currently ss. 12 and 13 of the Code. As at the earlier arbitration, the Com Ops alleged that the Police Board, as represented by the Police Department or the City of Vancouver, had discriminated against them on the basis of sex.

¶ 6 On May 8, 2000, a one-member panel of the Tribunal dismissed both claims under s. 37(1) of the Code: Reid v. Vancouver (City) (No. 5), 2000 BCHRT 30 (the "Tribunal Decision").

¶ 7 The Tribunal is a permanent adjudicative body established under s. 31 of the Code.

¶ 8 The Petitioners' complaints were heard over the course of 59 days, commencing on September 10, 1997, and continuing periodically until July 15, 1998. The final written submissions were filed on February 22, 2000.

¶ 9 The Tribunal dismissed both claims. The Tribunal's reasons will be discussed below but, for the purposes of overview, I will set out the statutory framework and the conclusions reached by the Tribunal in respect of each complaint.

¶ 10 Section 12 of the Code provides as follows:

Discrimination in Wages

12. (1) An employer must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work.

(2) For the purposes of subsection (1), the concept of skill, effort and responsibility must, subject to factors in respect of pay rates such as seniority systems, merit systems and systems that measure earnings by quantity or quality of production, be used to determine what is similar or substantially similar work.

(3) A difference in the rate of pay between employees of different sexes based on a factor other than sex does not constitute a failure to comply with this section if the factor on which the difference is based would reasonably justify the difference.

(4) An employer must not reduce the rate of pay of an employee in order to comply with this section.

(5) If an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer, by action, the difference between the amount paid and the amount to which the employee is entitled, together with the costs, but

(a) the action must be commenced no later than 12

months from the termination of the employee's services, and

(b) the action applies only to wages of an employee during the 12 month period immediately before the earlier of the date of the employee's termination or the commencement of the action.

¶ 11 The Tribunal concluded that for the purposes of s. 12, the City - who employed the Fire Dispatchers - was not the Petitioners' employer and, therefore, no wage-discrimination between employees of different sexes could have occurred (Tribunal Decision at [paragraph] 122).

¶ 12 Despite reaching this conclusion, the Tribunal made a number of factual determinations regarding the elements of wage-discrimination under s. 12 of the Code (Tribunal Decision at [paragraphs] 124-128).

¶ 13 With respect to the type of work done, the Tribunal concluded that Com Op I (Police) employees and FD I (Fire) employees performed substantially similar work (Tribunal Decision at [paragraph] 154). However, higher level communications operators (Com Op II and FD III) performed sufficiently different tasks to justify wage disparity (Tribunal Decision at [paragraphs] 163-164).

¶ 14 Concerning remuneration, the Tribunal found that Com Op I employees are paid less than FD I employees (Tribunal Decision at [paragraph] 182).

¶ 15 The Tribunal also found that there were no other factors (including classification plans, qualifications, experience, or separate bargaining schemes) that would justify pay inequality under ss. 12(3) of the Code (Tribunal Decision at [paragraphs] 190, 192, 195-201).

¶ 16 Finally, the classification plan under which the Petitioners' wage rates were established was not an "employment equity program" or "special program"

that fell within the exceptions under ss. 42(1) or 42(2) of the Code (Tribunal Decision at [paragraphs] 204, 208).

¶ 17 Given its conclusion regarding employers, the Tribunal declined to address the issue of remedy under s. 12, stating in part (at [paragraph] 209):

> Given that the issue of remedy will only arise if a reviewing court concludes that I am incorrect on the employer issue, any decision on remedy will be informed by the comments or findings of the court on the merits of the case.

¶ 18 The Tribunal also dismissed the Petitioners' s. 13 complaint (Tribunal Decision at [paragraphs] 210-236).

¶ 19 Section 13 of the Code provides as follows:

> 13 (1) A person must not
>
> ...
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the ... sex ... of that person....

¶ 20 The s. 13 complaint was dismissed as the Tribunal found that the Petitioners had not established a prima facie case of sex discrimination, under the terms of that section, for the following reasons:

1) As the City did not directly determine the classifications of the Petitioners, it cannot be responsible for differences in wages between the Petitioners and fire dispatchers (Tribunal Decision at [paragraph] 218);

2) The evidence failed to establish discrimination on the basis that civilianization of the Petitioners' work was tantamount to feminization (Tribunal Decision at [paragraph] 228); and

3) The evidence failed to establish that the classification system for the Petitioners' work discriminated on the basis of sex (Tribunal Decision at [paragraph] 233).

III. ISSUES

¶ 21 This application for judicial review of the Tribunal Decision was filed on November 21, 2001. The Petitioners allege that the Tribunal erred in law and jurisdiction in:

1) interpreting ss. 12 and 13 of the Code;

2) interpreting certain provisions of the Police Act;

3) determining factual issues, including the relevance of, weight to be accorded to, and inferences to be drawn from lay and expert evidence; and

4) applying ss. 12 and 13 of the Code to the facts at bar.

¶ 22 The main relief sought by the Petitioners is an order in the nature of certiorari quashing the Tribunal Decision and remitting the complaints back to the Tribunal with directions.

¶ 23 I would frame the issues as follows, for each complaint:

1. What is the appropriate standard of review?

2. Given that standard of review, should the Tribunal's decision be quashed and remitted back to the Tribunal with directions?

IV. ANALYSIS - SECTION 12

A. Position of the Parties and Analytical Approach

¶ 24 The complaint under s. 12(1) of the Code is that, because the female Petitioner Com Op I's are paid, on average, 40% less than the male Fire Department FD I's for substantially similar work, there is discrimination under one of the enumerated grounds.

¶ 25 The crux of the issue before the Tribunal was whether the Petitioners and the Fire Department communications operators have the same employer. The City asserts that they do not; that the Police Board, not the City, is the Petitioners' employer.

¶ 26 "Employment", and by reference "employ", are defined by s. 1 of the Code:

> "employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning;

¶ 27 Given the circumstances of the case at bar, this definition is not helpful. However, the Police Act, S.B.C. 1988, c. 53, s. 26(3)(a) (and its revised counterpart, R.S.B.C. 1996, c. 367, s. 26(3)(a)) (the "Police Act"), provides that every employee of a municipal police department, including the Petitioners, must be employees of the Municipal Police Board.

¶ 28 Section 26 states:

> 26 (1) A municipal police board must establish a municipal police department and appoint a chief constable and other constables and employees the municipal police board considers necessary to provide policing and law enforcement in the municipality.
>
> (2) The duties and functions of a municipal police

department are, under the direction of the municipal police board, to

(a) enforce, in the municipality, municipal bylaws, the criminal law and the laws of British Columbia,

(b) generally maintain law and order in the municipality, and

(c) prevent crime.

(3) Subject to a collective agreement as defined in the Labour Relations Code, the chief constable and every constable and employee of a municipal police department must be

(a) employees of the municipal police board,

(b) provided with the accommodation, equipment and supplies the municipal police board considers necessary for his or her duties and functions, and

(c) paid the remuneration the municipal police board determines.

(4) In consultation with the chief constable, the municipal police board must determine the priorities, goals and objectives of the municipal police department.

(5) The chief constable must report to the municipal police board each year on the implementation of programs and strategies to achieve the priorities, goals and objectives.

¶ 29 The Police Board derives its statutory authority from s. 23(1) of the Police Act and is constituted by the mayor of the municipal council, one person

appointed by that council and not more than five persons appointed after consultation with the Lieutenant Governor in Council.

¶ 30 The City has exercised its discretion pursuant to s. 23 of the Police Act to establish a Police Board. Therefore, it follows that all employees of the Vancouver Police Department are also employees of the Board.

¶ 31 However, the Tribunal did not end its inquiry there. The Tribunal stated that the purposes of the Code, as set out in s. 3, require a large, liberal and purposive interpretation of the Petitioners' complaints and that the 'employer issue' could not be resolved by simply relying on this technical provision of the Police Act (Tribunal Decision at [paragraphs] 28, 30-31). Instead, the Tribunal considered a variety of jurisprudence and addressed the issue of whether the Board and the City were co-employers. In the end, the Tribunal concluded that this was not the case.

¶ 32 Counsel for the parties have suggested two different analytical approaches to the determination of the appropriate standard of review.

¶ 33 The Petitioners advocate a two-stage analysis. First, they say the Court should review the 'legal test' used by the Tribunal to determine whether the City was the Petitioners' employer. This, say the Petitioners, is a question of law and must be decided on a standard of correctness.

¶ 34 The Petitioners submit that the Court should then apply the 'correct' legal test for employer to the facts of this case and review the Tribunal's decision as a question of mixed fact and law on a standard of reasonableness simpliciter.

¶ 35 All three Respondents disagree with this approach based on the recent decisions of the Supreme Court of Canada in Dr. Q v. College of Physicians and Surgeons of British Columbia (2003), 11 B.C.L.R. (4th) 1 (S.C.C.), 2003 SCC 19, and Law Society of New Brunswick v. Ryan, 2003 SCC 20.

¶ 36 The Respondents submit that the correct analytical approach is to articulate the issue under review and then apply a pragmatic and functional approach to determine the applicable standard of review for the matter as a whole, without parsing the issue into smaller questions of law, fact, and mixed fact and law, each with their own mini-standard of review.

¶ 37 For the purposes of the s. 12 complaint, the Respondents would frame the issue as a single question - "Who is the Petitioners' employer?" - and determine an overall standard of review on that basis.

¶ 38 For the reasons that follow, I prefer the Respondents' approach.

¶ 39 Three recent cases from the Supreme Court of Canada address the question of whether a Court may apply multiple standards of review to various portions of an administrative tribunal's decision.

