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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

GLENN CURRIE, EARL O. HENDERSON, TERRY V. WILLISKO
AND HEATHER MARGARET WILSON

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Currie et al. v. Canada Revenue Agency

In the matter of grievances referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: I. R. Mackenzie, adjudicator

For the Grievors: Alison Dewar, counsel

For the Employer: Karen L. Clifford, counsel

Heard at Saint John, New Brunswick, October 24 to 26, 2006;
at Hamilton, Ontario, March 22 and 23, 2007;
at Edmonton, Alberta, May 30 to June 1, 2007;
and at Ottawa, Ontario, June 7, 2007.

REASONS FOR DECISION

I. Grievances referred to adjudication

[1] Glenn Currie, Earl O. Henderson, Terry V. Willisko and Heather Margaret Wilson (“the grievors”) were all investigators/auditors at various Tax Services Offices (TSOs) across the country at the time they filed their grievances. Their employer, or former employer in the case of Ms. Wilson, is the Canada Revenue Agency (“the employer”). All four have grieved their generic job description PM0286 (“the original PM-03 job description”) for the position of Investigator/Auditor, classified at the PM-03 group and level. Ms. Wilson also submitted an acting pay grievance. Mr. Currie’s grievance was heard by an adjudicator and a decision denying his grievance was issued on June 29, 2004 (2004 PSSRB 75). That decision was upheld by the Federal Court in 2005 (2005 FC 733) and subsequently overturned by the Federal Court of Appeal in May 2006 (2006 FCA 194), which referred Mr. Currie’s grievance back to a different adjudicator to be decided in accordance with the Federal Court of Appeal’s reasons (discussed below).

[2] The grievances of Mr. Willisko, Mr. Henderson and Ms. Wilson were held in abeyance pending the outcome of the judicial review on Mr. Currie’s grievance. The parties agreed to add those grievances to the hearing of Mr. Currie’s grievance. The evidence portion of the hearing was conducted in Saint John, New Brunswick; Hamilton, Ontario; and Edmonton, Alberta. Final oral submissions were made at Ottawa, Ontario.

[3] Vincent Patrick O’Neill, who had originally grieved with Mr. Currie, withdrew his grievance after his testimony but before final arguments were heard. Counsel for the grievors submitted that Mr. O’Neill’s evidence should be considered in assessing the remaining grievances. I have not considered Mr. O’Neill’s testimony about his duties and responsibilities since that evidence is no longer relevant in the absence of his grievance. I have considered his evidence about the relevant employer programs only to the extent that it provides context for the evidence of the remaining witnesses.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”).

II. Background

[5] An adjudicator initially heard the grievance of Mr. Currie in 2004. The decision was judicially reviewed by the Federal Court (2005 FC 733) and the Federal Court of Appeal (2006 FCA 194). The Federal Court of Appeal directed that a different adjudicator redetermine the grievance in accordance with its reasons. The core of its reasons are as follows:

...

[24] It is clear from the adjudicator's reasons that he felt he could not, or felt he should not, require the employer to provide position specific Work Descriptions. As noted, he was of the view that this would lead to the balkanization of the employer's generic Work Descriptions. This view led him to suggest, in an oral ruling pronounced at the conclusion of the hearing before him and subsequently reproduced in his reasons for decision, that where an employee is required on an ongoing and permanent basis to do work which is substantially outside the Work Description applicable to his or her position, the employee's remedy is to apply for reclassification.

[25] This speaks of a relatively rigid conception of the role of an employee's Work Description. That view is not shared by all adjudicators. Adjudicator Galipeau pointed out in Breckenridge and The Library of Parliament, [1996] C.P.S.S.R.B. No. 69 (Q.L.) that:

[70] The job description, or, to use the expression enshrined in the collective agreement, "the statement of duties and responsibilities", is the cornerstone of the employment relationship between these employees and the Library of Parliament. It is a fundamental, multipurpose document which is referred to with regard to classification, staffing, remuneration, discipline, performance evaluation, identification of language requirements, and career planning. It is erroneous to limit its scope solely to use with regard to classification. It must be sufficiently complete to lend itself to the other uses I have just mentioned.

[26] This view of the role of a Work Description suggests that it is a document which must reflect the realities of the employee's work situation since so many aspects of the employee's rights and obligations in the workplace are bound to his or her Work Description.

[27] *The adjudicator's suggestion that reclassification is the appropriate remedy for an employee regularly engaged in doing work beyond the scope of his or Work Description is a particularly relevant example of this point. In argument before us, counsel for the appellants, without contradiction from opposing counsel, advised that a reclassification grievance will not proceed unless the employee agrees that his or her Work Description is accurate. Consequently, a person whose position is classified at the PM-03 level but who is regularly working on files of complexity 20 or greater cannot apply for reclassification unless he or she agrees that Work Description PM-0286 accurately describes their duties and responsibilities. As we have seen, the distinguishing characteristic of Work Description PM-0286 is the fact that the incumbent is assigned to work on files of complexity 10. Consequently, the applicant who seeks reclassification from PM-03 to PM-04 must agree that their job consists of working on files of complexity 10, which effectively undercuts the basis of their request for reclassification.*

[28] *As a result, the only way in which individual employees can access the reclassification process is by means of a revised job description which accurately describes the duties and responsibilities of their position. Article 56.01 of the Collective Agreement is the mechanism by which the employee is able to demand such a job description. An interpretation of article 56.01 which forecloses its use in the very circumstances which give it a purpose cannot withstand even the most deferential review by this Court.*

[29] *I would therefore allow the appeal with costs, set aside the order of the application judge, set aside the decision of the adjudicator and remit the matter to be decided by a different adjudicator on a basis consistent with these reasons. I would point out that nothing in these reasons should be taken as a finding of fact as to whether, and to what extent, the appellants are engaged in working on files of complexity 20 or greater. That is a question for the adjudicator to decide on the basis of the evidence which is put before him or her.*

...

III. Preliminary Rulings

[6] At the commencement of the hearing, counsel for the employer, made a motion to dismiss the grievances because they were “essentially moot.” She argued that the grievors grieved the original PM-03 job description dated December 6, 1996, which was in place when Ms. Wilson filed her job description grievance in April 2000. However, in October 2000, the employer provided the revised PM-03 job description

PM0286-20004171 (“the revised PM-03 job description”) that was made retroactive to May 18, 2000. There is therefore a period of only six weeks for which the original PM-03 job description was in effect. Because the revised PM-03 job description was not grieved, there is no remedy available for the grievors. Counsel for the employer argued that the decision in *Jaremy et al. v. Treasury Board (Revenue Canada - Customs, Excise & Taxation)*, 2000 PSSRB 59, was a very distinct set of facts and was not applicable here. She stated that we could not speculate why this matter was not raised at the first adjudication hearing. She submitted that the grievances were entirely academic and that I should dismiss them.

[7] In the alternative, counsel for the employer stated that if this matter does proceed, the employer's position was that only the original PM-03 job description is being grieved. She submitted that this would become more clear when discussing Mr. Henderson's grievance, filed in 1997. Counsel for the employer concluded that there were good labour relations reasons for staying within the four corners of the grievances.

[8] Counsel for the grievors stated that this was the first time that the employer has raised that objection after almost six years of litigation. She submitted that the employer cannot now raise that argument. She noted that the job description being grieved was the same as the revised PM-03 job description. The revised PM-03 job description does not reflect what the grievors did then or now.

[9] Counsel for the grievors argued that the grievances should not be narrowly construed: *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (C.A.); and *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42. She also argued that in its reply to the grievances, the employer incorporated the revised PM-03 job description by reference when it stated that the revised PM-03 job description “. . . should result in an accurate job description. . . .” Counsel for the grievors also submitted that the differences between the original PM-03 job description and the revised PM-03 job description were minimal. Counsel for the grievors also referred me to *Jaremy et al.* and submitted that it was applicable in this case.

[10] Counsel for the grievors argued that if I were to grant the employer's motion, it would render the grievors' rights under their collective agreement meaningless. To rule in the employer's favour would mean that in any job description grievance, the

employer would be able to avoid adjudication simply by issuing a new job description. She also submitted that denying the grievors the ability to challenge the revised PM-03 job description would simply see them back before an adjudicator after filing new grievances. She submitted that the employer's motion should be dismissed.

[11] In reply, counsel for the employer submitted that *Blouin Drywall Contractors Ltd.* and *Parry Sound* were not applicable since the case before me did not involve procedural or technical defects.

[12] I dismissed the employer's motion. I found that the approach in *Jaremy et al.* was appropriate. In that case, the adjudicator rejected the argument of the employer that a revised job description was not properly before him:

...

[23] . . . I disagree with this contention. It is clear that the grievors had initiated their grievances on the basis that their job descriptions failed to meet the requirements of the collective agreement. In the face of various attempts by the employer to meet those concerns the grievors continue to maintain that this was the case. It cannot be said that the employer was ever misled into believing that its latest effort in revising the job description, that is Exhibit G-4, laid to rest the employees' grievances. It is my conclusion therefore that I have jurisdiction to address these grievances.

...

This is a practical approach for addressing the concerns of grievors about their statements of duties. The labour relations system could be flooded with grievances every time a job description is modified if the rather narrow approach suggested by the employer were taken. The employer held out hope in the replies to the grievances that the review of the original PM-03 job description would address the concerns of the grievors, thereby bringing the revised PM-03 job description into the picture and raising legitimate expectations. I also noted that the Federal Court of Appeal has returned Mr. Currie's grievance to be decided by a new adjudicator "... on a basis consistent with these reasons" It is consequently not open to me to dismiss the grievances at this stage of the proceedings.

[13] Counsel for the grievors wanted to introduce a document prepared in 2002 (a case-complexity rating form). Counsel for the employer objected since the document

reflected duties performed after the filing of the grievances, and questioned its relevance. Counsel for the grievors submitted that the document was relevant since it shows that the revised PM-03 job description does not accurately reflect the complexity of the duties that were performed. I ruled that the document was not admissible because this hearing must deal with the duties that were being performed at the time of the events for which the grievances were filed. Post-grievance evidence must be used sparingly; otherwise, the hearing would become an ongoing investigation of the work being performed in the workplace.

[14] Counsel for the grievors sought to introduce the generic job description PM0677 for the position of Investigator/Auditor, classified at the PM-04 group and level (“the PM-04 job description”), to show the more applicable description of duties. The employer objected. The PM-04 job description was effective beginning in May 2000 but was not provided to employees until October 2000, thereby postdating the grievances. Counsel for the employer submitted that the additional grievances being added to this hearing include one that was filed in 1997, before the PM-04 job description was even in development. She also submitted that comparing the PM-04 job description to the original PM-03 job description was a classification matter that was beyond the scope of an adjudicator. Counsel for the grievors submitted that the instructions of the Federal Court of Appeal required me to review the PM-04 job description. She stated that the PM-04 job description was clearly in evidence at the first adjudication hearing and before the Federal Court of Appeal. She submitted that to address the issue of complexity as required by the Federal Court of Appeal, the PM-04 job description is the best evidence available. Counsel for the employer submitted that the present hearing is a new hearing and that I am not required to allow the introduction of documents that were adduced in the first adjudication hearing. She suggested that because the first adjudication hearing commenced with a mediation that was ultimately unsuccessful, matters may have “gotten off the rails.” She also submitted that the Federal Court of Appeal “got it wrong” when it considered the PM-04 job description.