¶ 40 In Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157, the issue arose in the context of a review of a decision of the Canada Labour Relations Board, upholding a complaint of unfair labour practice against the C.B.C.

¶ 41 Speaking for the majority, Iacobucci J. concluded (at [paragraphs] 48-49):

> As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate. However, this does not mean that every time an administrative tribunal encounters an external statute in the course of its

> determination, the decision as a whole becomes open to review on a standard of correctness. If that were the case, it would substantially expand the scope of reviewability of administrative decisions, and unjustifiably so. Moreover, it should be noted that the privative clause did not incorporate the error of law grounds, s. 18.1(4) of the Federal Court Act, R.S.C., 1985, c. F-7 (as amended by S.C. 1990, c. 8, s. 5). This tends to indicate that some level of deference should be provided.
>
> While the Board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole.

¶ 42 Madam Justice McLachlin (as she then was), however, dissented and asserted that each issue in the tribunal's decision should be subject to its own independent standard of review, to be determined with reference to the pragmatic and functional approach. She said (at [paragraphs] 103-104):

> I cannot agree, however, with the manner in which my colleague applies this [pragmatic and functional] test. He finds that the same standard of review - patent unreasonability - must apply globally to all issues, save for those which are clearly jurisdictional. While conceding that issues which are clearly jurisdictional or involve statutory interpretation must be judged by the more stringent standard of correctness, he nevertheless goes on to suggest that the standard for "the decision as a whole" must be patent unreasonability. I, on the contrary, see the functional test as

> question-specific. A single case may present several issues. On some, the legislator may have intended courts to defer to the Board; on others not. In my view, the functional test must be applied to each question which the Board considers, and the appropriate standard of review must be applied to its answers.
>
> The question-specific nature of the functional test for the standard of judicial review follows from the test itself. That test requires the reviewing court to consider: (1) the statute which empowers the board, including the purpose of the board, the scope of its powers, the breadth of language used and the presence or absence of a privative clause; (2) the board whose decision is impugned, including whether it possesses a developed jurisprudence, how its members are selected, how they participate in decision-making, and experience or context which gives them special advantages or insights; and (3) the nature of the problem under consideration, including whether it falls squarely or by implication within the powers of the board, whether its answer requires specialized knowledge, and whether it is a question of general application which a court is equally or better suited to answer ....
>
> [Emphasis added]

¶ 43 In addition, McLachlin J. stated (at [paragraph] 108) that the analysis ought not to be altered merely because an issue is "part of the substance of the dispute ... [or] by that fact that it may be 'preliminary' or jurisdictional". However, there was no discussion of what might properly constitute a separate "issue" or "question".

¶ 44 In Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249, 2002 SCC 11, the Court considered a review of a decision of the Judicial

Council of New Brunswick recommending that the Appellant, a Provincial Court Judge, be removed from her office due to improper conduct.

¶ 45 Two separate issues arose on judicial review: first, whether the Judicial Council had properly interpreted a provision of the Provincial Court Act, R.S.N.B. 1973, c. P-21; and second, whether the Judicial Council's ultimate decision, in light of that interpretation, was justified. The provision of the Provincial Court Act related to whether the Judicial Council was bound by findings of fact made by an Inquiry Committee. The ultimate decision was whether, given a finding of improper conduct, the Judge should be removed.

¶ 46 Madam Justice Arbour, writing for a unanimous Court, characterized the first issue as a question of law and the second as a question of mixed law and fact. After considering various factors applicable to the pragmatic and functional analysis, (U.E.S., Local 298 v. Bibeault, [1988] 2 S.S.R. 1048) Arbour J. concluded that the standard of review for the issue of statutory interpretation was reasonableness simpliciter, but that the standard of review for the ultimate decision was patent unreasonableness.

¶ 47 In reaching this conclusion, the Court did not comment on the decision in Canada Broadcasting Corp., supra.

¶ 48 Finally, in Canadian Union of Public Employees v. Ontario (Minister of Labour), 2003 SCC 29, C.U.P.E. requested judicial review of the Minister's appointment of four retired judges to chair arbitration boards pursuant to s. 6(5) of the Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H-14. Here the Court was not concerned with reviewing the decision of an administrative tribunal, but its well established law that the pragmatic and functional approach also applies to judicial review of ministerial decisions (see Dr. Q, supra at [paragraph] 21).

¶ 49 Justice Binnie, speaking for a majority of six judges in C.U.P.E., commented (at [paragraph] 97) that:

> Although the net result of a s. 6(5) appointment is the naming of a particular individual as a chairperson, the appointment is inevitably the product of a number of issues or determinations, some of them having to do with procedural fairness (e.g., do I first have to consult with the parties?), some of them legal (e.g., to what extent is my choice constrained by HLDAA?), some of them factual (e.g., what qualifications am I looking for?), and others of mixed fact and law (e.g., is this individual "qualified" within the range of choice permitted to me by HLDAA?). The Court's task on judicial review is not to isolate these issues and subject each of them to differing standards of review. The unions' attack is properly aimed at the ultimate s. 6(5) appointments themselves. Nevertheless, as a practical matter (and practicality is a welcome virtue in this area of the law), it is convenient to group these issues in order to facilitate the judicial review of the s. 6(5) decision.
>
> [Emphasis added]

¶ 50 At first blush, this statement of law appears to be in conflict with the decision in Moreau-Bérubé, supra; however, Justice Binnie distinguished the two cases on the following grounds (at [paragraph] 155):

> In [Moreau-Bérubé], the decision maker's interpretation of its enabling statute had emerged as a distinct issue before all levels of court, and it was convenient to deal with the legal determination and the ultimate decision separately. Here, these issues are bundled.

¶ 51 Justice Bastarache, in dissent, disagreed with the majority's application of the pragmatic and functional analysis. He asserted (at [paragraph] 7) that while

> some provisions within the same statute may require greater deference than others, depending on the factors ... It does not follow, however, that exercise of a discretionary power under a single provision ... should be viewed as "the product of a number of issues or determinations" ... with the decision maker's statutory interpretation singled out for closer scrutiny.

¶ 52 However, Justice Bastarache did not go so far as to conclude that Canadian Broadcasting Corp., supra, was wrongly decided. He distinguished the two cases by pointing out that in Canadian Broadcasting Corp., the decision of the tribunal was based on its interpretation of an external statute about which it had no inherent expertise, whereas in C.U.P.E., the Minister's decision was made solely under the authority of enabling legislation and, more importantly, should not be viewed as a multiplicity of preliminary determinations leading to a final decision. Justice Bastarache's dissent does not address the impact, if any, of the Moreau-Bérubé decision.

¶ 53 Three possible analytical approaches arise from these judgments. At the outset I note that for each, the appropriate standard of review is always determined with reference to the factors of the pragmatic and functional approach.

¶ 54 The first approach requires Courts to "operate on the assumption that they can isolate a single decision to be reviewed. They can determine one standard of review for that decision" (C.U.P.E., supra at [paragraph] 12, per Bastarache J.).

¶ 55 The second approach mandates that an overall standard of review be selected, but that preliminary legal determinations, such as issues of statutory interpretation, be scrutinized and, if incorrect, factored into the overall assessment of the reasonableness or patent unreasonableness of the decision (C.U.P.E., supra, per Binnie J.; Canadian Broadcasting Corp., supra, per Iacobucci J.; and most recently Starson v. Swayze, 2003 SCC 32 at [paragraph] 24).

¶ 56 The third approach allows Courts to employ separate standards of review for distinct issues in a single case. (Moreau-Bérubé, supra; Canadian Broadcasting Corp., supra, per McLachlin J.)

¶ 57 In this case, as in C.U.P.E., the exercise of statutory interpretation is 'bundled' inextricably with the ultimate issue. Determining who the 'employer' is, is not a pure question of law. Rather, it is very fact-specific. In enacting the Code the legislature used the term "employer" but chose not to define the term, thus leaving its definition open to fit the circumstances of each case in a manner that is consistent with the purposes of the Code. I doubt the plausibility of constructing a definition of 'employer' that would adequately apply to every case.

¶ 58 The case at bar is also distinguishable from Moreau-Bérubé, supra. There, the two issues were discrete - one was procedural, concerning whether the Judicial Council was bound by the findings of fact made by the Inquiry Committee; the other dealt exclusively with the appropriate remedy. Both issues would also have been determinative of the case. Here, there is really only one issue: whether the City is the Petitioners' employer. Accordingly, it would be incorrect to subject the various steps of the analysis to differing standards of review as though they were isolated issues. As will become apparent below, attempting to articulate a definition of 'employer' as a discrete question of statutory interpretation is, I think, an unnecessarily artificial exercise.

¶ 59 I would mention at this stage that the nature of the problem, which is, in part, a question of statutory interpretation, plays a role in determining the overall standard of review by which this Court must examine the Tribunal's decision. I turn now to determining that standard of review.

B. Standard of Review

¶ 60 The Supreme Court of Canada has endorsed a pragmatic and functional approach to the determination of the proper standard of review of an administrative tribunal's decisions. The inquiry is issue specific and focuses on the extent to which the legislators intended the matter at hand to be adjudicated exclusively by the Tribunal. There are four factors that must be considered in determining the proper standard of review:

(1) Privative Clause

Legislative intent demonstrated by words within the Tribunal's enabling statute and, most importantly, the presence or absence of a privative clause;

(2) Expertise

Whether the Tribunal has any particular expertise relative to the Courts with respect to the question under review;

(3) Purpose of Statute

The purpose of the Tribunal's enabling statute, and whether that purpose lends itself to less or more deference; and

(4) Nature of the Problem

The nature of the problem under review, and whether it

constitutes a question of law, fact or mixed law and fact.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 at [paragraphs] 25-38;
Canada (Director of Investigation and Research, Competition Act v. Southam Inc., [1997] 1 S.C.R. 748 at 766.

¶ 61 There are only three standards of review: correctness, reasonableness and patent unreasonableness: Southam, supra at 776-780 and Ryan, supra at [paragraphs] 23-26.

¶ 62 The correctness standard allows the Court to intervene if it disagrees with the decision under review on a point to which this standard applies.

¶ 63 The reasonableness standard shows considerable deference to the expertise of the decision-maker so long as the decision is logically supportable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. The defect may be in the evidentiary foundation itself or in the logical process by which conclusions are drawn from that foundation.

¶ 64 The reasonableness standard is closely akin to the clearly wrong standard applied by appellate courts in reviewing fact-finding by trial judges. This standard implies a rigorous test; the evidence, viewed reasonably, must be incapable of supporting the decision-maker's findings or inferences, but this test does not go so far as the standard of patent unreasonableness.

¶ 65 Patent unreasonableness is the most deferential standard of review. The difference between the unreasonable and the patently unreasonable review standards has been said to lie in the immediacy or obviousness of the defect. The patently unreasonable standard is frequently applied to review of decision of tribunals whose decisions are protected by full privative clauses.

Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941 at 963;

Southam, supra at 777;

Moreau-Bérubé, supra at [paragraph] 69.

1. The Presence or Absence of a Privative Clause or Statutory Right of Appeal

¶ 66 The Code does not contain a privative clause or a statutory right of appeal. The absence of a privative clause may in some cases suggest that a more searching, less deferential standard is appropriate. The absence of a right of appeal suggests a more deferential standard. In this case I find the absence of both a privative clause and right of appeal to be a neutral factor in the determination of the standard of review.

Moreau-Bérubé, supra at [paragraph] 42;

Pushpanathan, supra at [paragraph] 30;

Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commission) (2001), 33 Admin. L.R. (3d) 27, 201 BCSC 101 at [paragraph] 24.

2. Relative Expertise

¶ 67 The Petitioners argue that this factor suggests a less deferential approach on the basis that Human Rights Tribunals have no particular expertise in the determination of legal questions of general application, including matters of mixed fact and law. In support of this submission, the Petitioners rely on Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554 at [paragraphs] 44-45. In particular they point to this statement by Lamer J. (as he then was) at [paragraph] 45:

But a human rights tribunal does not appear to me to call for the

> same level of deference as a labour arbitrator. A labour arbitrator operates, under legislation, in a narrowly restricted field, and is selected by the parties to arbitrate a difference between them under a collective agreement the parties have voluntarily entered. As well, the arbitrator's jurisdiction under the statute extends to the determination of whether a matter is arbitrable. This is entirely different from the situation of a human rights tribunal, whose decision is imposed on the parties and has direct influence on society at large in relation to basic social values. The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

¶ 68 The Petitioners acknowledge that deference must be shown to the Tribunal's fact-finding expertise, but submit that in matters of statutory interpretation and the application of societal values, such as here, the Tribunal's conclusions must be reviewed on a standard of correctness (see University of British Columbia v. Berg, [1993] 2 S.C.R. 353 at 368-369).

¶ 69 In Dr. Q, supra, the Chief Justice stated at [paragraph] 28:

> Greater deference will be called for only where the decision making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise. Thus, the analysis under this heading has three

> dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.
>
> [Internal citations omitted]

¶ 70 Here the Tribunal comprised of one member. He is a permanent member of the Human Rights Tribunal. That is to say his full-time, permanent employment is the hearing of human rights cases. The creation of the Tribunal as a permanent adjudicative body under the Act is itself a legislative statement of expertise. See, for example Canada (Director of Investigative and Research) v. Southam Inc., supra at 776:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage judges do not.

¶ 71 Yet, human rights cases do not engage the type of technical expertise which is said to be present in securities regulation hearings (such as those at issue in Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557), or combines investigation hearings (such as in Southam, supra).

¶ 72 For this reason, the general tenor of the Courts' approach to human rights tribunal expertise has been less deferential. As Bastarache J. stated in Barrie PubliC Utilities v. Canadian Cable Television Assn., 2003 SCC 28 at [paragraph] 85, human rights is an "area of law where the tribunal has been held to have no greater expertise than the court...". This view has been expressed in a number of Supreme Court of Canada decisions. (See Berg, supra, and Mossop, supra, Gould v. Order of Pioneers, [1996] 1 S.C.R. 571 at [paragraph] 46; and Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321).

¶ 73 A number of academic commentators have criticized this approach (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed. The Province of Administrative Law (1997), at p. 279; and A. Harvison Young, "Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference" (1993), 13 Admin L.R. (2d) 206), and indeed the Supreme Court has suggested that the precise degree of deference to be accorded to a human rights tribunal may still be open to question (Pushpanathan, supra, at [paragraph] 46).

¶ 74 However, it appears that greater deference will be accorded to a tribunal's decision where the nature of the inquiry falls within the tribunal's expertise relative to the court's - namely, fact-finding and drawing evidentiary inferences in respect of human rights issues: Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at [paragraph] 29; Berg, supra, at 370.

¶ 75 The task in this case is drawing evidentiary inferences in respect of human rights issues. Determining whether the City was the Petitioners' employer or co-employer is not merely an exercise in applying common-law indicia of employment. Rather, the task is to determine whether the functions performed by the City constitute indicia of employment within the context of the Code. On the particular facts of this case the expertise of the Tribunal in drawing evidentiary inferences from findings of fact would suggest more deference.

3. The Purpose of the Statute

¶ 76 The purposes and primacy of the Code are established by s. 3 and s. 4:

> 3. The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British

Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code;

(f) to monitor progress in achieving equality in British Columbia;

(g) to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f).

4. If there is a conflict between this Code and any other enactment, this Code prevails.

¶ 77 At [paragraphs] 31 and 32 of Dr. Q, the Chief Justice stated:

> A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court.
>
> ...
>
> In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference. The more the legislation approximates a conventional judicial paradigm involving a pure lis inter partes determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show.

¶ 78 Human rights legislation is aimed at the elimination of discrimination. It is remedial in nature, seeking to provide relief for the victims of discrimination and to educate, as opposed to punish, those who discriminate. Its goals include ameliorating the effects of discrimination as well as preventing future discrimination, both at individual and systemic levels. Human rights legislation is "quasi-constitutional" and "fundamental" law that declares public policy regarding matters of general concern. The proper interpretive approach to human rights legislation must seek to fully implement its purposes rather than to minimize and enfeeble its effect.

> B. v. Ontario (Human Rights Commission) (2002), 219 D.L.R. (4th) 701 (S.C.C.) at [paragraphs] 44-45, 2002 SCC 66;
> C.N.R. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114 at 1133-1136;
> Ontario (Human Rights Commission) v. Simpsons Sears Ltd., [1985] 2 S.C.R. 536 at 546-547; and
> Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 at 89-91.

¶ 79 In Pushpanathan, supra at [paragraph] 36, the Supreme Court of Canada observed that more curial deference may be appropriate if the nature of the function involved is polycentric - requiring a delicate balancing of a variety of interlocking and interacting interests and considerations - as opposed to bipolar, conceived primarily in terms of establishing rights as between parties.

¶ 80 However, the presence of bipolar versus polycentric elements is not a conclusive factor in the standard of review analysis.

¶ 81 Furthermore, a dispute resolution process that is framed in bipolar terms may still involve significant polycentric elements. This is certainly true of adjudication under human rights legislation, which is specifically intended to

address not just individual and past discrimination, but also systemic and future discrimination.

¶ 82 Here the purpose of the statute as it applies to this case is adjudicative, and would therefore be a factor weighing in favour of less deference.

4. Nature of the Problem

¶ 83 At [paragraph] 34 of Dr. Q, the Chief Justice states:

> When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value ... Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

¶ 84 In Southam, supra at [paragraph] 35, Iacobucci J. described the distinction between questions of law, fact, and mixed law and fact, as follows:

> ... questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed fact and law are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question of what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I

> recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

¶ 85 At [paragraph] 37, Iacobucci J. went on to explain that the more a decision about whether facts at issue satisfy a legal test is tied to a particular set of circumstances, then the more likely the decision involves a question of mixed fact and law, rather than pure law:

> By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R.P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

¶ 86 It has also been made clear, in Pushpanathan, supra at [paragraph] 33, that the nature of the question under review and the criteria of expertise are closely interrelated factors. Factual findings and inferences generally attract a highly deferential standard of judicial review. Depending on the presence of other

factors - i.e., privative clause, tribunal expertise, statutory provisions governing scope of review or appeal - a deferential standard can also apply to findings of law or mixed law and fact. (See, for example Canada (Attorney General) v. Public Service Alliance of Canada, [2000] 1 F.C. 146 (T.D.))

¶ 87 In this case, the question before the Tribunal was one of mixed fact and law, and the result depended heavily on the various findings of fact and inferences drawn from the evidence. Moreover, the result of the Tribunal's decision is of very little general precedential value, given the unique circumstances surrounding the relationship between the various parties. Consequently, this factor suggests a more deferential standard of review.

¶ 88 To summarize: one factor, the wording of the statute, is neutral; one factor, the purpose of the statute, suggests a less deferential review; two factors, the relative expertise of the human rights tribunal and the nature of the question, suggest a somewhat greater degree of deference. Of these factors, I find that the most compelling in this case is the nature of the question which, as I have described above, is one of mixed fact and law. None of the four factors are determinative of the standard of review and each must be weighed accordingly against the others. I conclude that the proper standard of review in this case is reasonableness.

¶ 89 I turn next to an examination of whether the findings of the Tribunal, when measured against a reasonableness standard, ought to be disturbed. Here, I should mention that the only remedy available is to quash the decision and return the complaints, with directions, to the Tribunal for reconsideration. It would not be appropriate on judicial review to substitute different findings for those of the Tribunal.