[15] I allowed the introduction of the PM-04 job description for the purposes of the grievance of Mr. Currie. I reserved my decision on the relevance of the PM-04 job description for the other grievances. I have discussed the overall relevance of the PM-04 job description for all of the grievances in my reasons below. Since the Federal Court of Appeal had considered the PM-04 job description, I held that I was required to consider it to come to a determination in accordance with its reasons.

[16] At the commencement of the evidence portion of the hearing relating to Mr. Henderson, the employer articulated a further objection. Mr. Henderson filed his grievance in 1997 (although the grievance was not referred to adjudication until 2002). The employer objected to the PM-04 job description being used in his grievance, because the PM-04 job description only came into existence in May 2000 — three years after Mr. Henderson's grievance was filed. Counsel for the grievors submitted that Mr. Henderson was promoted to a PM-04 position in June 2002 and that he would testify that his duties in 1997 were identical to his duties in 2002 as a PM-04. That would show that the PM-04 job description was the most appropriate for comparison purposes. She also argued that the parties had agreed on test cases and that it was not now open to the employer to change its mind.

[17] I reserved my decision on that objection and indicated that I would entertain further submissions in final argument. I have set out my ruling on the general relevance of the PM-04 job description below, including its relevance to Mr. Henderson's grievance.

IV. Summary of the evidence

[18] An order excluding witnesses was granted. The parties produced a joint book of documents (Exhibits J-1 to J-9). The grievors testified, and seven witnesses testified for the employer.

[19] On consent, I ordered that the identity of taxpayers and any individuals under investigation would not be disclosed in this decision. Any identification of these individuals in the exhibits will also be protected.

A. Nature of the work

[20] The parties submitted the following agreed statement of facts:

...

[The employer] was established as an independent crown agency in 1999 under the general superintendence of a Commissioner.

[The employer] is headquartered in Ottawa, and comprises thirty-four tax service offices (TSO) spread across the country.

Each TSO has a Compliance Program, comprising a civil audit side and a criminal investigation side.

Where, following civil audit, criminal conduct is suspected whether by way of fraud, willful evasion of taxation or income obtained from criminal activity, the matter is referred from the criminal audit side to the criminal investigation side of the Tax Service Office.

Criminal investigation is itself comprised of two sub-programs: criminal investigation program (CIP) and the special enforcement program (SEP).

Within Investigations, there are two principal jobs nationally: auditors (AU) and program administrators (PM).

[21] The original PM-03 job description (Exhibit J-4) gives a general description of the role of an investigator/auditor:

...

Investigations that may result in criminal prosecutions of individuals and or corporations; audits of individuals and/or corporations who are suspected of earning income from illegal activities and assistance to other agencies and programs.

...

[22] There are two audit programs at issue in these grievances, the Special Enforcement Program (SEP) and the Criminal Investigations Program (CIP). The focus of the SEP is auditing individuals and corporations suspected of obtaining the bulk of their income from illegal sources such as narcotics. The purpose of those audits is to assess the amount of tax owing on income obtained illegally. The focus of the CIP is to investigate and prosecute offences under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th supp.), and the *Excise Tax Act*, R.S.C., 1985, c. E-15. The CIP conducts criminal investigations that require proof beyond a reasonable doubt.

[23] The key activities of the revised PM-03 job description (Exhibit G-2) are as follows:

KEY ACTIVITIES

[1] *Investigating routine domestic and international tax fraud schemes, complexity 10, that require minimum or medium accounting knowledge, through the analysis*

and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the Statutes administered by the Agency.

- [2] *Planning and conducting routine investigations, including searches and seizures under the Income Tax Act, Excise Tax Act, Excise Act and/or the Criminal Code.*
- [3] *Establishing the theory of proof, conducting interviews, evaluating witnesses, procuring, preserving and weighing all evidence and defenses to determine whether a criminal prosecution recommendation is warranted.*
- [4] *Preparing investigation stage reports including the prosecution report with recommendations to the Department of Justice.*
- [5] *Conducting audits of individuals and corporations suspected of earning income from illegal activities, such as drug trafficking, extortion, prostitution, etc. Most audits are done without complete accounting records, necessitating the use of indirect methods of verification.*
- [6] *Participating in the selection and development of workload by screening files and referrals from police, other agencies and the Integrated Proceeds of Crime units and identifying and evaluating potential compliance issues, and providing advice and assistance to the external organizations.*
- [7] *Preparing and/or executing legal documents such as search warrants, search information (affidavits), applications, detention orders, subpoenas, summonses and information for criminal charges, documentation to support section 490(15) CC applications, legal requirements to produce information, documents and various reports including legal briefs to the Department of Justice recommending section 238 ITA and or section 326 ETA (GST) prosecution action.*
- [8] *Advising and assisting Crown Counsel in the carrying out of prosecution actions, including familiarizing counsel with the evidence, applicable tax law, accounting matters, and offences committed.*
- [9] *Organizing and preparing evidence for presentation in court.*
- [10] *Preparing audit reports and working papers to support (re)assessments and penalties.*

- [11] *Preparing Crown's disclosure of all relevant information, documents and materials in accordance with legal requirements.*
- [12] *Identifying and gathering data from compliance reviews, valuations, tax incentive and rebate programs, tax avoidance, third party non-compliance and tax evasion cases for use in referring issues to the appropriate section for their review.*
- [13] *Testifying as a Crown witness in criminal and/or civil courts and consulting with Crown Counsel in any plea negotiations.*
- [14] *Preparing press releases for Communications.*
- [15] *Auditing of tax returns and/or the financial records of individuals or corporations suspected of earning income from illegal activities.*
- [16] *Developing contacts and sources both internally and externally with the view of receiving information that will identify, support, verify or refute allegations of fraudulent activity relating to statutes administered by the Agency.*
- [17] *Researching tax law, other legislation, jurisprudence and Agency publications and policies to arrive at appropriate investigative or audit conclusions.*
- [18] *Discussing and negotiating proposed adjustments, penalty recommendations, technical and contentious issues with taxpayers and/or their representatives.*
- [19] *Obtaining information and evidence for, and providing expertise to other tax services offices, foreign and domestic taxation authorities, enforcement agencies and other programs, including testifying in foreign jurisdictions.*
- [20] *Screening informant leads and handling on a priority basis international requests for assistance in gathering evidence for criminal investigations including grand jury and multi-agency investigations.*
- [21] *Evaluating referrals received from all sources for acceptance as investigative cases.*
- [22] *Gathering and analyzing information for the purpose of identifying cases of deliberate non-compliance.*
- [23] *Advising and assisting taxpayers and/or their representatives in resolving contentious audit problems*

relating to the administration or enforcement of the various statutes administered by the Agency.

- [24] *Compiling asset information to assist in the collection of taxpayers' indebtedness and encouraging early and voluntary payment of debts owing to the Crown.*
- [25] *Providing assistance to Crown in enforcing court ordered sentences including fines.*
- [26] *Assisting in the training and development of less experienced team members and Other Agency staff.*
- [27] *Providing timely and accurate responses to taxpayer requests for service.*
- [28] *Presenting and disseminating information to the public to encourage voluntary compliance.*
- [29] *Assisting Communications in the publication of court results.*
- [30] *Participating in team decision-making and evaluation of the team's performance.*

[24] A critical distinction made in the revised PM-03 job description at issue in these grievances is the complexity rating of investigation under the CIP. The following note appears near the beginning of the revised PM-03 job description (Exhibit G-2; a similar note appears in the original PM-03 job description, Exhibit J-4):

...

NOTE: Investigation cases are assigned based on a complexity rating system which evaluates the investigation's scope, the legal and evidentiary difficulties anticipated, the method of evasion, the forensic accounting/auditing challenges and degree of difficulty of tax issues expected to be encountered. . . .

...

When an investigator conducts investigations as a member of a team, the case assigned may have a higher complexity rating.

...

[25] The revised PM-03 job description (effective date May 18, 2000; Exhibit G-2) succinctly describes the process used to determine the case complexity rating as follows:

...

... The rating form T20CR lists numerical weight factors that are considered when determining case complexity for assignment purposes. The sum of the numerical factors recorded determines the grade and level to which the case will be assigned. ...

...

[26] Generally, tax investigation files are given a case-complexity-factor rating through a case-complexity rating form (Exhibit J-7). Points are given under the following categories:

- Degree of Knowledge (civil and criminal);
- Offences (number of Acts involved, method of evasion, period of time covered and number of entities to be charged);
- Overt Action (writing of search information, number of locations to search, multiple provincial jurisdictions, use of “CSERs” during search and complex computer system);
- Forensic Examination of Evidence (degree of difficulty and forensic laboratory examination);
- Method of Investigation (net worth completed, other indirect method used, flow of funds analysis);
- Third Party Evidence (uncooperative compellable key witness(es), number of witnesses, foreign evidence requests, foreign witness, and other witness related factors);
- Judicial Procedures (Commission evidence required, legal challenge during investigation stage, solicitor-client privilege claim, disclosure of evidence likely required, case will likely be contested, case meets criteria for indictment);

- Complicating elements (arrest of subject, formal joint investigations, full-time team investigation, subject involved in other illegal activity related to offences, jeopardy (re)assessment, bankruptcy involved, and other).

[27] The point distribution scale is as follows: 0 to 29 points is a complexity code of 10/11 and is associated with the AU-01 or PM-03 level, and 30 to 42 points is a complexity code of 22 and is associated with the AU-02 level (Exhibit J-7). When the PM-04 job description was introduced in 2000, the PM-04 position complexity level was the same as that of the AU-02 position (Exhibit G-3). The revised PM-03 job description (Exhibit G-2) describes cases at complexity code 10/11 as “simple/routine” and those at complexity code 20/22 as “difficult.”

[28] The revised PM-03 job description also describes the difference in complexity levels under “Thinking Challenge” as follows (Exhibit G-2):

. . . Cases with a complexity rating of 10 contain fewer factors than do cases with a complexity rating of 20, and many of the factors which are present have a lesser degree of complexity. The thinking challenge is less difficult when there are fewer factors and when they have a lower degree of complexity.

. . .

[29] Under the section “Skill and Knowledge,” the revised PM-03 job description (Exhibit G-2) sets out the distinction between “routine” and “complex” as follows:

. . . Cases with a complexity rating of 10 likely require less skill and knowledge than do cases with a complexity rating of 20. The existence of fewer skill and knowledge factors produces a less complex environment. In total, this environment could be classified as routine.

[30] A guide for case complexity rating was published in 1988 (“the 1988 guide”) (Exhibit J-5), and an amended version was published in 2000 (“the 2000 guide”) (Exhibit J-6). The 1988 guide states that the case-complexity rating form was designed to measure the complexity of investigating tax evasion cases (CIP cases), to provide a basis for the assignment of cases and to facilitate the planning of future staff requirements. The 1998 guide further states that the preliminary investigation of a file should be assigned to an investigator at a classification level that “. . . will satisfy the anticipated complexity of a resulting full-scale case.” SEP audits are not rated.

[31] Claudette Miller was a team leader in the Investigation Division of the Saint John TSO from 1997 to 2005 and supervised Mr. O'Neill. She testified that CIP investigations are generally not rated at the preliminary or information-gathering stage because there is not enough information available to rate the file. An investigation file is generally rated at the stage when work begins on the preparation of the "information." "Information" is the document used to substantiate laying charges under the *Income Tax Act* or the *Excise Tax Act*. The 1988 guide stated that the file should be rated only once (at the commencement of the full-scale stage):

...