C. Application of Reasonableness Simpliciter Standard to the Tribunal's s. 12 Decision

¶ 90 How does a reviewing court apply the standard of reasonableness? In Ryan, supra at [paragraph] 47, Iacobucci J. said:

> The standard of reasonableness basically involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach in Pushpanathan, supra, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage de novo in its own reasoning on the matter.

¶ 91 At [paragraph] 50, he contrasted the reasonableness review with the correctness review:

> At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

¶ 92 And at [paragraphs] 55-56 he continued:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, supra, at [paragraph] 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see Southam, supra, at [paragraph] 79).
>
> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> [Emphasis added]

¶ 93 The errors which the Petitioners submit were made by the Tribunal may be grouped roughly as follows:

* The Tribunal misapprehended the evidence as to who had responsibility for collective bargaining and classification of positions.
* The Tribunal misapprehended the evidence as to the role of the Police Board and its ability to remedy any employment

discrimination because of its complete financial dependence on the City of Vancouver.

* The Tribunal did not have due regard to the purpose of the Human Rights Code when it focused its enquiry about the identification of the employer principally on responsibility for collective bargaining and classification. The Code requires a much more liberal and purposive view of who the employer is and, further, the Tribunal failed to consider whether the Police Board and the City of Vancouver were, for the purposes of the Code, both employers of the Petitioners.

¶ 94 I recognize that the Petitioners made many more specific points in their submissions but I believe the preceding sums up their argument.

1. The Tribunal Misapprehended the Evidence as to Who Had Responsibility for Collective Bargaining and Classification of Positions

¶ 95 With respect to the determination of wages, one of the Tribunal's critical findings was that the Board was responsible for compensation practices, including determining the communications operators' wages.

¶ 96 Paragraph 96 of the Tribunal Decision states:

> Communications operators' wages are determined through a combination of collective bargaining and the job classification process. I find that the Board is responsible both under the Police Act and in practice for the positions taken by the employer in collective bargaining.

¶ 97 At [paragraph] 113, the Tribunal stated:

> Responsibility for compensation practices rests primarily with the Board. Under the Police Act, the Board is responsible for remuneration of its employees.

¶ 98 And at [paragraph] 114, the Tribunal stated:

> However, the City was required to ratify the Board's collective agreements after the Board signed them. That is not surprising. The City clearly has an interest in the outcome of bargaining involving the Board: it must pay the bill. This is not a sufficient basis from which to conclude that the City was responsible for compensation practices in the way that an employer would be.

¶ 99 The Petitioners say that these findings regarding responsibility for compensation practices are clearly wrong.

¶ 100 The Petitioners say that if the Tribunal ignored or failed to consider evidence or wholly ignored or failed to deal with conflicting evidence on a major issue, then in those circumstances, the decision should be set aside (See Danson v. Alberta (Labour Relations Board) (1983), 4 Admin. L.R. 89 (Alta. Q.B.); SEIU, Local No. 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382).

¶ 101 The Petitioners say the Tribunal relied on the evidence of Ms. Watson, a member of the Police Board, but made no mention of the conflicting evidence of the Chair of the Police Commission, Ms. Askew, or the evidence of former Chief Constable Stewart.

¶ 102 At [paragraph] 96, under the heading "Summary on Compensation Practices", the Tribunal says:

> In summary, the Board carries the primary responsibility for compensation practices. The City's involvement in these activities

relates primarily to its overall financial responsibility.

[Emphasis added]

¶ 103 At [paragraph] 121, the Tribunal appears to consider the joint or co-employer option, stating:

> In my opinion, the City is not the Complainants' employer, either alone or as a co-employer with the Board. I reach that conclusion for the following reasons: first, based on the criteria described above, and giving greatest consideration to responsibility for compensation practices, I find that the Board is the employer. The Board is primarily responsible for collective bargaining with and for determining the job classifications of communications operators. The City has little or no influence on the classification of the positions or in collective bargaining related to the communications operators' positions. Therefore, the City would not be able to independently comply with a s. 12 remedy. Second, the Police Act unambiguously describes employees of the police force as employees of the Board. Under s. 4 of the Code and the principles of statutory interpretation discussed above, it is open to me to find an employer for the purposes of the Code that is different than the employer under the Police Act. However, taking into account the purposes of the Code, I do not reach a different conclusion. Section 12 is not pay equity legislation. In the ONA case the majority relied on the purpose of the Pay Equity Act - "to redress systemic gender discrimination and compensation for work performed by employees in female job classes" - to justify crossing bargaining unit boundaries to find a male comparison group. Although it is appropriate to apply a broad and liberal interpretation to the meaning of "employer" within the Code, the purpose of s. 12, even

> when read in light of s. 3 of the Code, is more constrained than that of the Pay Equity Act. In my opinion, it is not necessary to find the City to be the employer to ensure consistency with the purposes of s. 12.

¶ 104 Ms. Braha, for the Petitioners, argues that the City of Vancouver and the Vancouver Police Board employer bargaining proposals, for the purposes of collective agreement negotiations and ultimate collective agreements, were identical in every year except one. She says this is evidence of the fact that the Board was not independent of the City of Vancouver for the purposes of collective bargaining. She says the Tribunal ought to have drawn an inference that the City controlled or influenced collective bargaining from the evidence of the similarity between the collective agreements. For example, the pay scale upon which City employees' positions are classified is the same pay scale upon which Board employees are paid.

¶ 105 The evidence of Mr. Graham, the GVRD negotiator who negotiated on behalf of the City of Vancouver and the Police Board, supports the Tribunal's finding that the Police Board bargained independently of the City of Vancouver. He also testified that the City has nothing to do with the preparation of the Police Board bargaining proposals. Similarly, the evidence of Mr. Dobell, the City of Vancouver manager, supports the finding of independence of the Police Board. Mr. Dobell testified that the City council is "stuck paying the bill but don't have control" over spending. With respect to salary and classification services he testified that the City has an advisory role and the City acts on behalf of the Board. He described the Police Board as "autonomous".

¶ 106 The Petitioners rely on the evidence of Mr. Bradbury, the VMREU negotiator, concerning whether the Police Board was at the bargaining table during collective bargaining for City employees. Mr. Bradbury said, in part:

> Q. All right. Now, I want to ask you; when you agree on a deal,

when you and Malcolm Graham actually shake hands when you have reached an agreement, has it been your understanding that you were agreeing to a deal that included the Vancouver Police Department employees?

A. Oh. If it wasn't specific, it was certainly a "me too". There was a couple of jurisdictions. White Rock would be one, the Vancouver Public Library when they were out or in or whichever -- I mean, it was -- I'm just trying to think of the other one that was out. It was clear that these would be "me too" agreements that would be done in -- by the next day, sort of thing, or within a very short period. Before the ratification process was completed.

And those groups would be required -- the ceiling and the floor had already been established. They weren't going to get anything more or anything less. It was here's the deal, ink it and move on. If there was a couple of local issues, they probably had sorted those out. They were stapled on and inked the deal. There was no mystery about that. Everybody knew it.

¶ 107 The Petitioners argue that Mr. Bradbury's evidence was ignored by the Tribunal. The Tribunal did not specifically mention the evidence of the union negotiator, Mr. Bradbury. The Tribunal found that the Police Board was ultimately responsible for negotiations with its civilian employees, including the Petitioners. Mr. Bradbury's evidence is not inconsistent with the Tribunal's finding. Moreover, there was one period in which the VMREU decided to negotiate its own agreement with the Board, which is an indication that the Board did have the authority to do so, if it chose.

¶ 108 The thrust of Mr. Bradbury's evidence is that while he did not have formal or written instructions to negotiate for the civilian police employees, he and his counter-parts with whom he negotiated were well aware that the civilian police employees would be governed by the terms of the collective agreements already negotiated with the City of Vancouver employees. He testified that the Police Department was not part of the regional bargaining conducted by the labour relations department of the GVRD. He also acknowledged that the Police Board has always maintained the position that it was a separate employer.

¶ 109 Former Chief Constable Stewart testified that his department was responsible for negotiating collective agreements for the Police Department civilian employees union. He testified that the only direct link with the City of Vancouver and the Police Department was funding. He testified:

> . . . an operation as important as the Police Department I don't think could function properly with two, say, executive authorities. I think it's clear that the independence of police forces is paramount, and the Act makes it clear that employees are employees of the Board. If there weren't operational - I think it would be fraught with operational problems.
>
> I certainly never viewed any civilian employee as being - working for some other organization, just as I would request in my annual budget an additional number of sworn members as required, I would request an additional number of civilian members.

¶ 110 Mr. Graham testified that he is an employee of the Greater Vancouver Regional District, known as the GVRD. His job is to manage the negotiations on behalf of the GVRD members. The various cities or municipalities in the Lower Mainland are members of the GVRD. The Vancouver Police Board is not a member, but various boards and commissions use the expertise and services of the GVRD labour relations bureau to provide professional negotiators. In that

capacity, the Vancouver Police Board engaged Mr. Graham to negotiate a collective agreement with the VMREU to cover the civilian employees of the police force. He testified that his negotiation is done on behalf of the Police Board even though it is not a member of the GVRD. He testified that the police civilian employees' collective agreement may have similar provisions to those contained in the regional agreements but they are bargained separately.

¶ 111 The Tribunal heard evidence from Mr. Bradbury over the course of three days but clearly did not accept the Petitioners' argument that the inference which ought to be drawn from Mr. Bradbury's testimony was that the fact the Board reached similar or identical agreements to the City of Vancouver meant that it was not independently responsible for collective bargaining for its civilian employees. I conclude that there was evidence before the Tribunal on which it could have reasonably and logically reached the conclusion, and did reach the conclusion, that the Board, and not the City, was responsible for collective bargaining.

¶ 112 I turn now to the Tribunal's finding that the Board, and not the City, was responsible for employee classification. At [paragraph] 117, the Tribunal found:

> City staff were involved in evaluating the rates of pay for positions within the police department, including those of the communications operators. However, on the preponderance of the evidence, I find that they were doing so on behalf of the Board. They took their instructions from police staff and reported to the Board. It was the Board that decided whether to approve the proposed classifications and rates of pay. Moreover, the job evaluation division was funded by the GVRD. Although the communications operators' positions were created by City Council, the Council did not consider the specifics of the classifications.

¶ 113 The Petitioners argue that:

* At [paragraph] 117 of the Decision, the Tribunal appears to base its entire conclusion on the classification portion of the Decision on four main facts:

    * City staff took instructions from police staff and reported to the Board;
    * The Board decided whether to approve the proposed classifications and rates of pay;
    * The job evaluation division was funded by the GVRD; and
    * City council did not consider the specifics of classifications.

* The Petitioners submit that the Tribunal failed to consider the breadth of evidence, including much documentary evidence, which shows the City's controlling and determining role in classification issues.

[Emphasis added]

¶ 114 The Tribunal found that the job evaluation and classification function was performed by the City on behalf of the Board. The Petitioners argue that the evidence proved that the City performed the job evaluation and classifications independently of the Board; in other words that the City had control over those processes. The City Manager did have an independent role to perform regarding the classification of jobs under the collective agreement. Where there was a dispute under the collective agreement regarding the appropriate classification of a position, the City Manager was named in the collective agreement as arbiter, the first step in the grievance process. The Tribunal did not consider this appointment to be proof of the City's independence, but rather a method of

dispute resolution adopted by the parties to the collective agreement. I find that is a reasonable conclusion on his part.

¶ 115 The Petitioners point to the 1991 - 1993 Collective Agreement between the Police Board and the VMREU as evidence of the controlling function of the City. Under the heading "Reclassification of Positions and Classification of New Positions", the agreement provides that requests for reclassification may come from the Chief Constable, employees, or the union. The City Manager is authorized to approve a reclassification report once it has been agreed to by the Department Head (the Chief Constable or his designate) and the Union. If the reclassification involves a retroactive salary increase or the creation of a new permanent position, the increase must be approved also by City Council.

¶ 116 At [paragraph] 117, the Tribunal said that the City was involved in evaluating the rates of pay for the communications operators but that the City was doing so on behalf of the Board. At [paragraph] 121, the Tribunal said "The City has little or no influence on the classification of the positions...."

¶ 117 It is not the function of this Court to re-weigh the evidence. There is evidence accepted by the Tribunal that can reasonably support these findings of fact.

¶ 118 Furthermore, Mr. Zora's evidence supports the Tribunal's findings. Mr. Zora was responsible for classification either directly or in a supervisory capacity for most of the time covered by the Petitioners' complaints. He testified about job classification and evaluation. In the years that are the subject of the Petitioners' complaints, the Police Department did not have a human resources or personnel department. Rather, it used the resources of the City of Vancouver and later the GVRD. Mr. Zora testified that he acted on requests from the police administration to undertake certain classification work concerning the communications operator positions. Mr. Zora's department drafted the job specifications and rates of pay, which were then sent to the VMREU and the Police Board for approval. Then,

they were processed at the City for budget and payroll purposes. City Council does not approve the class specifications but does approve the funding to create additional positions.

¶ 119 Mr. Dobell, the City Manager, testified that the Board has the final say on classification work done for it.

¶ 120 On the whole, I cannot say that the Tribunal's finding in respect to responsibility for classification and job evaluation is unreasonable. The relationship between the Board and the City is complex. The Tribunal found that the City's responsibility stemmed from its role as a funder and a service provider, but that it was not the controlling mind in respect to compensation and classification. However, below I consider whether the City's overall responsibility for funding ought to have been given consideration by the Tribunal.

2. The Tribunal Misapprehended the Evidence as to the Role of the Police Board and its Ability to Remedy Any Employment Discrimination Because of its Complete Financial Dependence on the City of Vancouver

¶ 121 At [paragraph] 66, the Tribunal found as follows:

> I find that the City has overall financial responsibility for the communications operators in that the Board is economically dependent on the City for its funding. The Board is legally responsible for the preparation of its budget. In practice, that responsibility is largely delegated to the chief constable and his staff to prepare in consultation with City officials. The City controls the size of the Board's budget, however, the Board, through its staff, has considerable independence to move funds within the budget. The possibility of taking disputes over funding to the Police Commission gives the Board a degree of independence, at least in

> theory that is not shared by other municipal departments. That right has never been used, so I cannot say whether the right gives any real independence to the Board on issues related to its overall budget.

¶ 122 At [paragraph] 112, under the heading "Conclusion on the Employer Issue", the Tribunal found:

> There is a clear interdependency between the Board and the City. The City is responsible for financing the operations of the police both under the Police Act and in practice. The Board is responsible for preparing a budget; however, that is actually done by staff of the police department in consultation with staff of the City and within parameters set by the City. The Board itself plays a very small role in the budget process. It is significant that, unlike other City departments, the Board has an external avenue to resolve budgetary disputes with the City: it can take the issue to the Police Commission.

¶ 123 With respect to the Tribunal's finding at [paragraph] 66 that "through its staff [the Board] has considerable independence to move funds within the budget", the Tribunal misapprehended the evidence. While the Tribunal is correct that the Police Department has independence to move small amounts of funds within the budget, that finding is irrelevant to the inquiry as to who has financial responsibility for remuneration of the Petitioners, which is part of the inquiry as to who has the power to remedy the discrimination, if any.

¶ 124 Former Chief Constable Stewart testified that once the budget was approved by the Board, and then by City Council, the Police Department could only move small amounts from item to item. He said "small - its, you know, a couple of thousand here, a couple of thousand there would be - not a $35,000 - or $50,000-a-year position". Stewart also testified about the process for

approving a supplementary budget. It, too, involved justifying the need for additional money to City Council and gaining approval for the additional money from City Council.

¶ 125 Mr. David Fairey, an expert labour economist, was asked by the Petitioners to calculate the total hourly compensation differential between the Police and Fire Department communications operators. Although his opinions on other matters were not accepted by the Tribunal, these particular calculations are not in dispute. The differential in 1989 averages about $18,000 over Steps 1, 3, and 5, for each Level 1 operator, and rises to average about $28,500 over Steps 1, 3 and 5 by 1996. There were about 70 Level 1 operators. I was told by counsel that the Police Board's annual budget in 1995 was between $98 and $99 million. This year it is $140 million. The cost of correcting the wage discrimination alleged by the Petitioners for about 70 (as at 1994) Communication Operators is, according to Mr. Fairey's calculations, well in excess of $1 million per year.

¶ 126 As an example of an authorization payment for a large salary increase, in 1990 an arbitration award increased the pay grades for the Communications Operators. The annual recurring cost was calculated then at $344,737.00. The City Manager authorized the expenditure and noted on a memorandum to the City controller that only an information report to City Council was necessary.

¶ 127 The Tribunal noted that disputes about money between the City and the Board could be taken to the Police Commission as a form of arbitration. The Police Commission has, to date, never been asked to rule on such a dispute. Ms. Askew, the Chair of the Police Commission and a member of the Police Board, expressed some doubt as to the authority of the Police Commission to order the City to make a particular payment. Nevertheless, the Tribunal found that the City's status was similar to that of the government funding an independent agency. The agency is completely financially dependent on the government but retains a degree of autonomy. Similarly, here the Tribunal found the Board was

autonomous despite its financial dependence. Below I will consider whether this finding is reasonable, given the importance of a large, liberal and purposive interpretation of the Code. I note in passing that both the City and the Board have been aware of the Petitioners' complaint about the wage discrepancy between Fire and Police Communication Operators since about 1986.

3. The Tribunal Did Not Have Due Regard to the Purpose of the Human Rights Code When It Focused its Enquiry about the Identification of the Employer Principally on Responsibility for Collective Bargaining and Classification

¶ 128 In order to provide some context for this analysis, I will describe legal tests for determining who the employer is, as articulated by the Tribunal, the Petitioners, and the Respondents.

¶ 129 The Tribunal stated at [paragraph] 55:

> Section 12 of the Code is an equal pay provision in a human rights statute. Its purpose is to eliminate sex-based wage discrimination. Given the remedial nature of the Code, the "employer" for the purpose of this section must be an entity capable of eliminating the discriminatory wage, if one is found to exist. In determining who is the Complainants' employer, I will consider the indicators suggested in the ONA case, as modified by the Barrie decision. That is, for my purposes, the most important element is the entity responsible for compensation practices and the valuing of the Complainants' work because this means it would be capable of eliminating any wage gap that may be found to exist. The other factors are relevant considerations and may, in some cases, carry greater weight. However, in this case, the most important question to ask is who can provide a remedy to the Complainants if their complaint is substantiated, not who ultimately pays the bill.

¶ 130 In their brief, the Petitioners summarize what they say is the correct legal test suitable for determining whether the City of Vancouver was the employer:

> In conclusion, the petitioners submit that in determining the test for who was the employer, the Tribunal should have accorded legal significance to the following elements including:
>
> (a) whether the entity was capable of and/or did perform employer functions;
> (b) who actually performed employer functions, including paying wages and benefits, human resources, budgeting, police direction, classifications and collective bargaining;
> (c) whether the entity held itself out to third parties as the employer;
> (d) whether the entity withheld and remitted income taxes of the employees;
> (e) did the entity enter into agreements that bound or affected the employees and/or their workplace;
> (f) did the entity have a reviewing role regarding the workplace;
> (g) did the entity use, depend and rely on the work; and
> (h) what were the legal obligations of the entity regarding the work and/or the employees.