. . . unless significant changes become evident as the case proceeds. It is assumed that a certain percentage of full scale cases will encounter what may be termed "subsequent complicating factors", but since all investigators should be capable of dealing with these additional factors in their files, they will no longer be included as assignment criteria.

...

[Emphasis in the original]

[32] The 2000 guide (Exhibit J-6) states that the form should only be amended if additional points change the complexity level of the case.

[33] Both the 1988 (Exhibit J-5) and the 2000 guides (Exhibit J-6) state that cases should be assigned to the "grade" of investigator indicated on the rating form. Both guides note that because of workload or staff availability or for training purposes, there may be occasions where it is necessary to assign files to investigators who are either above or below the grade indicated. Both the 1988 and the 2000 guides comment about the assignment of cases to investigators that do not conform to the normal assignment criteria. The 1988 guide states (the 2000 guide contains nearly identical language) the following:

...

. . . In those instances . . . there should be a clear understanding between the Investigator and District Office management as the arrangement under which the investigator is performing the investigation. . . .

...

[34] Investigations are usually cases that are referred to the Investigations Division from the Audit Division of the TSO. Ms. Miller testified that approximately 75 percent of cases came from the Audit Division. On occasion, files came from other sources or were self-generated. A case that does not come from the Audit Division requires more work at the preliminary stage because no work has been done on the file at the Audit Division. After the preliminary stage, there is no difference in how the cases are handled. There are four stages for a case, although not all cases will proceed to the latter stages. The stages are: 1) preliminary; 2) investigation; 3) court proceedings; and 4) appeal.

[35] At the preliminary stage, the investigator has 60 days to evaluate the referral and to determine whether or not to accept the file for investigation. This stage involves reviewing the written summary of concerns prepared by the Audit Division, reviewing audit working papers and notes, speaking with the auditor, interviewing third parties and interviewing the taxpayer under investigation. At this stage, the investigator will make a determination on whether there are reasonable and probable grounds to believe that an offence has been committed and will prepare a preliminary report with a recommendation on whether or not to accept the file for investigation. The preliminary report is signed by the team leader and the assistant director. If the file is not recommended for investigation, it goes back to the Audit Division.

[36] After the preliminary report is completed, it is used to assist in assigning a complexity rating to the case (Exhibits J-5 to J-7). Once the rating has been determined, the case is assigned to an investigator. The assignment is normally based on the classification level of the investigator, although things are not always handled that way and the differences are noted below in the summaries of evidence of the individual grievors.

[37] The work on the SEP is described in “key activity” section number 5 of the revised PM-03 job description (Exhibit G-2; see paragraph 23 of this decision). Under “Thinking Challenge,” the job description describes the work as follows:

...

The special enforcement work is performed in an environment where taxpayers under investigation are suspected of being engaged in acts of purposeful deception. Investigators must develop and carry out plans to uncover

fraud, often using forensic approaches by analyzing and evaluation information, identifying schemes and artifices, establishing theories of proof sufficient to support civil (re)assessments.

...

[38] In such cases, the audits performed are called “net worth” audits. In the absence of formal records of income due to the illegal source of that income, auditors perform an investigation and audit of the net worth of an individual.

[39] Barbara Toole is Assistant Director of Enforcement (formerly “Investigations”) at the Saint John TSO and has been in that position since October 2000. She testified that the SEP audit functions of a PM-03 were set out in the revised PM-03 job description. In regular field audits, net worth audits are performed by PM-02 or AU-01 auditors. SEP audits are similar; however, there are usually no books and records, or what is available is incomplete and disorganized. SEP audits also have the additional element of a suspicion of criminal activity. For those reasons, SEP audits are performed by investigators/auditors at the PM-03 level.

B. Mr. Currie’s grievance

[40] Mr. Currie started working at Revenue Canada (now the Canada Revenue Agency) in 1977. He joined the Investigations Division of the Saint John TSO in September 1996.

[41] Mr. Currie worked on a large investigation file from the time of his arrival at the Investigations Division. The investigation involved an individual who prepared tax forms for clients and who had counselled his clients to commit tax fraud. The file involved 280 individuals, and it took up to 4 years to evaluate whether there was fraud and if so, to what extent. The file was assigned to him as a lead investigator once it was decided to launch a full-scale investigation in the fall of 1997.

[42] The file was complexity rated at the PM-03 level effective August 22, 1997. Mr. Currie testified that it was rated as a result of a request to his supervisor, John Landry, in February 1997. At that point, Mr. Currie had been working on the file for one-and-one-half years. He had completed the searches of taxpayer records and had interviewed an extensive number of clients. He had begun the verification process to disprove the fraudulent claims for tax credits. He did not believe that the

complexity rating was accurate. He testified that points should have been given for knowledge. The numerous methods of tax evasion used by the individual taxpayers were not recognized in the complexity rating. Also, he testified that there were a large number of computerized records that were not recognized in the complexity rating. When he raised all of this with Mr. Landry, Mr. Landry told him that he believed the rating was accurate and that he had no intention of re-evaluating the file. Mr. Currie filed a grievance.

[43] In January 1999, the file was examined again by Mr. Landry and rated at the top level of the PM-03 level, backdated to 1997. It was examined once again by Mr. Landry on March 8, 1999. This time, it was rated at the AU-02 level. The following note from Mr. Landry appears at the bottom of the case complexity rating form (Exhibit G-1):

...

Rating guidelines reflect 17 points which places the file at an AU2 level. Since Glenn does not meet the basic qualifications [for an AU-02] he cannot be given an [acting] AU2 or an acting PM4 assignment because there are no PM4 Investigators positions in RevCan. Tax. Glenn will continue to work file at current level.

...

[44] Mr. Currie continued with his grievance, and at the third level of the grievance process, it was resolved. Mr. Currie was granted acting pay at the AU-02 level retroactively from September 1996 to early 1999. He was paid acting pay for the number of hours he had charged to the file. The file was then reassigned because Mr. Currie did not meet the educational requirements for the AU group.

[45] Mr. Currie testified that close to 400 criminal charges were laid and that the file went to the court stage. Mr. Currie was the chief crown witness. There were two or three pretrial motions that lasted over two years. After the matter was set down for trial, the accused taxpayer pleaded guilty and was sentenced in September 2001. Between 1996 and 2001, Mr. Currie did not work on any other files.

[46] The PM-04 job description was effective in May 2000. The complexity rating for the file would have placed it within the PM-04 job description.

[47] Mr. Currie reviewed some of the key activities of the revised PM-03 job description (Exhibit G-2) against the duties he performed in the investigation file. He testified that there was no such thing as a routine tax evasion case and that the file he worked on could not be described as “routine.” He also testified that every file was worked on to the same standards.

[48] The second key activity listed in the revised PM-03 job description (see paragraph 23 of this decision) is the planning and conducting of “. . . routine investigations. . . .” Mr. Currie testified that the file was not a routine or simple investigation.

[49] Mr. Currie reviewed the PM-04 job description (Exhibit G-3) and testified that it more accurately described the duties that he performed. He was also of the view that a complexity rating code of 20 (the PM-04 level) was more appropriate for the file that he worked on. He testified that the key activity in the PM-04 job description of advising and assisting team members and taxpayers more accurately described the work that he performed. There were 10 or 11 investigators assisting in the investigation, and they all had to be instructed. He was involved in coordinating interviews and providing team members with information. Some investigators had to be educated about what a valid claim was and what was fraudulent.

[50] Mr. Currie also testified that he was involved in the key activity set out in the PM-04 job description of advising and assisting team members in negotiating proposed reassessments of tax returns “. . . where the issues are complicated, contentious and/or involve large amounts, in adversarial circumstances” He testified that there was no paragraph in the revised PM-03 job description that had a level of detail comparable to that of the PM-04 job description.

[51] He testified that there was extensive interaction with almost 300 people, including credit unions and accounting firms. The PM-04 job description specifically refers to the fact that cases with a higher complexity rating will have more third parties, whereas the revised PM-03 job description does not include that reference.

[52] The PM-04 job description also states that cases with a higher complexity “. . . will likely involve more complex schemes with higher quantum, resulting in more complex interaction. . . .” which is not contained in the PM-03 job description. In the file that Mr. Currie worked on, various schemes were used, some more complex than

others. However, that did not result in more difficulty. It required more research because of the sheer volume of schemes used.

[53] The PM-04 job description also states that cases with a higher complexity rating will involve more difficult testimony and more complex cross-examination issues. Mr. Currie was extensively cross-examined in one of the motions on the file that he worked on. He testified that the revised PM-03 job description does not accurately reflect that situation.

[54] The PM-04 job description refers to interacting with team members when providing technical and investigative advice and training. Mr. Currie testified that he was required to provide such guidance.

[55] In terms of “influence,” Mr. Currie testified that what is of national significance in terms of investigations is not usually related to the complexity of the file but to something new or innovative in tax fraud, or to some new defence tactic. Mr. Currie referred to an influential court case that was rated at the lowest complexity level and that was one of the most important cases in the past 20 years.

[56] In terms of media attention, Mr. Currie testified that the case he was involved in attracted provincial media attention. The revised PM-03 job description refers to local media attention, and the PM-04 job description refers to regional and occasionally national media coverage.

[57] Under “Thinking Challenge” the PM-04 job description refers to “. . . a number of complicating factors . . .” that will arise during an investigation that can generally be predicted at an early stage of the investigation, while other more complicating factors “. . . may materialize and consequently require adaptation by the investigator.” The revised PM-03 job description refers to “. . . one or more . . .” complicating factors “. . . which are normally predictable at an early stage . . .” in the investigation. Mr. Currie testified that there were four complicating factors in the case he worked on: the amount involved exceeded \$100,000, there were legal challenges, there was a “fought” trial (although settled at the end) and there were victim impact statements. There was also an effect on the community, given the amounts involved and the size of the community.

[58] The PM-04 job description refers to the role of the investigator in analyzing and evaluating “. . . a moderate volume and variety of evidence . . .”, whereas the revised PM-03 job description simply refers to analyzing and evaluating evidence. Mr. Currie testified that the volume of evidence was substantial, not moderate.

[59] Both job descriptions refer to the requirement to modify investigation plans to deal with factors not in the control of the investigator, such as legal challenges and evidence uncovered during an investigation. The revised PM-03 job description states that the complexity of those factors and the extent of modification required is generally “of a low level” according to the case-complexity rating system. The PM-04 job description states that it is generally “at a medium level.” Mr. Currie testified that in the case he worked on the taxpayers were “sticking to their story,” so he had to change his approach to interviews and be more aggressive.

[60] Mr. Currie testified that he had the skills to handle the case that he was assigned. In terms of knowledge and skills in forensic accounting methods, the only difference between the two job descriptions is that the PM-04 job description refers to “difficult” evasion schemes and the revised PM-03 job description describes them simply as evasion schemes. Mr. Currie testified that he had to have knowledge of forensic accounting methods because of the interconnections in the scheme being investigated.

[61] Mr. Currie testified that as the lead investigator on the file, he was ultimately responsible for it and was relied upon to make decisions on the file and support those decisions with a rationale. He was the lead investigator from September 1996 until April 2000.

[62] As noted above, Mr. Currie received acting pay for his work on the file from September 1996 to early 1999 at the AU-02 level. He also worked on the file in 2001 and received acting pay for the hours worked from June 18, 2001, to September 28, 2001, at the PM-04 level.

[63] In cross-examination, Mr. Currie testified that he performed SEP audits between 1996 and 2000 and that his SEP duties were captured in his original PM-03 job description. He also testified that the PM-04 job description more accurately described his duties on a day-to-day basis. He was acting as a PM-04 from June 2005 to July 2006

because he was working on a case rated at a higher complexity rating than the complexity level for the revised PM-03 job description.

[64] Ms. Toole testified that she met regularly with team leaders to discuss file assignments. If a PM-03 investigator/auditor was assigned a file beyond the scope of his or her job description, that employee received acting pay.

C. Mr. Henderson's grievance

[65] Mr. Henderson filed a job description grievance on October 23, 1997 (Exhibit G-4). He received a final-level reply to his grievance on August 1, 2002, and the grievance was referred to adjudication on September 9, 2002 (Exhibit G-5). On June 1, 2002, Mr. Henderson was promoted to a PM-04 position. He retired from the public service in March 2005.

[66] Mr. Henderson started his career at Revenue Canada (now the Canada Revenue Agency) in 1970 and became a PM-03 in 1975. He was appointed to a position as an SEP investigator at the Hamilton TSO in the early 1990s. After working on a pilot project on the underground economy he returned to the SEP on April 1, 1995. His role on his return to the SEP was to develop workloads and to serve as a liaison officer between Revenue Canada and various law enforcement agencies in the region (Exhibit G-6). At that time, the Hamilton TSO was rebuilding its SEP. In addition to building the workload for the office, Mr. Henderson was also involved in mentoring and training new investigators. As part of his duties, Mr. Henderson prepared applications under the *Criminal Code*, R.S.C., 1985, c. C-46, to obtain records from law enforcement agencies. He was also expected to perform a number of SEP audits, and he completed six in his first year (Exhibit G-6). He testified that SEP files were not complexity rated and that the complexity rating forms were not used for those files.

[67] In the following fiscal year he continued to develop the workload for the Hamilton TSO. He was also involved in liaising with a number of law enforcement agencies to obtain names and targets for audits. In that year he completed four audits, as the time he spent on coaching and mentoring was more than in the previous year. He spent time coaching two AU-01 officers (Exhibit G-6). Mr. Henderson also served several "requirements" to file income tax returns and net-worth statements which are formal requests to taxpayers.

[68] Mr. Henderson estimated that he was spending half his time on workload development and mentoring. The other half of his time was spent on auditing.

[69] Mr. Henderson was asked in examination-in-chief to describe a typical day. He testified that he would meet with the Royal Canadian Mounted Police (RCMP) who would have files that they wanted to discuss with him from a tax perspective. If he met with the RCMP at their office, Mr. Henderson would take either the team leader or a junior investigator/auditor with him to “show them the ropes.” The RCMP would share what they had in their files with him. He would then return to the Hamilton TSO and run the name through the tax database to see how the tax records corresponded with the information from the RCMP. The information would then be cross-referenced with the GST, personal and corporate databases. Files would be opened on all referrals either by Mr. Henderson or by someone he would ask. After an initial checklist was run through, including such things as criminal record checks, vehicle checks and real estate checks, the file would then be assigned for investigation.

[70] Mr. Henderson testified that he sometimes followed cases through the courts. He would observe court proceedings, make notes of evidence and add the information to the lead bank. He would also review newspapers to obtain the names of individuals charged with criminal offences and would occasionally call the relevant police force to obtain the history of a charge.

[71] Mr. Henderson also stated that on occasion he had to obtain an access order from the courts. An access order is the authority to share records that were obtained through a search order of another law enforcement agency.

[72] Mr. Henderson said that he also received referrals from other TSOs as well as from a network of “tax crusaders” that Mr. Henderson also described as “reliable sources.”

[73] In terms of mentoring and coaching, Mr. Henderson testified that AU employees lacked training in performing net-worth audits and that he had to walk them through files. They often asked him to attend initial interview meetings. He also directed them on how to prepare access orders.

[74] In examination-in-chief, Mr. Henderson was asked about the kinds of audits he performed. He testified that he performed what he described as “PM-03” audits: ones that were not expected to be time consuming.

[75] He testified that nobody else at the Hamilton TSO was doing workload development when he was performing that function. When he was developing the workload, he did not necessarily know whether it was a PM-03 or an AU workload. Many of the leads he developed were assigned to AU-02s and AU-03s or were transferred to other TSOs.

[76] Mr. Henderson was asked in examination-in-chief why he filed his grievance in October 1997. He testified that the job had previously been filled by AU-02s or possibly by those with higher classifications. He stated that workload development officers at other TSOs were either AU-03 team leaders or dedicated AU-02 investigators. He testified that he wanted to be paid equivalently. When asked about the reference to the original PM-03 job description in his grievance, he stated that he had likely been coached by his bargaining agent. He testified that there had been rumours and “talk” for several years that the employer was in the process of creating another job description.

[77] On November 6, 1998, Mr. Henderson wrote a letter to Roy Prince, the Acting Assistant Director of the Investigations Division at the Hamilton TSO requesting acting pay (Exhibit E-4). After setting out the duties of his job function, Mr. Henderson wrote:

...

In March, 1997, an AU2 was assigned responsibility for the Leads, Assistance, And Voluntary Disclosure (LAD) program. Then, in April, 1998, an Acting AU3 Team Leader position was created for this individual. A significant portion of the job functions are identical to my own and, in fact, there has been frequent overlap, and even duplication of effort. However, I have never been informed of any change in my own job function, which I continue to perform to this day.

In light of the recent acting AU3 appointment for the same duties as I perform, I am requesting Acting Pay and a level equivalent to AU3, effective the date I was assigned to these duties, 1 April, 1995.

...

[78] Mr. Prince replied on November 12, 1998 (Exhibit E-5). He denied the request for acting pay on two grounds. First, he stated that Mr. Henderson did not meet the basic qualifications for the AU group and therefore did not qualify to receive acting pay at the AU-03 level. Second, he stated that the key activities of the original PM-03 position included the duties that Mr. Henderson was claiming justified acting pay.

[79] Mr. Henderson filed a classification grievance on October 17, 1997 (Exhibit E-6). He received a final-level reply on February 19, 1998, denying his grievance (Exhibit E-7). Mr. Henderson did not pursue the classification grievance further (the only route available to him would have been a judicial-review application).

[80] Mr. Henderson discussed acting pay at the PM-04 level with his then team leader, Patricia Northey, in December 2000 (Exhibit E-14). She told him that he was not “substantially” performing all of the key activities of the PM-04 job description. She identified the activities that he was not performing as those related to audits and investigations. She suggested that he “self-assess” the work he had been doing to make a determination as to whether he was performing the key activities set out in the PM-04 job description. He responded with a memo (Exhibit E-15). He set out a summary of his duties and concluded as follows:

...

Because of my above noted duties I have not performed my own audits/investigations in recent time. Therefore tracking my performance in the traditional fashion may be somewhat subjective in relation to identifying my contribution with the Key Activities outlined in Work Description for [PM-04].

During discussions with previous managers Roy Prince and Andre Verschoore regarding this newly created Job Description it was stated that I would be appointed in an Acting Position until the positions were filled in the normal fashion.

Furthermore my contribution regarding the Key Activities of the Job Description are demonstrated in part with the success of the SEP production in this TSO. A review of my recent performance reviews, current production of the SEP completed files, inventory of files in the lead bank and recent appointment as a competition board member will confirm this statement.

The duties of my position as described above have previously been filed with staff in this office at the AU2 level. My

colleagues in other TSO are at levels up to AU3's. Thus I feel that I should be made and Acting PM4 as of May 18, 2000.

...

[81] Ms. Northey testified that she did not recall that SEP liaison work was ever done by someone classified at the AU-02 group and level at the Hamilton TSO. She was also not aware of the classifications of the persons at other TSOs who did that work.

[82] Arthur Payne, another of Mr. Henderson's team leaders, testified that all team members were involved in workload development. He testified that Mr. Henderson did not perform any duties that were not in the original PM-03 job description. He stated that gathering information (the preliminary stage of an investigation) is not complex. Analyzing the gathered information determines the file's complexity. Mr. Payne testified that Mr. Henderson never performed SEP audits rated higher than PM-03. Mr. Payne never received from Mr. Henderson a request for acting pay. He was asked if Mr. Henderson would have been entitled to acting pay. He stated that the Hamilton TSO only had PM-03 positions and that Mr. Henderson did not meet the educational qualifications for an acting AU assignment. In cross-examination, he agreed that the AU-02 and PM-03 job descriptions were nearly identical. In re-examination, he noted that AU-02 positions did not involve workload development but rather performing audits.

[83] Mr. Henderson received a revised PM-03 job description in December 2000, which he signed (Exhibit E-9). He did not grieve that job description. He testified that he was not happy being at the PM-03 level. However, he thought that it was close to the time that the new PM-04 position would be posted, and he was confident that the revised PM-03 job description would be redundant. He testified in cross-examination that the PM-04 position had been in the "pipeline" for some time and that he had had discussions with previous team leaders who had assured him that he would be appointed to a PM-04 position. He stated that it was more of an expectation than a promise.

[84] In November 2002, Mr. Henderson and his bargaining agent approached Mr. Landry, who was then Assistant Director of the Investigations Division at the Hamilton TSO, with concerns about acting pay that had initially been raised in material submitted by Mr. Henderson on December 11, 2000. Mr. Henderson was seeking acting pay at the PM-04 level for the period from May 18, 2000, to June 1, 2002. Mr. Landry

responded on December 5, 2002 (Exhibit E-10). He denied the request on the basis that Mr. Henderson was not substantively performing all the key activities of the PM-04 position.

[85] Mr. Henderson requested further details from Mr. Landry on January 10, 2003 (Exhibit E-11), and received a reply a week later (Exhibit E-12). Mr. Landry listed the duties as described by Mr. Henderson and then identified the key activities of the revised PM-03 job description that, in his view, corresponded with those described duties:

...

You [stated that] your "Duties consist of:

- *Establishing contacts with law enforcement agencies to encourage leads and to obtain information for the SEP*
- *Handling confidential external informants, and obtaining leads and information from them.*
- *Assessing SEP leads and analyzing the information and conducting additional research.*
- *Developing leads and analysis into SEP workload.*
- *Where appropriate, making lead referrals to other CCRA programs.*
- *Facilitating meetings with RCMP and other law enforcement agencies to identify and discuss SEP targeting.*
- *Serving as trainer and mentor to new and less experienced SEP personnel.*
- *Conducting liaison with law enforcement agencies on behalf of staff from other CCRA programs.*

In addition during the post year I was designated The CCRA Tax representative to CISO."

I reviewed each of the duties you described above and I would like to cite part of the KEY ACTIVITIES described in the PM-03 job description

...

[86] Mr. Landry went on to list the following of the “key activities” section that he believed captured the duties listed by Mr. Henderson (for full references see the list of key activities at paragraph 23 of this decision): numbers 6, 12, 16, 19, 21, 22, 26 and 27.

[87] On June 1, 2002, Mr. Henderson was promoted to a PM-04 position through a competitive process. He was asked in examination-in-chief what changes occurred in his duties after his promotion. He testified that there were very little if any changes to his duties. He testified that he did fewer audits, more coaching and more workload development. He was asked if the complexity of the audits that he was performing changed, and he replied: “I don’t think so.” He was not sure how many audits he performed as a PM-04. His performance management report for 2001-2002 (Exhibit G-8) states that Mr. Henderson completed one audit on a hydroponic grow operation. He stated that the only difference from other audits was the possible collection loss because of the nature of the operation, which required him to perform a “jeopardy assessment” of the file.