¶ 131 The Petitioners further submit that these elements are consistent with the criteria set out in human rights jurisprudence and give effect to the purposes of the Code.

¶ 132 The Respondent Board (with whose submissions the City of Vancouver agrees) says that the Tribunal's selection of employer criteria from the ONA,

infra, case as modified by the Barrie, infra, decision was the correct analytical framework to decide this case.

¶ 133 In Ontario Nurses Association v. Haldimand - Norfolk (Regional Municipality), [1989] O.P.E.D. 3 at [paragraph] 51, the Ontario Pay Equity Tribunal applied the following criteria:

1. WHO HAS OVERALL FINANCIAL RESPONSIBILITY? Indicia of this test include: Who has responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the Act? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?
2. WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES? The indicia for this criteria include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in the non-unionized setting?
3. WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE? Within the test the following are helpful indicia: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensable? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees perceptions of who is the employer?
4. WHAT IS MOST CONSISTENT WITH ACHIEVING THE

> PURPOSE OF PAY EQUITY ACT? If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purpose and objectives of the Pay Equity Act, 1987.

¶ 134 In Barrie (City) v. Canadian Union of Public Employees Local 2380 (CUPE), [1991] O.P.E.D. 41, the four-part ONA test was modified. At [paragraph] 33 of the Vice-Chair's decision, the Pay Equity Tribunal stated:

> What we have set out, therefore, is a scheme for applying the tests set out in [ONA] within the framework of the legislation. The Tribunal should start with a identifying [sic], where possible, the parties to the existing collective bargaining or employment relationship. The Tribunal must then determine if the employer in that relationship controls the compensation practices and the valuing of work. The first two tests and the third part of the third test set out by the Tribunal in [ONA] will elicit evidence upon which the Tribunal can determine, in the vast majority of cases, who is the "employer" for the purposes of the Act. The part of the third test that asks whether the work at issue is integral to the enterprise may be of some further assistance in the private sector, and the fourth test may be resorted to if the answer is still unclear.

¶ 135 The Respondent Board and City of Vancouver add to the Barrie modification of the ONA test that a flexible approach in conformity with the stated purposes of the human rights legislation should govern this case, as opposed to the pay equity legislation, which governed the Barrie and ONA cases.

¶ 136 Mr. Hamilton for the Board says that there are three core functions, all of which are higher level employer functions that are exercised independently by the Board. These core functions are responsibility for collective bargaining, responsibility for classification, and hiring and firing.

¶ 137 He says that there is no suggestion in the case law that a joint employer can have less than these higher level functions of an employer. In other words, a minor role does not make an entity a joint employer (Labourers' International Union of North America v. York Condominium Corp., [1977] O.L.R.B. Rep. Oct. 645). He says that whatever can be made of the City's influence, it does not extend to these higher level functions.

¶ 138 The Tribunal found that the City did not have independent responsibility for any of these three higher level functions and therefore could not be said to be the employer or impliedly the joint employer.

¶ 139 The Petitioners argue that that correct test is not ONA as modified by Barrie, but rather a broader, liberal, purposive test as described in the cases of Tulk and Rosin, infra. The Petitioners argue that the Tribunal focused its inquiry on compensation practices and the value of work. This, they say, is incorrect and improperly restricts the inquiry for the definition of the employer under the Code. The Petitioners say responsibility for compensation practices and valuing work do not determine who is an employer under human rights jurisprudence.

¶ 140 The Petitioners' test for identification of the employer, as described in their Reply Brief is:

> ... A correct human rights test for the definition of employer is broad, gives effect to the purposes of the Code and is flexible. It is submitted that a correct Human Rights test for the definition of employer does not slavishly select and apply pre-established criteria from one legal or statutory context into the Human Rights context.
> ...
> Moreover the Board in Love Kumar Sharma specifically recognized the inadequacy of simply applying the common law to a human rights context; It recognized that the common law tests "... were not addressed, as the human rights code plainly is, to problems of

> discrimination, denial of opportunity, and equality of opportunity." The Board then went on to explain that based on that reason, it would emphasize the factual rather than the purely legal aspect of the matter and that it would emphasize dependency rather than control in making its determination as to the correct test.

¶ 141 In Love Kumar Sharma v. Yellow Cab Company Ltd. (1983), 4 C.H.R.R.D/1432 286 (B.C. Bd. Inq.), Mr. Sharma applied to buy shares in Yellow Cab, which is a requirement for all Owner-Drivers. He was refused permission to purchase the shares because he had previously filed a human rights complaint against Yellow Cab. Yellow Cab argued that the Board of Inquiry had no jurisdiction because the relationship between an Owner-Driver and Yellow Cab was not an employment relationship and therefore the Code had no application. The Board of Inquiry ruled that the relationship between an Owner-Driver and Yellow Cab constitutes employment within the extended definition encompassed by the Code. The Board of Inquiry stated that the determination of whether an employment relationship existed for purposes of the Code was different than at common-law. At [paragraph] 12307:

> It is important to emphasize here that our concern is not to determine whether an employment relationship exists as a matter of common law. It is, rather to decide whether an employment relationship exists in whatever special sense may be contemplated by the definition in the Code. That being the case, while common law concepts of employment are useful by way of guidance, they cannot be decisive of the issue under the Code.

¶ 142 On the facts of Love Kumar Sharma, the Board of Inquiry found that economic dependency, and direction and control were the factors which were determinative of an employment relationship. At [paragraph] 12315, the Board of

Inquiry explained the relationship between employment for the purposes of the Code and the common-law concept:

> ... The point is that the very fact that the Code uses the word "employment" and defines it in an extended way, suggests that while the intention was to go beyond the concept of employment at common law, it was not the intention to embrace relationships which do not, in one form, or another, resemble the common law concept of employment.
>
> [Emphasis added]

¶ 143 The second case relied on by the Petitioners for the proposition that the term employment should be given a broad and flexible interpretation consistent with the purpose of the Code is Kathleen Strenja v. Bob Bennetts Sr. and Comox Taxi Ltd. (1981), 2 C.H.R.R.D./585 (B.C. Bd. Inq.). Ms. Strenja was found to have been discriminated against when the owner of Comox Taxi refused to permit her to work as a part-time taxi driver because of a company policy that women could not work as taxi drivers for Comox Taxi. The Board of Inquiry had to determine if Ms. Strenja was the employee of Mr. Bennetts Sr. or Comox Taxi, because she had entered into an employment contract with a Mr. Hawley who owned the taxi, and her wages were to be paid by Mr. Hawley. The Board determined that she was the employee of Comox Taxi for the purposes of the Code. The Board considered the following factors: power of selection, payment of wages, power to suspend or dismiss, ownership of the tools, chance of profit, risk of loss, purpose of the legislation, and power to control the method of doing the work. The Board concluded that Comox Taxi had a measure of control over how she performed her work. The Board also concluded that a person may have more than one employer for different purposes.

¶ 144 The Board relied on the employment criteria described in York Condominium Corp., supra. In a labour relations context, that Board found the following criteria to be determinative:

* The party exercising direction and control over the employees performing the work
* The party bearing the burden of remuneration
* The party imposing the discipline
* The party hiring the employees
* The party with the authority to dismiss the employees
* The party who is perceived to be the employer by the employees
* The existence of an intention to create the relationship of employer and employees.

¶ 145 In Tulk v. Newfoundland (Ministry of Health and Community Services) (2002), 210 Nfld. & P.E.I.R. 101 (T.D.), the Newfoundland & Labrador Supreme Court found, on judicial review of a Board of Inquiry of the Human Rights Commission decision, that a government ministry was liable for discrimination under the Human Rights Code, R.S.N. 1990, c. H-14, as the employer of a fired homecare worker. The homecare worker was fired by her client in discriminatory circumstances. The issue was whether the Ministry, which funded the program under which the employer (the patient cared for by the homecare worker) hired, fired, paid, and controlled the terms of employment, could be liable as an employer under the Code. In Tulk, the Ministry had no involvement in the discriminatory act of firing Ms. Tulk (she was fired because she was pregnant). Both the Human Rights Tribunal and the Court found (on a standard of review of correctness) that because the Ministry utilized the homecare worker, Ms. Tulk, to fulfill its mandate and obligation to provide services to persons with disabilities, it was, for Human Rights purposes, the employer. The Court found (at [paragraph] 23) that the Ministry:

> directly participated in the formation and conduct of the relationship ... and [was] the prime initiator of the policy in response to a legislative mandate and its sole funding enables the program in which Ms. Tulk participated as the employee. In my view, the Department is so involved in the relationship as its prime author, supporter and funder as to require it to stand to the violation of the Human Rights Code to which this complainant was subject during her participation in that relationship.

¶ 146 At [paragraph] 26, the Court held:

> To sever the components of this integral relationship is to submit to legal separations of that relationship that, in the end, will:
>
> (a) Avoid the real and apparent identification of the undertaking of the Applicant; and
>
> (b) Allow for the unfairness apparent in permitting this relationship and its undertaking to avoid the basic standard of conduct applicable to all persons who, as part of their undertaking engage the labour (in this case home care services) of a person entitled to the protection of the Human Rights Code.

¶ 147 Here the thrust of the Board's argument is that, based upon the facts of this case, the determination of who the employer is must focus upon an inquiry as to responsibility for remuneration which, in turn, is an enquiry about responsibility for collective bargaining and classification.