[88] Mr. Payne agreed that Mr. Henderson’s duties did not change substantially when he became a PM-04. Mr. Payne stated that there were fewer audits to do, so more emphasis was put on workload development. Mr. Henderson was also on extended leave during the period, so there were fewer audits assigned to him. After Mr. Henderson indicated his intention to retire, Mr. Payne did not assign him any SEP audits because of the length of time they take to complete.

D. Mr. Willisko’s grievance

[89] Mr. Willisko filed his job description grievance on August 14, 2000 (Exhibit G-12), and grieved that the original PM-03 job description did not accurately reflect the work that he had been performing since January 1, 1992. Mr. Willisko was appointed to a PM-03 position in August 1980 and started performing investigations in 1992. He became a certified fraud examiner in 1997.

[90] Mr. Willisko was seconded to work at the Integrated Proceeds of Crime Unit (“the IPOC Unit”) in Edmonton in April 1998. The IPOC Unit is a multi-force unit headed by the RCMP. A Memorandum of Understanding (MOU) between the RCMP and the employer (Exhibit E-27) sets out the requirements for the secondment of tax investigators/auditors to the RCMP. The MOU notes that operational requirements

require a “. . . reconsideration of the traditional role . . .” played by Revenue Canada in the course of police investigations. In particular, seconded employees are expected to provide the RCMP with ongoing assistance from the earliest stages of proceeds-of-crime investigations.

[91] The MOU further provides that the RCMP officer in charge (OIC) of each IPOC Unit has overall responsibility for the management of the unit as well as direct supervisory authority over all employees assigned to the unit as follows:

. . .

4.2 The OIC of each IPOC Unit has complete discretion, as to the timing of and the decision of, which files are investigated and which files are releasable to [the employer] in accordance with the law. [The employer’s] members of the IPOC Unit may communicate and release information and documentation to [the employer] officers outside of the IPOC units only with the approval of the OIC. . . .

4.3 Each OIC IPOC Unit will consult with a representative from [the employer’s] Investigations when considering issues likely to affect the working conditions within, or the operational capability of the IPOC Unit.

. . .

[92] The MOU states that the employer’s “. . . internal administration policies . . .” would apply to seconded employees and that seconded employees would retain “. . . rights and obligations of their respective agency.”

[93] The MOU also sets out the role of seconded employees:

. . .

5.3 The role of the dedicated [the employer] Personnel while on the IPOC Units may include, but is not limited to:

(1) analyzing information for [proceed of crime] investigational purposes;

(2) advising IPOC Units on financial matters with regard to [proceed of crime] investigations by identifying relevant financial sources and materials;

(3) reviewing of search materials and financial evidence with regard to [proceed of crime] investigations in accordance with the law;

(4) where appropriate, performing net worth analyses on targets;

(5) assisting in accordance with s. 462.48 of the Criminal Code;

(6) assisting the OIC in evaluating IPOC cases for referral to [the employer] and providing feedback on IPOC case referrals by tracking and maintaining statistics on assessments, fines and collections and

(7) liaising with [the employer's] auditors and investigators outside of the IPOC units for the purpose of audits and investigations as referred to them by the IPOC OIC.

...

[94] Mr. Willisko described his role as an investigator with the IPOC Unit as comprising disseminating *Income Tax Act* information and conducting investigations where there were allegations of tax evasion. He was also responsible for identifying files to be referred to the SEP. He was also qualified to be an expert witness on financial analysis. His team leader, Layne Wilson, assigned SEP files for him to complete. Mr. Wilson described those audits as “basic.” Mr. Wilson testified that Mr. Willisko called him on a regular basis and that Mr. Willisko did not frequently come to the Edmonton TSO to advise Mr. Wilson of what he was working on.

[95] David Poon was the Acting Assistant Director of the Enforcement Division at the Edmonton TSO from 1996 and was confirmed in the position in 2001. He testified that he met with the OIC of the IPOC Unit at least two times per year to discuss, among other things, Mr. Willisko’s activities. The RCMP was the primary charging agency and was always the lead investigator on IPOC-Unit files. In cross-examination, Mr. Poon stated that he did not discuss specific files with the OIC. For the purposes of this hearing, Mr. Poon prepared a chart (Exhibit E-28) correlating the role at the IPOC Unit with the original PM-03 job description. He concluded that Mr. Willisko’s duties fell within the original PM-03 job description. He also testified that there were no complexity rating forms for SEP audits.

[96] Mr. Willisko filed a grievance claiming acting pay on June 8, 2000, for the period from January 1, 1992, to June 2000 (Exhibit E-24). He was granted acting pay for the period of January 1, 1993, to December 31, 1997, as a settlement of the grievance. The grievance reply from Mr. Poon stated, in part the following:

...

... case assignment in the Investigations Division is based upon Form T20CR Case Complexity Rating. The T20CR is prepared once the case becomes a full-scale investigation. There is no requirement to prepare a T20CR at the workload development stage or for Special Enforcement Program audits. The T20CR applicable during this time period states that investigation cases with a point rating of 15 to 22 are normally assigned to Investigators at the AU02 level.

...

Mr. Poon identified three cases assigned to Mr. Willisko that were at the AU-02 level. The other cases were not accepted as being at the AU-02 level. One case had a complexity rating of 13, which was within the PM-03 range. Other cases were "... concluded as SEP audits and not as investigations. ...". According to Mr. Poon, the complexity rating form was not applicable to those files, so they remained at the PM-03 level. One case was at the workload development stage, and no complexity rating form was required. Mr. Poon also stated the following:

...

... The work performed on the ... case is part of your assignment to the RCMP. As discussed, any potential CCRA investigations on [the case] should be referred to your team leader for assignment.

...

[97] In August 2000, Mr. Willisko was working on a large file involving smuggling and trafficking. The file was not complexity rated, but Mr. Willisko testified that he knew from the beginning that it was not a PM-03 file and that "management" knew it as well. Mr. Willisko reviewed the case-complexity form and estimated that the complexity rating for the file should have been 33. He completed his work on the file in 2004. Other files that he worked on were also not complexity rated. One file that he worked on was not as complicated as the smuggling file, but he estimated its complexity at somewhere in excess of 23 points.

[98] Mr. Willisko was asked why he filed his grievance. He testified that it was clear to him that his request for acting pay was to be denied in part. As well, in May 2000, a PM-04 job existed. He testified that his original PM-03 job description did not reflect

the type of work that he had done for at least seven or eight years. He testified that it made no sense that he would be considered as having less knowledge than a field auditor. The complexity of the file he worked on was in the AU-02 range, and some files were at the AU-03 level. Mr. Willisko testified that he also filed a grievance in August 2000 requesting a complete and current job description as well as the point rating allocated by factor to his position (Exhibit G-12).

[99] Mr. Poon wrote to Mr. Willisko on November 20, 2000 (Exhibit E-25), with respect to Mr. Willisko's responsibilities at the IPOC Unit:

...

... you are not expected to perform any duties beyond those outlined in that job description. It is our responsibility to ensure that you are assigned work that is consistent with your job description. Any files or workload which is beyond [your job description] should be immediately brought to the attention of your Team Leader for appropriate action.

To assist in the determination whether your work at the RCMP falls within the parameters of [your job description], the only tool available to us at this time is Form T20CR [the complexity rating form]. In this regard, we request that your workload at the RCMP be evaluated using Form T20CR.

...

[100] Mr. Poon testified that he never threatened to move Mr. Willisko out of the IPOC Unit. His reference to "appropriate action" meant reassigning the file to someone else if it was at a higher complexity rating. In cross-examination, Mr. Poon admitted that the tone of the letter "sounded ominous" but that he had talked to Mr. Willisko and reassured him that it was not his intention to remove him from the IPOC Unit.

[101] Mr. Poon testified about a meeting he had with Mr. Willisko and Mr. Wilson on February 27, 2001. He provided notes taken at the meeting (Exhibit E-31). From his notes, Mr. Poon testified that Mr. Willisko stated that he wanted to remain in the IPOC Unit and that he had no problem working on IPOC-Unit files from a tax perspective. Mr. Willisko was advised at the meeting that he was not the lead investigator on RCMP files and that his job description stated that he could work on higher complexity-rated files if he was not the lead investigator. Mr. Poon testified that Mr. Willisko stated that he had "no problem with this." He was also advised that all IPOC-Unit files have a SEP

element which was also covered in his job description. He was further advised that any CIP audits referred to the CIP for full-scale investigations would be rated in accordance with the complexity rating form and that any file rated higher than PM-03 would have to be reassigned. Mr. Poon testified that Mr. Willisko concurred with that statement.

[102] Following the meeting, Mr. Wilson emailed Mr. Willisko (Exhibit E-30) on March 8, 2001, to clarify the employer's position on Mr. Willisko's duties while at the IPOC Unit. Mr. Wilson repeated the comments made by Mr. Poon in his November 20, 2000, letter (Exhibit E-25), quoted in paragraph 99 of this decision. In addition, Mr. Wilson set out the following:

...

- *All parties agreed that Proceeds of Crime Files are considered to be Special Enforcement Program files for purposes of the Investigations program.*
- *For purposes of the Special Enforcement Program, it is agreed that Special Enforcement Program audits are considered to be within [your job description].*
- *If complex issues or any other factors develop within the Special Enforcement Program audits, which may result in the audit being classified outside [your] job description, the file will be discussed with your supervisor for further action. Some examples of complex issues include: sophisticated fraud schemes, numerous inter-company transactions, a series of corporations with interwoven transactions or a precedent setting scheme.*
- *In situations where the Special Enforcement Program audit develops into a Criminal Investigations Program prosecution, the audit will be referred by way of a T134 into the Criminal Investigation Program. As such, the T20CR [complexity rating form] will be prepared and the complexity of the case will be discussed with your supervisor for further action.*
- *This agreement will not affect your current job description and classification grievance.*

...

[103] Mr. Poon spoke to Mr. Willisko by telephone on March 15, 2001, and summarized that conversation in an email to Mr. Wilson the following day

(Exhibit E-30). Mr. Willisko told Mr. Poon that he had read and understood the email. He told Mr. Poon that he did not have any questions and advised him that his job description grievance was proceeding to adjudication.

[104] Mr. Willisko was subpoenaed to testify at a tax evasion court case scheduled to be heard on May 22, 2001. He testified that after reviewing the investigation file, he discovered that it was rated at the AU-03 level. He further testified that a request for acting pay was denied. He advised his team leader by voice mail on May 18, 2001, that, in accordance with advice from his lawyer, he would not be performing any duties outside of his job description. In a letter to Mr. Willisko (dated May 28, 2001; Exhibit E-29), Mr. Poon stated that the inference of the voicemail message was that he was refusing to testify. The federal prosecutor had made a determination on May 18, 2001, that Mr. Willisko's testimony was in any event, not required. Mr. Poon stated in the letter that it was the employer's position that testifying as a witness — as an expert or otherwise — was a component of the revised PM-03 job description (Exhibit E-29). Mr. Poon concluded the letter by asking that if Mr. Willisko felt that any of the current activities he was performing at the IPOC Unit were not included in the revised PM-03 job description that he advise Mr. Poon or Mr. Wilson so that those activities could be addressed

[105] Mr. Willisko was appointed to a PM-04 position in 2002. He testified that there was no difference in his duties after his appointment. Mr. Poon testified that the introduction of PM-04 jobs enabled the PM-03s to work on an acting basis on more difficult files and gave managers greater flexibility in assigning files of a higher complexity. He also testified that quite frequently, employees worked on files of a lower level of complexity than that specified in their job descriptions.

[106] Mr. Wilson testified that, apart from the period when Mr. Willisko received acting pay, Mr. Willisko was never assigned duties that were not within his job description.

E. Ms. Wilson's grievances

[107] Ms. Wilson filed an acting pay grievance on April 28, 2000 (Exhibit G-10). She filed a job description grievance on the same date (Exhibit G-11).

[108] Ms. Wilson commenced her employment in 1970 and began working in the Audit Division of the Southern Interior (B.C.) TSO in 1980. In October 1988, she became

a PM-03 investigator/auditor in the CIP. From January to December 2001, she was in an acting PM-04 position until she succeeded in a competition for a PM-04 position. She retired from the public service in October 2006.

[109] When she started as an investigator/auditor in 1988, her supervisor assigned files based on each investigator's knowledge and suitability. There was normally only one investigator on a file, and if assistance was required, the investigator would go to the team leader.

[110] Ms. Wilson reviewed the large cases that had been assigned to her for investigation. The case complexity forms for the files that were introduced at the hearing (Exhibits G-13 to G-17) included her handwritten notes of what she believed should have been the correct ratings. She testified that she made those notes after filing her grievances and did not show them to her team leader.

[111] The first case that she reviewed was assigned in 1989 and involved two related corporations and the failure to report a sale of shares as well as an altered trust agreement. The case involved 25 witnesses and a number of search locations, including Yellowknife, Northwest Territories. Her supervisor gave the file a complexity rating of 11, putting it within the range of a PM-03 (Exhibit G-13). Ms. Wilson testified that the rating was not accurate given the complicating factors on the file. She testified that in her view, the file warranted a complexity rating of 25, which would have placed it at the AU-03 level. In her testimony, she presented arguments for why additional points should be added to each factor. She completed the file in 1995.

[112] The second case that she reviewed also involved undisclosed sales. The case involved 213 witnesses and proceeded to trial. The case was settled after the first court appearance and resulted in a fine in excess of \$100,000. The case was complexity rated by her supervisor at 14, within the range of a PM-03. She testified that it was not an accurate rating and submitted that given the factors involved in the investigation, it should have been rated at 18 points, which would have put it in the range of an AU-02. The case was completed in 1993.

[113] She also reviewed a case that was assigned to her in 1990 that was rated at 15 points, an AU-02 rating. She testified that the investigation file should have received more points, given its complexity. She worked on the file from the beginning and was the sole investigator. The case was completed in 1995.

[114] Paul Brisson was the Assistant Director, Enforcement Division, Southern Interior (B.C.) TSO. He was the Acting Assistant Director in 1996 and was appointed to the position in 1997. He testified that he had discussions with his employees about files every day or every week. He conducted monthly case planning meetings where investigators listed the cases they were working on and what they had done on the files and what they were planning to do. He testified that he determined the complexity level of a file before assigning it to an available investigator. The investigator would then perform a preliminary investigation to determine if there were reasonable and probable grounds for a full investigation (requiring a search and seizure). After the search and seizure, Mr. Brisson would review the file's complexity rating to determine if any changes were required. If an adjustment to the complexity rating changed the assigned classification level, then the person assigned the file would receive acting pay at the higher level. If the employee was not eligible for that higher-level position, he then would have to consider reassigning the file.

[115] In 1996, Ms. Wilson was assigned an investigation file that was originally complexity rated at 11 points and then subsequently raised to 16 points, putting it in the range of an AU-02. Mr. Brisson sent a request to Kevin J. Ritcey, Director, Tax Services, Southern Interior (B.C.) TSO, on February 5, 1998 (Exhibit E-19), requesting acting pay for Ms. Wilson at the AU-02 level, retroactively. In his email he noted that a number of PM-03 officers in Vancouver were recently paid acting pay at the AU-02 level. He was seeking acting pay for Ms. Wilson from May 14, 1997, to February 5, 1998. He assigned the file to himself on February 5, 1998. He wrote that Ms. Wilson had agreed to assist him in completing the file. He also commented on the challenges of assigning case files as follows:

...

HQ, Rod Jamieson, and myself had long discussions on this problem of no PM4 & 5s for acting positions when investigations cases handled by PM staff - who are very capable of doing the investigation - but then the case complexity increases and we [have] to withdraw the case from them and hold onto it until an AU becomes available.

...

[116] After consulting with a representative of Human Resources, Vince Boutilier advised Mr. Brisson that the employer's policy stipulated that persons must be

“qualified” to act in positions. Persons classified as PM-03 did not generally meet the educational qualifications of an AU position. Mr. Ritcey emailed Mr. Brisson on March 2, 1998 (Exhibit E-19), setting out his answer on requests for acting pay for two PM-03s (including Ms. Wilson) as follows:

I broached the subject at last week’s Tax Directors Meeting and the consensus was that as a rule we should not be paying acting pay unless the recipients are “qualified” at the intended pay level.

However, I am satisfied that the work actually done by [Ms. Wilson] was on AU02 complexity files and that it was as a direct result of their efforts that these files have been productively resolved. I therefore will approve, on an exception basis, the request to pay them at the AU02 rate of pay for the time they expended on these files.

I would hope that HQ Investigations soon completes its work on the classification of investigations jobs and revises the complexity systems and tools to ensure that employees are compensated fairly for the work they do.

[117] Ms. Wilson received acting pay from October 8, 1997, to February 5, 1998 (the date the file was reassigned), for a total of 650 hours. She testified that she had worked in excess of 2000 hours on the file. She also testified that her supervisor told her that he had been advised by a contact in Human Resources that if she received acting pay of more than 650 hours, the acting assignment would have to be posted for competition. Mr. Brisson testified that he added up all the hours charged to the file from the date of assignment to the date of reassignment, and that was how he reached the total of 650 hours. The file was completed in 1999.

[118] Ms. Wilson received acting pay for the period from February 16, 1999, to December 29, 1999, due to the increased complexity of her files (Exhibit E-20). She received an “acting letter” for that work on February 21, 2000 (Exhibit E-20).

[119] Mr. Brisson testified that the case assigned to Ms. Wilson in 1998 was reassigned to him as the lead investigator in 2000 after she brought to his attention the fact that the complexity had changed. He agreed with her and increased the number of points assigned. He testified that Ms. Wilson continued to work on the file as he worked on it. In addition, he requested assistance from other investigators. In cross-examination he testified that Ms. Wilson assisted him on the file but also that she did most of the work on the file. He testified that he could not assign the file to

her because there was no PM-04 position that she was eligible for at that time. When the PM-04 job description was created, he reassigned the file to her and paid her acting pay from January 2001. In cross-examination he testified that the file was near completion when he assigned it to himself. Ms. Wilson compiled the evidence and conducted all the third-party interviews. She was responsible for working with the Department of Justice because she had laid the charges. In re-examination, Mr. Brisson emphasized that the ultimate responsibility for the file, when it was assigned to him, rested with him.

[120] Ms. Wilson received acting pay for the period from January 2, 2001, to March 31, 2001, as a PM-04 due to the increased complexity of the files and her workload (Exhibit E-21). She received a further period of acting pay from April 1, 2001, to December 31, 2001, for the same reasons and was advised of that acting pay on March 16, 2001 (Exhibit E-21). On the complexity rating form for this file, Mr. Brisson noted that it was assigned to Ms. Wilson as an acting PM-04 as no PM-04s or AU-02s were available to take the case (Exhibit E-21).

[121] Mr. Brisson testified that Ms. Wilson never asked for acting pay for any other files.

[122] Ms. Wilson testified that her other duties included training all investigators on all aspects of an investigation, including how to prepare an “information,” prepare search warrants and conduct searches. She trained people at the PM-03 to AU-03 levels.

[123] Ms. Wilson testified that she filed her job description grievance because she believed the work that she was performing was at the AU-02 level, not the PM-03 level. In addition, all customs officers had been reclassified to the PM-04 level. In her view, the PM-04 job description better reflected the work she was performing.

[124] Ms. Wilson was asked why she waited to file an acting pay grievance. She testified that she had always been told that since there was no PM-04 position for investigators at that time, she did not qualify for acting pay at the PM-04 level.

[125] Ms. Wilson was acting as a PM-04 in January 2001 and was appointed to a PM-04 position in December 2001. She testified that when she started the PM-04 position she was not assigned new duties or new files and did not receive any special training.

[126] Ms. Wilson provided a letter written by her supervisor from 1988 to 1996, Brian T. Rodger, dated April 21, 2001 (Exhibit G-18). Counsel for the employer objected to the introduction of this exhibit, as Mr. Rodger was not called as a witness. I allowed the exhibit and reserved my decision on the weight to be given to it. Mr. Rodger wrote about how he assigned cases and about his confidence in Ms. Wilson in assigning her cases above her classification level. Since Mr. Rodger was not at the hearing to testify and, more importantly, to be cross-examined, I have given his letter no weight.

V. Summary of the arguments

A. For the grievors

[127] Counsel for the grievors submitted that the decision of the Federal Court of Appeal overturning the original adjudication decision of Mr. Currie's grievance clearly shows what needs to be addressed in these grievances. The issue is whether the revised PM-03 job description is a complete and accurate job description, as required under the collective agreement. She submitted that where the grievors regularly perform duties outside the revised PM-03 job description, those duties are more accurately described in the PM-04 job description. The Federal Court of Appeal stated that if the adjudicator finds evidence that a substantial part of the grievors' duties involved files of a complexity rating of 20 or more, then the adjudicator must grant the grievances:

...

... I would point out that nothing in these reasons should be taken as a finding of fact as to whether, and to what extent, the appellants are engaged in working on files of complexity 20 or greater. That is a question for the adjudicator to decide on the basis of the evidence which is put before him or her.

...

[128] Counsel for the grievors submitted that the timing of the introduction of the PM-04 job description was not a problem. The grievances were filed over the period from 1997 to August 2002. The PM-04 job description (which is a complete and accurate description of the grievors' duties) did not come into effect until May 2000. However, before May 2000, files were still complexity rated. She argued that my first task was to determine the complexity level of the files that each grievor was working

on. If that complexity level was not covered by the revised PM-03 job description, a finding that the revised PM-03 job description is not current or complete is required.

[129] Counsel argued that given that the PM-04 job description is identical to the revised PM-03 job description, other than with respect to the complexity rating, the appropriate job description is the PM-04 job description. The original PM-03 job description (Exhibit J-4) was effective June 1994 and was revised with an effective date of May 2000. Counsel reviewed the two PM-03 job descriptions in detail and argued that there is no substantive difference between them other than updated language. Both job descriptions set out the complexity-level rating of files to be worked on by investigators at 10. The Federal Court of Appeal compared the revised PM-03 and PM-04 job descriptions and concluded that the only difference was complexity. Counsel reviewed the revised PM-03 and PM-04 job descriptions (Exhibits G-2 and G-3) and noted that the only substantive differences were in the complexity level of assigned files.

[130] At the time of the filing of the grievances and before, the grievors were working on cases that were either complexity rated at a higher level or that should have had a higher complexity rating. Counsel reviewed the evidence of each grievor and argued that the evidence showed that each grievor's job description did not reflect the work they performed.