¶ 148 The Board argues that the Tribunal focused its inquiry on the first two elements of the test in ONA and gave proper consideration to those elements of the test as modified by Barrie and proceeded in accordance with the large, liberal and proposive interpretation of the Human Rights Code. In other words, the

purpose of the Code applied to this case is to consider which entity had the ability and/or responsibility to correct the alleged breach of the Code.

¶ 149 As already noted, the Board argues that the York Condominium case, which describes higher level functions of an employer, is more closely applicable to this case.

¶ 150 Mr. Hamilton posed the question "which party can eliminate the wage gap, the discriminatory practice?" He says that on the evidence the answer is the Board. Counsel did not refer to any testimony in which that question was put to either a City or Board employee witness.

4. What Test did the Tribunal Apply?

¶ 151 At [paragraph] 52 of its reasons, the Tribunal described the test it utilized:

> In Barrie the Pay Equity Tribunal considered the factors it had set out in ONA. The majority held that, in seeking to identify the "employer", the enquiry "should centre on identifying the entity that is responsible for existing compensation practices and the valuing of work":
>
> > The reason is purely practical; the entity that established the existing compensation practices at some point made some decisions about the value of work in that workplace. That entity, therefore is in the best position to review those practices, as the Act requires, and remedy gender inequities to establish pay equity. (at para. 19).

¶ 152 Mr. Hamilton says that this is the proper test to be applied here. The Tribunal noted, at [paragraph] 54, that while these pay equity cases (Barrie and

ONA) provide a useful analytical framework, it is important to keep in mind that the present case arises under a human rights statute.

¶ 153 At this point it is important to reiterate that the Petitioners argue that either the City alone or the City and the Vancouver Police Board together were the Petitioners' employer for purposes of s. 12 of the Code. The Petitioners argue that, similarly to Tulk and Love Kumar Sharma, there is an interdependent relationship between the Board and the City and that in practice, the two entities are inextricably interrelated. Mr. Hamilton says that the Board is dominant and retains the functions or facets of a true employer and the City does not. He agrees that the Tribunal did not find that the City and the Board were a joint employer.

¶ 154 As noted above, the Tribunal, at [paragraph] 121, considered and rejected the Petitioners' submission that the City and the Board were joint or co-employers.

¶ 155 I must accept the findings of fact made by the Tribunal that:

1. The Board has responsibility for collective bargaining.
2. The Board is responsible for classification.

¶ 156 There is evidence on which these findings could properly be made. I do not think that the fact that the Tribunal did not review all the conflicts in the evidence permits me to decide that these findings are unreasonable. The evidence of Stewart, Graham, and Zora provides a sufficient and reasonable basis upon which the Tribunal could make the findings it did.

¶ 157 From these two findings, the Tribunal concluded that the City was not the Petitioners' employer. I find that this conclusion is not reasonably supportable, given the analytical framework set out by the Tribunal. The

weakness in the conclusion stems from a misapplication of the notion of remedial analysis.

¶ 158 The Tribunal unreasonably narrowed the scope of its inquiry, given the nature of the adjudicatory task at bar. Although the Tulk, Love Kumar Sharma, and Strenja cases are not binding authority, they are illustrative of the application of a large liberal and purposive interpretation of the Code. Here, while explicitly purporting to employ a large, liberal analysis as required by the Code, the Tribunal based its conclusion on two factors and ignored the broader circumstances of the case. Given the two findings above, the Tribunal concluded that the Board was autonomous and, thus, that the City was not a co-employer as it did not perform these higher-level functions.

¶ 159 Yet, it is not in dispute that the City bears the burden of financing the payroll of the Police Department. The sum of money required to remedy the current wage disparity is, and was, on the evidence, far beyond the ordinary budget of the Police Board. Thus, while the Board could accede to a renegotiated pay scale, it is unclear and the Tribunal did not find, whether the Board could actually require the City to fund the increased expenditure.

¶ 160 Therefore, it appears that the Tribunal was not alive to the fact that, while the Board is indeed autonomous within a certain sphere of influence, it is potentially constrained in its actions.

¶ 161 Here lies a gap in the logic of the conclusion. While the Tribunal specifically found that, given the Board's exclusive control over bargaining and classification, the City could not independently remedy the wage disparity, the Tribunal did not address the question of whether the Board could, of its own accord, accomplish that same task, given the role of the City council in approving the Board's budget. Furthermore, at [paragraph] 52 of its reasons, the Tribunal appears to base its decision as to who could remedy the disparity on the fact that the Board originally "established the existing compensation practises". The Code

is a dynamic remedial statute and ought not to be interpreted so narrowly in a temporal sense. The discrimination, if any, has existed since the civilianization of the Com ops positions and the opportunity to remedy that alleged discrimination has existed continuously since then.

¶ 162 In essence, the Tribunal queried: "Who can remedy the wage discrepancy?" and answered: "The City cannot do it alone", given the Board's exclusive control over certain higher-level employment functions. The Tribunal then concluded: "Therefore, the City was not the Petitioners' employer". However, the Tribunal did not ask or answer the critical question, given its framework for the inquiry at hand: "Can the Board alone without the City remedy the wage discrepancy?"

¶ 163 In other words, the Tribunal appears to have over-looked the importance of the financial relationship between the various parties in this case. This oversight resulted in a conclusion that is not reasonably supported by the findings of fact made from the evidence, as the logical chain is missing a necessary link and is inconsistent with a flexible purposive interpretation of the Code.

¶ 164 The Court's task on judicial review, given a standard of reasonableness, is to ensure that "the reasons, taken as a whole, are tenable as support for the decision" (Ryan, supra). Here, the Tribunal's decision unreasonably narrows the considerations applicable in determining who employs the Petitioners for the purposes of s. 12 of the Code and, as a result, does not adequately explain how the Board alone or the Board without the City could remedy the alleged breach of s. 12. Although the Tribunal said it was applying a broader definition of employer, as is appropriate under s. 12, it actually applied a narrow definition.

D. Conclusion on Judicial Review of s. 12

¶ 165 Accordingly, the Tribunal's s. 12 decision is set aside in part and remitted to the Tribunal for reconsideration in accordance with these Reasons. The parties are at liberty to seek further directions if necessary.

¶ 166 Before concluding my review of the s. 12 complaint, I turn to the Petitioners' challenge of certain findings relating to whether Com Ops perform similar or substantially similar work to that done by fire dispatchers.

E. Review of the "Substantially Similar" Findings

¶ 167 As stated above in the overview of its decision, despite concluding that the Petitioners were not employed by the City, the Tribunal found that the Com Op I position was substantially similar to the FD I position; however, the Tribunal concluded that the Com Op II and III positions were not sufficiently similar to their counter-parts at the Fire Department to satisfy that element of discrimination for the purposes of s. 12.

¶ 168 The Petitioners take issue with these latter findings.

¶ 169 The Petitioners submit that these findings are obiter dicta, must be quashed along with the rest of the decision and should have no binding authority on any reconsideration of the issues at hand. Alternatively, the Petitioners assert that there are numerous factual and legal errors in this portion of the Tribunal's decision and have requested leave to make full submissions pending my determination of the other matters at issue in this judicial review.

¶ 170 With respect to the Petitioners' first submission, I cannot conclude that the Tribunal's findings are obiter in the pure sense of that term.

¶ 171 The Petitioners rely on Aho v. Kelly (1998), 57 B.C.L.R. (3d) 369 (S.C.), for the definition of obiter dictum. At [paragraph] 60, Bauman J. accepted the following statement from Black's Law Dictionary, 6th ed.:

> Words of an opinion entirely unnecessary for the decision of the case...a remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way", that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause...
>
> [Emphasis added]

¶ 172 This definition is supplemented by two statements made by Decary J.A. in Dumont Vins & Spiritueux Inc. v. Celliers Du Monde Inc. (1992), 42 C.P.R. (3d) 197 (F.C.C.A.). He stated, at 205:

> What has been clearly and expressly decided in the reasons does not become a mere obiter dictum just because nothing is said about it in the conclusion. It is a matter of perspective and overall assessment
>
> ...
>
> It hardly needs to be added that the case at bar is not one in which a court mentions several reasons for deciding a matter when only one of those reasons would have sufficed (and even in such a case, as Belanger J.A. noted in Roland Jacques Inc., supra, such reasons would have been rationes decidendi), but a case in which a court decides two matters which are before it and the reasons given in support of each of the two "decisions" are very definitely rationes decidendi.

¶ 173 Here, the Tribunal's findings on the "substantially similar" issue are not collateral to the question at bar, nor are they entirely unnecessary to the decision reached. The Tribunal's findings are not "by the way" commentary or general statements of principle that reach beyond the narrow scope of the decision at bar.

¶ 174 Rather, the s. 12 analysis required the Tribunal to examine three distinct matters: the employer issue, the substantially similar work issue, and the equal pay issue. The conclusion reached on each of these issues is fundamental to the ultimate determination in the case and each was squarely at issue during the Tribunal hearing. As the Tribunal stated, at [paragraph] 123 of its decision, "[t]he law and facts related to the other issues [similar work and pay] ... were thoroughly and ably presented and argued."

¶ 175 While the determination of these issues might not be reflected in the Tribunal's conclusions, the questions were fully argued by both sides at the hearing, the Tribunal clearly considered the issues in detail, and conclusions were drawn from the evidence relating directly to the status of the parties. Accordingly, these findings should not be set aside as a matter of course.

¶ 176 I am supported in this conclusion by s. 5(1) of the Judicial Review Procedure Act, which states:

> Powers to direct tribunal to reconsider
>
> 5(1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.
>
> [Emphasis added]

¶ 177 Also, as the Tribunal stated at [paragraph] 123 of its decision, "a different outcome on the employer issue would not affect the factual or legal determinations required for those other issues [including the substantially similar

issue]." There is no procedural unfairness in refusing the Petitioners the right to re-argue a fully canvassed and considered aspect of the case. Given my conclusion with respect to the employer issue, accepting the Petitioners' argument would require the Tribunal to re-hear all of the evidence relating to each aspect of the s. 12 claim, which would be both inefficient and unnecessary.