[131] Counsel for the grievors submitted that with respect to those files that were not complexity rated, I must look to other indicators of complexity. The evidence showed that the work being performed was at a higher complexity level than work being performed by auditors at the AU-02 level. In cases where the file was reassigned to the team leader as the lead investigator, there was no evidence that the team leaders worked on those files. The grievors continued to perform the work on the files, and all that matters is the substance of the work being done.

[132] In the case of Ms. Wilson, the complexity rating of some files was not accurate, as some factors were not accounted for in the original assessment of the files. If those factors had been assessed, the complexity rating would have been higher.

[133] For all those grievors who were subsequently appointed to a PM-04 position, their work did not change, and the complexity of the files that they worked on did not change.

[134] With respect to Mr. Willisko, there was no complexity rating form ever prepared by the employer and the employer's witnesses had no direct knowledge of the work that he performed. The best evidence on the complexity of the work is that of the grievor, and that evidence should be preferred. Mr. Willisko also testified that when he was appointed to the PM-04 position, the nature of his work did not change.

[135] Counsel submitted that the only relevant jurisprudence to consider was the decision of the Federal Court of Appeal that sent Mr. Currie's grievance back to adjudication. The Federal Court of Appeal looked at the issues in the grievance in a manner consistent with general principles relating to job descriptions. What the Court's decision states is that if a job description does not completely and accurately reflect the work being performed, then it is deficient. She also referred me to *Breckenbridge et al v. Library of Parliament*, PSSRB File Nos. 466-LP-225 to 233 and 241 to 245 (19660912), which the Federal Court of Appeal relied on to show that a job description is not only about classification. What the grievors choose to do with a complete and accurate job description is beyond the jurisdiction of an adjudicator.

[136] Counsel argued that it was open to an adjudicator to order a new PM-03 job description that reflects the complexity rating of the work. The PM-04 job description does reflect the complexity level of the assigned files, and it is appropriate for an adjudicator to order that the PM-04 job description is the appropriate job description for these grievors.

[137] With respect to the acting pay grievance of Ms. Wilson, the evidence showed that she substantially performed the duties of a higher classification. It was an ongoing and continuing grievance and could therefore be distinguished from the ruling in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.) (QL), on its timeliness. Counsel referred me to *Macri v. Treasury Board (Indian and Northern Affairs)*, PSSRB File No. 166-02-15319 (19871016), upheld by the Federal Court of Appeal in *Canada (Treasury Board) v. Macri*, [1988] F.C.J. No. 581 (C.A.) (QL). In that case, the adjudicator ordered acting pay for the period beyond the 25-day time limit set in the collective agreement:

...

If the decision of the Federal Court of Appeal [in Coallier] is to be read as barring Macri, or any grievor, from collecting what is alleged to be owed them for a period

*greater than the 20th or 25th day (as the case may be) preceding the lodging of a grievance and within which action must be initiated then surely this forces unfortunate consequences on both parties. It will force employees to demand that management take no longer than 20 or 25 days to resolve decisions lest grievances be automatically lodged to protect their positions. This could frustrate delicate negotiations at most inopportune times. It might well lead to an increase in unnecessary litigation before this Board. Conversely, if the rationale of *Coallier* is as I fear, then there will be every incentive for the employer to delay making decisions in the hopes that an employee will neglect to grieve before the 20th or 25th day, thereby failing to protect his/her interests and becoming barred from claiming what was alleged to be owed. That is to say, there would be an incentive for the employer to fail to act. Such a result would be unconscionable or inequitable.*

...

[138] Counsel also referred me to *Muir v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17714 (19890201).

[139] Counsel for the grievors submitted that denying Ms. Wilson acting pay was inequitable because she was initially advised that she was not eligible to receive acting pay since she did not have the educational qualifications for an AU position. It was clear that there were different practices across the country, and the same standards should apply across the public service. In addition, Ms. Wilson relied on the representations of management and did not apply for acting pay as a result of those representations.

[140] In the alternative, should *Coallier* apply, Ms. Wilson should receive acting pay for a period of 25 days prior to the filing of her grievance.

B. For the employer

[141] Counsel for the employer argued that the issue to be determined is whether or not the original PM-03 job description represents a complete and current statement of duties for the grievors. The Federal Court of Appeal heard no evidence. The Court simply “cut and pasted” job descriptions from the record. There is nothing in the Court’s decision that binds me one way or the other. The Court is asking me to look at the evidence with fresh eyes (see paragraph 29 of the Federal Court of Appeal’s decision, quoted at paragraph 5 of this decision).

[142] A job description defines the relationship between management and the employees. All of the evidence indicates that the original PM-03 job description meets the conditions of being complete and current. Although it may not contain the exact wording that the grievors want, employees are not entitled to a job description of their choice. None of the grievors had an issue with the original PM-03 job description until they encountered the customs group employees. That was the impetus for the grievances of all except Mr. Henderson.

[143] Counsel submitted that all of the managers were clear and categorical in their testimony that if a PM-03 investigator/auditor was given duties beyond his or her job description, either he or she was given acting pay or the file was reassigned.

[144] Counsel argued that the job description at issue was the one that existed when the grievances were filed. This applies to the grievances of Mr. Currie, Ms. Wilson and Mr. Henderson. Mr. Willisko filed his classification grievance in August 2000 — straddling the dates of the job descriptions. Counsel emphasized that one of the key points is that the grievances are essentially academic because the grievors asked for a new job description, received one and did not grieve it. The revised PM-03 job description (Exhibit G-2) has remained in place for six years. In the interests of labour relations certainty, it is important that grievances relate to matters that existed at the time of the filing of the grievances.

[145] Counsel for the employer stated that the rest of her submissions were in the alternative.

[146] Counsel submitted that with respect to the PM-04 description, it was important to remember that none of the investigators/auditors who occupied PM-03 jobs were reclassified to a PM-04 position. All PM-03 employees had to apply for PM-04 positions. That is distinct from a reclassification. Some of the jurisprudence relied on by the grievors is analogous to a reclassification situation, which is not the case here.

[147] When Mr. Currie worked on files of a higher complexity, he received acting pay. Mr. Currie testified that the revised PM-03 job description accurately described all of the SEP duties he performed. Ms. Toole testified that everything that a PM-03 investigator/auditor does is covered in the revised job description, and if the duties fall outside of the job description, employees receive acting pay. All of the employer's witnesses testified that all of the duties performed by Mr. Henderson were covered in

his original PM-03 job description. He asked for acting pay on three different occasions with three different managers and none of them found him to be performing duties outside of his job description. He never grieved those conclusions.

[148] With respect to Ms. Wilson, it would be inequitable if she were to receive acting pay. She did not explain why she never approached her supervisor to advise him that some of the complexity rating forms were faulty. The completion of the complexity rating forms is not the prerogative of an employee, but the forms are management tools to be completed by the team leader. It is unfair for Ms. Wilson to raise an acting pay issue so long after the fact, especially when all the evidence indicates that her manager would have listened to her concerns. Ms. Wilson's supervisor had the ultimate responsibility for the files that were rated at the higher complexity.

[149] Counsel also referred me to *Coallier*. The time period in the collective agreement begins to run as soon as the employee learns of the facts on which the grievance is based. The corrective action open to an adjudicator is therefore limited to the 25 days prior to the filing of the grievance. Counsel also referred me to *Babiuk et al. v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 51.

[150] Counsel reviewed the two PM-03 job descriptions at issue in great detail. She asserted that in many cases the duties were broadly described and that they adequately captured the duties being performed by the grievors.

[151] With respect to Mr. Willisko, counsel submitted that the grievor was not the lead investigator on the case files. She also submitted that the complexity rating form was not designed for RCMP investigations. Everything Mr. Willisko did was captured in the original PM-03 job description. He received approximately five years of acting pay, and nothing further was warranted. The employer was careful to remind Mr. Willisko of the parameters of his job.

[152] Counsel submitted that a job description does not need to go into great detail and will be found to be sufficient if it contains the "fundamentals." She referred me to *Kerswill v. Treasury Board (Natural Resources Canada)*, 2000 PSSRB 91, *Jaremy et al.* and *Hughes v. Treasury Board of Canada (Natural Resources Canada)*, 2000 PSSRB 69.

[153] Counsel also referred me to *Batiot et al. v. Canada Customs and Revenue Agency*, 2005 PSLRB 114. That decision also involved a similar distinction in job

descriptions based on case complexity. In *Batiot et al.*, evidence was adduced that the grievors chose to complete the higher complexity cases rather than refer them to their team leaders for reassignment. The adjudicator found that the employees were doing so on a voluntary basis and that the higher-complexity cases were not within their job descriptions. He also held that the employer was entitled to manage the workplace and that including the higher-complexity cases in the job description would have the effect of voiding the employer's re-engineering of the TSO.

[154] Counsel submitted that the onus was on the grievors to demonstrate that duties missing from the original PM-03 job description were substantial. They did not meet that onus. When the grievors performed work at a higher complexity rating, they were paid acting pay. Although the original PM-3 job description may not be "all they dream about," that does not make it wrong.

C. Grievors' rebuttal

[155] The Federal Court of Appeal held that an adjudicator has jurisdiction to change national generic job descriptions. The mootness argument was not open to the employer, as that matter had already been ruled on at the commencement of the hearing.

[156] It is clear that the grievors cannot access other rights without an accurate job description. Grievors have a right to an accurate job description and should not be penalized because it took seven years to get to a hearing. The employer has blurred the distinction between the general description of duties and the complexity of those duties. Without the reference to complexity, the job descriptions of the PM-03 and PM-04 positions are similar. There is simply no basis for the employer's argument that the adjectives make no difference. The employer would not have created the distinction if adjectives were of no consequence.

[157] The fact that the grievors were not paid acting pay for some work does not mean that they were not performing higher-complexity work.

[158] The complexity form is normally completed by management and, the employer argued that it was not the prerogative of the employee to fill out the form. The employer cannot avoid the responsibility of completing accurate forms and then complain when employees do it. The employee understands what goes on in the file,

and when the employer does not understand what is going on in the file, the employee has to correct it.

[159] Counsel submitted that *Batiot et al.* involved different circumstances. In that case, the employees were not required to perform the duties and were directed not to do so.

VI. Reasons

[160] This decision involves four job description grievances and one acting pay grievance. The Federal Court of Appeal overturned the previous decision of an adjudicator relating to the job description grievance of Mr. Currie. The other grievances were held in abeyance pending the Federal Court of Appeal's decision.

[161] I have already addressed above (at paragraph 12) the employer's argument at the commencement of the hearing that the grievances were moot. I dismissed the objection on the basis that the Federal Court of Appeal had instructed me to decide the issues in dispute in accordance with its reasons. If the employer intended to rely on the mootness argument, it should have raised it at the first adjudication or before the Federal Courts. The record shows that the parties agreed to hold these grievances in abeyance pending the outcome of the judicial-review application of the first adjudication decision on Mr. Currie's grievance. It is not now open to the employer to argue that these grievances are moot because the grievors have either retired or are in different jobs.

[162] In her final submissions, counsel for the employer reiterated her arguments that the grievances do not concern the revised PM-03 job description. I have already disposed of that objection, so I do not need to comment on those submissions. I have considered the employer's alternative arguments below.

A. Job description grievances

[163] To frame the reasons set out below, it is worth listing the main points set out by the Federal Court of Appeal in decision 2006 FCA 194:

- The work description is "... a document which must reflect the realities of the employee's work situation ...";

- The distinguishing characteristic of the revised PM-03 work description is the assigning of files of complexity 10;
- The question for the adjudicator to decide, on the basis of the evidence, is whether, and to what extent, the grievors are engaged in working on files of complexity 20 or greater.