¶ 178 The proper approach to challenging these findings is an application for judicial review. The Petitioners have reserved the right to make full submissions on the alleged errors contained in the Tribunal's reasons and I grant leave to them to do so.

V. ANALYSIS - SECTION 13

A. Background

¶ 179 Given the length of time this proceeding has consumed, it may be of assistance to the parties if I also consider in these Reasons the s. 13 complaint. For the reasons which follow I would dismiss the application to review the Tribunal's decision under s. 13.

¶ 180 As noted above, the Tribunal dismissed the complaint under s. 13 on the basis that it was not discriminatory for one employer, the Board, to pay different wages to its employees than a different employer, the City, paid to its employees. Additionally, the Tribunal found that the City had not caused or influenced the Board to pay or provide inferior wages or benefits to the predominantly female complainants than those of the fire dispatchers. The Tribunal held that the complainants failed to establish their assertion that the creation of their positions was a civilianization by the Respondents of duties formerly performed by police officers, which was tantamount to feminization and therefore sex discrimination. It also rejected the complainants' argument that the Communications Operator classifications were discriminatory on the basis of sex because the classifications were described in a gender-biased way and this resulted in undervaluation of the positions as a result of sex.

B. Standard of Review

¶ 181 I have already decided that a reviewing court ought to consider the standard of review separately for discrete or particular issues. (See Dr. Q, supra at [paragraph] 22).

¶ 182 Applying the functional and pragmatic approach, the first three factors (the purpose of the statute, the wording of the statute and the expertise of the Tribunal) have been discussed above and my conclusion regarding the degree of deference owed to the Tribunal based on an analysis of those factors does not differ in respect to the Tribunal's decision here under s. 13. However, the nature of the question to be answered under s. 13 of the Code may be different than the nature of the question answered by the Tribunal under s. 12.

¶ 183 Under s. 13, the overall question was "Did the Board or the City discriminate in respect to the Petitioners' employment?"

¶ 184 The Tribunal considered this question from three perspectives: (a) whether the Board or the City had discriminated against the Petitioners by treating them less favourably than the City treated its fire dispatchers (Tribunal Decision at [paragraphs] 217-218); (b) whether the City had discriminated against the Petitioners by causing or influencing the Board to pay the Petitioners less than it paid its fire dispatchers (Tribunal Decision at [paragraph] 218); and (c) whether the Petitioners had been discriminated against because of the occupational segregation of women, observable in the process of civilianization of the dispatch function, and the corresponding undervaluation of the work of Communications Operators because women perform it, manifested by lower pay for civilians doing the work (Tribunal Decision at [paragraphs] 220-221).

¶ 185 From this perspective, the nature of this problem is extremely fact-intensive. The overall determination made by the Tribunal is clearly a question of mixed fact and law, and as with the s. 12 analysis, this factor suggests a greater

degree of deference. I conclude that the Tribunal's decision under s. 13 must also be scrutinized on the basis of reasonableness.

C. Application of Reasonableness Simpliciter Standard to the Tribunal's s. 13 Decision

¶ 186 The Petitioners argue that the Tribunal ought to have first determined whether or not the City and the Petitioners had an employment relationship in a broader sense than in the conventional employment or labour law context, thus giving a broad and purposive interpretation to s. 13. The Petitioners argue that having found that the City could be a person who discriminated against the Petitioners within the meaning of s. 13, it would necessarily follow that there was discrimination because of a differential in the pay and benefits provided to the petitioners as compared to the fire dispatchers.

¶ 187 There is no question that the City could be, for some purposes, a person who discriminates under s. 13 in respect to the employment of the Petitioners.

¶ 188 But here, the Tribunal said that the conduct complained of was payment of inferior compensation. The Tribunal looked again, as it had in the s. 12 complaint, to a remedial analysis, that is, who could remedy the alleged discrimination. The analysis is a conduct-based analysis; not a relationship-based analysis. The Tribunal asked: if the compensation is discriminatory, then what person has responsibility for the discrimination? For the same reasons as in the s. 12 analysis, the Tribunal found that the City was not responsible for the alleged discrimination. It is quite true that s. 13 need not be restricted to an employer in the traditional common law or statutory sense and, in my view, the Tribunal recognized this. But, to be liable under s. 13 the Respondent must be the party who committed the discriminatory act or participated in it, and the payment must be discriminatory.

¶ 189 The other, broader question considered by the Tribunal was whether the City could influence the compensation practices of the Board to a degree that it could remedy the alleged wage gap between the fire and police communication operators. In other words, although the City was not responsible for collective bargaining or classification, as found by the Tribunal in its s. 12 decision, its considerable influence may have been sufficient to enable the City to remedy the alleged discrimination. That influence may, for the broader purposes of s. 13, have led to a finding of discrimination by the City. However, at [paragraphs] 96 and 218, the Tribunal appears to conclude that the City exercised little influence over the compensation.

¶ 190 Paragraph 218 of the Tribunal's reasons states:

> The City employs the fire dispatchers. If the Complainants established that the City causes or influences the Board to pay or provide inferior benefits to the predominantly female communications operators than the City provides to the predominantly male fire dispatchers, that might be a basis for finding that the City engages in sex discrimination. However, I have already found that the City exercised little influence in the collective bargaining between the Board and the Complainants' union. Therefore, those differences that arise directly as a result of collective bargaining cannot be a basis for a finding adverse to the City. However, the classifications were not established through collective bargaining. I have found that the City personnel who were involved in drafting classifications for the communications operator positions were doing so on behalf of the Board and were paid by the GVRD. The City did not directly determine the classifications of the communications operators. Therefore, any difference in wages between the communications operators and the fire dispatchers that results from the classifications of the communications operators

cannot be the City's responsibility.

¶ 191 The Petitioners argue that the Tribunal erred in stating at [paragraph] 228 that "the Complainants relied on no evidence in support of their submission that the process of civilianization is tantamount to feminization."

¶ 192 The Petitioners say that the following evidence was before the Tribunal in support of their submission that the process of civilianization is tantamount to feminization.

* In the early 1970s the City of Vancouver decided to civilianize the communications section of the Vancouver Police Department. On October 29, 1974, City Council approved the construction and staffing of a new communications centre at the Police Department.
* The communications centre at the Police Department was created in approximately 1975. Prior to 1975, the communication functions of the Police Department were performed by police constables, who were almost entirely male. Further civilianization occurred in the 1980s.
* The City calculated that civilianizing the communications functions would result in a net savings to the City.
* The civilians (the communications operators) who were hired to perform the communications functions which had previously been performed by male police constables, were almost entirely female.
* The wages paid to the female civilians, the communications operators, was substantially less than the wages paid to the male constables who performed communications work.

¶ 193 The Petitioners assert, in their written brief, that the evidence shows that the process of civilianization is tantamount to feminization in the case of the communications operators. The Tribunal, they say, has ignored obvious inferences that can be drawn from the facts and it is therefore submitted that the decision should be set aside.

¶ 194 The Petitioners' submission on this point cannot succeed. The Tribunal accepted the evidence set out above, but found that the evidence was not proof of feminization. What the Petitioners had to prove was that they were paid less because they were women. This evidence referred to by the Petitioners proves only that they were paid less because they were not police officers, that their positions were at first undervalued and in 1990, a period not covered by the complaint, their wages were increased as a consequence of the arbitration award of Mr. Larson. The very purpose of civilianization was to save money. The Tribunal determined that this evidence did not meet the test of discrimination. That conclusion is not unreasonable given the evidence at bar.

¶ 195 At [paragraph] 229, the Tribunal says "there is no evidence that call-taking and dispatching is a job historically performed by women and undervalued."

¶ 196 In 1973, the Petitioners' union, VMREU, presented a brief to the then Board of Police Commissioners in favour of the civilianization of the communicator operator's position. The brief states in part:

> The point of this brief is simply stated. Certain jobs presently filled by police constables can and should be done by civilians. In support of this statement we offer the following arguments. The first and obvious attraction to replacing a constable with a civilian is that civilian employees cost less money.

The memorandum continues to cite examples of civilians performing this job in various jurisdictions in North America. The brief continues:

> In summation, what we are saying is that the most economical Police Department operation includes both police and civilian personnel utilizing the best of both categories in the best possible way. We believe that the number of police doing police work can be maximized by greater use of civilians and the goals of the department realized at considerably less extra cost than is now anticipated.

¶ 197 In the case of Andrews v. The Law Society of British Columbia, [1989] 1 S.C.R. 143 at 174-175, discrimination is described as follows:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

¶ 198 Given the evidence before the Tribunal, particularly in respect of the Petitioners' union supporting the civilianization process, I conclude that the Tribunal's findings were logically supported by the evidence. I see no basis on a standard of reasonableness to disturb the Tribunal's decision regarding the s. 13 complaint.

VI. DISPOSITION

¶ 199 In summary, I make the following orders:

(1) The application for judicial review of the Tribunal's decision to dismiss the Petitioners' complaints under s. 12 of the Code is granted. The complaints under s. 12 are remitted to the Tribunal to reconsider in accordance with these Reasons for Judgment.

(2) The parties have leave to apply for further directions concerning remission for further consideration to the Tribunal, if that is necessary.

(3) The application for judicial review of the Tribunal's decision to dismiss the Petitioners' complaints under s. 13 of the Code is dismissed.

(4) The application for judicial review of the Tribunal's decision concerning the similarity of work and positions is adjourned pending the parties' submissions on that issue.

¶ 200 The parties may make submissions as to costs.

GARSON J.

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