[164] The job description at issue in these grievances is a generic job description. Adjudicators have addressed the right to a current and accurate job description in the context of generic job descriptions. In *Hughes*, an adjudicator concluded that a generic job description need not contain a detailed listing of all the activities performed under a specific duty; nor should it list at length the manner in which those activities are accomplished. In *Jaremy et al.*, an adjudicator noted that it is not unusual for generic job descriptions to be written “. . . in fairly broad language.” The job description will meet the requirements of the collective agreement if it adequately describes “. . . in broad terms . . .” the functions and duties of the grievors. The absence of a “. . . minute delineation . . .” of duties does not necessarily lead to the conclusion that the job description is less than complete and current.

[165] I agree that it is the nature of a generic job description that it will not reflect all of the day-to-day activities of an incumbent of that position. However, the disputed activity in these grievances is more than a “minute delineation.” The complexity of the work assigned goes to the core of the job. The evidence has shown that complexity is the major factor relied on by the employer in determining who is assigned what case. Complexity of work also goes to the heart of a job. In addition, the Federal Court of Appeal has been quite specific in its instructions: the adjudicator must determine whether and to what extent the grievors are performing duties at the complexity level of 20 or greater.

[166] The employer had objected to the introduction of the PM-04 job description as an exhibit. I allowed it, and reserved my decision on its relevance. The Federal Court of Appeal clearly used the PM-04 job description as a point of comparison with the revised PM-03 job description, in particular to highlight the issue of the complexity ratings of files. The task of an adjudicator in a job description grievance is to determine if the grievor’s job description accurately reflects the duties being performed. The task can be conducted without reference to other job descriptions. In this case, it is still my task to determine if the duties of the grievors included work on

files of a higher complexity rating than that specified in their job description. The PM-04 job description is a convenient point of comparison but is not essential for a determination of the grievances. In an acting pay grievance, the job description of the higher-classified position is important and quite clearly relevant.

[167] Counsel for the grievors suggested that an adjudicator had the jurisdiction to order that the PM-04 job description is appropriate for the grievors. In my view, that would be the equivalent of a reclassification of their positions. The Court of Appeal conducted a side-by-side comparison of the revised PM-03 and PM-04 job descriptions. However, I believe that was done to highlight the critical factor that the first adjudicator did not assess: the complexity rating of investigations. I do not believe that the Court was suggesting that an adjudicator had the authority to declare that the PM-04 job description was the appropriate job description in the circumstances. That would clearly be contrary to the former *Act*, which specifically leaves to the employer the sole right to determine the classification of positions.

[168] The evidence in this hearing was that when the grievors were required to be lead investigators on investigation files rated at a complexity rating higher than 10 (in other words, files that would normally have been handled by either a PM-04 or an AU-02), they were either paid acting pay for the hours worked on the files or the files were reassigned to a different investigator at the appropriate classification level (often the team leader). I will address those two situations separately.

[169] The granting of acting pay to the grievors for working on a file of complexity level 20 or above is an acknowledgement by the employer that the work being performed is not contained in the revised PM-03 job description for their substantive positions. Acting pay may well be a pragmatic approach to variations in the complexity of files that come into a particular TSO. However, that is not the conclusion of the Federal Court of Appeal.

...

[19] In the end, the adjudicator dismisses the appellants' grievances as it is his view that Work Description PM-0286 is broad enough to include the appellants' actual work assignments. In doing so, he was prepared to accept that even if the appellants were doing work beyond their Work

Description on an ongoing and permanent basis, their Work Description was not affected even though they might be entitled to additional compensation. . . .

. . .

[Emphasis added]

The adjudicator had suggested that acting pay might be payable where work that was not contained in the job description was “temporary.” The Court had, as noted in the quote above, concerns about situations where the work outside of the job was being performed on an “. . . ongoing and permanent basis” The Court did not comment on situation where the assignment of work outside of the job description was “temporary.”

[170] The evidence showed that three of the grievors (Mr. Currie, Ms. Wilson and Mr. Willisko) did perform duties outside of the revised PM-03 job description (as lead investigators of files complexity rated at 20) on a regular and ongoing basis. That they have received acting pay for this work does not change the fact that the revised PM-03 job description did not accurately reflect the work being performed. The nature of the investigation work means that once a file is assigned the investigator follows it through to its conclusion — and this means that the work on the file will continue over an extended period of time. This period of time cannot be described as “temporary.” Work as a lead investigator on files rated at complexity level 20 was performed on a regular and ongoing basis. However, it could not be described as “permanent” since it was performed on an episodic basis. There were periods when these three grievors worked exclusively on files rated at complexity level 10 and performed no work (as lead investigators) on files complexity rated at level 20. Mr. Henderson did not perform any work on files complexity rated at 20.

[171] The *Batiot et al.* decision relied on by the employer is not applicable to the facts in this case. There was no evidence that the grievors were given the choice of continuing to work on higher complexity rated files or that they were directed to refer those files to investigators/auditors at a higher classification.

[172] In order to reflect the regular and episodic performance of duties as lead investigators of files complexity rated at 20, the PM-03 job descriptions of Mr. Currie,

Ms. Wilson and Mr. Willisko must be amended. Under “Key Activities”, after the first activity, the following key activity should be added to the job description:

On an episodic basis, and over an extended period, investigating difficult domestic and international tax fraud schemes, complexity 20, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the Statutes administered by the Agency.

[173] When cases rated at a complexity level of 20 or above were reassigned to an employee at the appropriate classification level, often to the team leader, the grievors testified that they continued to work on those files. The revised PM-03 job description recognizes that employees will work on files rated at a higher complexity level when working as part of a team. A note in the introductory section of the revised PM-03 job description (Exhibit G-2) states the following:

...

Note: . . . When the investigator conducts investigations as a member of a team, the case assigned may have a higher complexity rating.

...

That note is not contained in the body of the revised PM-03 job description, and I consider it to be a key activity of the position. For greater clarity and certainty, the text of the note should be included in the “key activities” section of the revised PM-03 job description. The following should be added to the end of the first key activity: “Working on investigation files at a higher complexity rating than 10 when the investigator is a member of a team that reports to a lead investigator.”

[174] The grievors argued that in all cases where a file was reassigned to their team leader, they did “all the work” on the file. The evidence was not conclusive on that point. The grievors’ did not meet their burden of proof. However, even if it were the case, it would not be relevant for the job description grievances. The revised PM-03 job description distinguishes between being the lead investigator and being a member of a team. That is a valid distinction in roles, given that a lead investigator has ultimate responsibility for the file.

[175] The other situations raised in these grievances are those cases where the investigation file is not complexity rated or the employee disputes the complexity rating of the file. The Federal Court of Appeal was clear in its instructions that I was to determine if the grievors worked on files “. . . of complexity 20 or greater. . . .” It is not clear whether the Court intended that an adjudicator decide on the complexity rating of files. However, in any event, I find that the grievors did not establish that the files they worked on should be rated at that level. In other words, they did not meet their burden of proof. Generally speaking, the complexity rating of a file is a matter that should be discussed with the supervisor and on up the chain of supervision, as required. Once a file is reviewed and possibly rated at a higher level, it can be reassigned.

[176] The SEP files were never rated using the complexity rating form. That work is captured by “key activity” number 15 in the revised PM-03 job description (see paragraph 23 of this decision): “Auditing of tax returns and/or the financial records of individuals or corporations suspected of earning income from illegal activities.” There is a more detailed description of that activity under “Thinking Challenge,” quoted at paragraph 37 of this decision.

[177] There was evidence presented by some grievors that employees performing the same duties at other TSOs were classified at a higher level. No direct evidence of that was tendered. There was also reference made in the testimony of Ms. Wilson to the classification of customs officers at the PM-04 level. In addition, Mr. Henderson testified that those employees previously involved in workload development at the Hamilton TSO had been classified at a higher level. However, a reference to the classification of other positions does not advance the position of the grievors with respect to their job description grievances. To engage in such a comparison amounts to a challenge of the classification of their positions, which is not within the jurisdiction of an adjudicator.

[178] With respect to Mr. Henderson, the revised PM-03 job description includes workload development under number 6 of the “key activities” (paragraph 23, of this decision): “Participating in the selection and development of workload by screening files and referrals . . .” (Exhibit G-2).

[179] Ms. Wilson testified that she trained a number of employees classified at a higher level than her. Mr. Henderson also testified to his role as a mentor and trainer

for a number of new employees classified in the AU group. I note that the revised PM-03 job description lists as a “key activity,” in number 26 (paragraph 23, of this decision) the following: “Assisting in the training and development of less experienced team members . . .”, which clearly captures that role.

[180] Mr. Willisko told his supervisor that it was not within the revised PM-03 job description to testify at a trial as an expert witness on a matter that was complexity rated at a level higher than 10. The revised PM-03 job description is clear that testifying at trial is a part of the duties of the position. Under “key activities” the revised PM-03 job description states, at number 13, (paragraph 23 of this decision) the following: “Testifying as a crown witness in criminal and/or civil courts”

B. Acting pay grievance

[181] The Federal Court of Appeal in *Coallier* held that the time limit for filing a grievance begins to run as soon as the grievor learns of the facts on which the grievance is based. In such cases, the retrospective effect of the grievance is limited to the 25 days prior to the filing of the grievance.

[182] Ms. Wilson has testified that her reason for not filing an acting pay grievance earlier was that she was advised by the employer that she was not eligible to receive it. However, she did receive acting pay on a number of occasions, both before and after she filed her grievance. In any event, the employer’s position that a collective agreement provision is not available to an employee cannot justify a failure to file a grievance in a timely manner. Unlike the situation in *Macri*, there was no explicit or implied promise by the employer to Ms. Wilson that it would address the matter in dispute. Accordingly, Ms. Wilson is not able to claim acting pay for the period prior to the 25 days preceding the filing of her grievance.

[183] In any event, Ms. Wilson filed her acting pay grievance on April 28, 2000. In the 25 days prior to April 28, 2000, Ms. Wilson was working on a file that had been reassigned from her to Mr. Brisson. Mr. Brisson was therefore the lead investigator and Ms. Wilson was working under his direction. The revised PM-03 job description specifically recognizes that “. . . When an investigator conducts investigations as a member of a team, the case assigned may have a higher complexity rating.” Since Ms. Wilson was not the lead investigator, she is not entitled to acting pay for that

period. I note that she was reassigned as lead investigator on the file in January 2001, and that she did receive acting pay from that point.

[184] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VII. Order

[185] The job description grievance of Mr. Henderson is dismissed.

[186] The job description grievances of Mr. Currie, Ms. Wilson and Mr. Willisko are allowed, in part.

[187] The PM-03 job descriptions of Mr. Currie, Ms. Wilson and Mr. Willisko are amended by adding the following to the first activity:

Working on investigation files at higher complexity ratings than 10 when the investigator is a member of a team that reports to a lead investigator.

[188] The PM-03 job descriptions of Mr. Currie, Ms. Wilson and Mr. Willisko are further amended under “Key Activities” by adding the following, after the first key activity:

On an episodic basis, and over an extended period, investigating difficult domestic and international tax fraud schemes, complexity 20, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the Statutes administered by the Agency.

[189] The acting pay grievance of Ms. Wilson is dismissed.

August 22, 2008.

**I.R. Mackenzie,
adjudicator**