

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2018 CHRT 23

Date: July 25, 2018

File No.: T1727/8211

Between:

Diane Carolyn Emmett

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Revenue Agency

Respondent

Decision

Member: Susheel Gupta

Table of Contents

I.	Background.....	1
II.	Procedural History.....	2
III.	Facts	4
	A. Ms. Emmett’s Education and Employment History with the CRA.....	4
	B. CRA Executive Staffing.....	6
IV.	Issues.....	7
V.	Preliminary Matters	8
	A. Passage of Time/Delay.....	8
	B. Audio Gap in Mr. Troy’s Testimony.....	10
	C. Scope of the Complaint.....	11
VI.	Applicable Legal Principles	12
	A. Section 7 of the <i>Act</i>	12
	B. Section 10 of the <i>Act</i>	17
	C. Compound Discrimination.....	19
	D. Tribunal’s Holistic Approach	20
VII.	The Witnesses	20
VIII.	Position of the Parties and Analysis.....	24
	A. Has the Complainant met her burden establishing systemic discrimination on the prohibited ground of sex under section 10 of the <i>Act</i> ?	24
	(i) Culture, Attitude and Cross-Organizational Expertise	25
	(ii) Executive Policy Framework.....	28
	(iii) Selection Process	29
	(iv) Acting Assignments	37
	(v) Statistical Evidence.....	40
	(vi) Conclusion	49

B.	Has the Complainant met her burden establishing systemic discrimination on the prohibited ground of age under section 10 of the <i>Act</i> ?	50
	(i) Selection Process	50
	(ii) Pre-Retirement Flex Policy	52
	(iii) Culture and Attitude	53
	(iv) Statistical Evidence	55
	(v) Conclusion	56
C.	Has the Complainant met her burden establishing systemic discrimination on the compounded grounds of sex and age under section 10 of the <i>Act</i> ?	56
D.	Was the Complainant discriminated by the Respondent on the basis of sex and/or age contrary to section 7 of the <i>Act</i> ?	57
	(i) 1999 Acting Director Opportunity (TNTSO)	58
	(ii) 2000 Acting Director Opportunity (TETSO)	60
	(iii) 2001 Acting Director Opportunity (TCTSO)	61
	(iv) 2001 Acting Director Opportunity (TETSO)	62
	(v) 2002 Lateral Move / Director Deployment Opportunity (TETSO)	63
	(vi) 2003 and 2004 Transfers of other Executives	64
	(vii) 2003 Acting Director Opportunity (TNTSO)	65
	(viii) 2004 Director Competition (TCTSO)	66
	(ix) 2004 Interim Director Opportunity (TETSO)	68
	(x) 2004 Lateral Director Competition (TETSO)	69
	(xi) 2004 to 2006 Short-Term Acting Opportunities	73
	(xii) 2006 Acting Director Opportunity (TNTSO)	73
	(xiii) 2006 Competition Held for Two Director Positions (TNTSO and TWTSO)	76
E.	Conclusion	79

I. Background

[1] The purpose of this inquiry is to decide whether the Complainant, Ms. Diane Emmett, was subjected to discrimination based on sex and/or age by her employer, the Canada Revenue Agency (CRA), with respect to policies and practices established by the CRA (s. 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act* or the *CHRA*)) and/or in the course of employment (s. 7 of the *Act*).

[2] Ms. Emmett worked for the CRA from 1981 until her retirement in 2011. She aspired to become a Tax Service Office (TSO) Director in the Greater Toronto Area (GTA). This, in of itself, appears to be an impressive challenge for anyone given that, at the relevant time, there were only **4 TSO Director positions in the GTA**, 3 at the EX-03 level and 1 at the EX-02 level. In pursuit of this goal as an EX-02, she conveyed her interest in acting EX-03 assignments and applied for selection processes at the TSO Director level.

[3] Aside from one acting assignment, Ms. Emmett claims the CRA bypassed her for TSO Director job opportunities in favour of male colleagues who were no better or even less qualified than her. Regarding job opportunities where a female was selected, Ms. Emmett claims it was because they were younger than her. She claims her treatment is reflective of a larger practice within the CRA of systematically denying executive level employment opportunities to women and/or persons over the age of 50, especially in the Southern Ontario Region (SOR) and then after 2006 in the Ontario Region (OR) when the Northern Ontario Region (NOR) merged with the SOR to form the OR.

[4] There is no dispute that sex and age are characteristics protected from discrimination under the *Act* and that Ms. Emmett possesses these characteristics. There is also no dispute that Ms. Emmett did not receive the job opportunities at issue. The only remaining question for the Canadian Human Rights Tribunal (Tribunal) to decide is whether Ms. Emmett's sex and/or age was a factor in her being denied the employment opportunities at issue.

[5] Information regarding the identity of current and former employees of the Respondent unrelated to the complaint has been anonymized in accordance with the confidentiality order issued in *Emmett v. Canada Revenue Agency*, 2013 CHRT 12

[Emmett 2013]. Only those names of individuals who testified at the hearing are found within this decision.

[6] For the reasons that follow, the complaint is dismissed.

II. Procedural History

[7] This matter has been with the Tribunal for an exceptionally long period of time. When assigned this file following the passing of former Member Bélanger, I continuously worked with the parties to ensure that, after a thorough review of the record of the case, a final decision would be rendered as quickly as possible in accordance with the Tribunal's obligations under the *Act* (ss. 48.9(1)).

[8] Member Bélanger presided over approximately 52 days of in-person hearing days. Over 85 exhibits were filed totalling over 7,319 pages of material.

[9] The Complainant filed her written closing submissions (totalling 123 pages) on March 31, 2015. The Respondent filed fulsome closing submissions (over 200 pages) on June 22, 2015. The Complainant filed a Reply (over 160 pages) on August 25, 2015.

[10] Sadly, Member Bélanger passed away on November 27, 2015, before the completion of the case. Shortly after Member Bélanger's death, the parties were contacted by the Tribunal Chairperson to discuss how to move forward. I was subsequently assigned to carry the inquiry forward to completion.

[11] After a series of case management conference calls (CMCC), the parties agreed that a new evidentiary hearing would not be required and that the matter should proceed based on the record of the case. The parties agreed that the record of the case would include: all oral evidence presented at the hearing, all of the evidence (exhibits) previously tendered during the hearing, as well as, all oral and written submissions to date. Furthermore, my review of the evidence would be based on **both** the written transcripts **and** the audio recordings of the hearing. There was one exception with regards to the receipt of new evidence concerning the testimony of Mr. Gerald Troy. Unfortunately, his testimony was not captured by the audio recording software when he testified before

Member Bélanger. The parties agreed to allow Mr. Troy to testify before me so that I could hear his evidence as part of my review of the case.

[12] I also allowed the parties to file amended final submissions in order to fix discrepancies in their footnote references. Furthermore, as transcripts had not been previously ordered by the former Member, I ordered transcripts of the entire proceedings to be produced and provided to assist the parties at no expense to them.

[13] The parties agreed that should I have any questions, required clarification or further submissions upon completing my review of the evidence, I would contact them in writing or hold a CMCC.

[14] The parties agreed to make additional opening statements (case “overview”), before I commenced my hearing and careful review of all of the evidence. That overview occurred on October 7, 2016. During the course of the overview, the parties were given an opportunity to highlight key points in their respective cases before I began to review the record of the case and hear all the evidence filed during the course of the hearing. The parties agreed to me contacting them jointly if I believed that I required further closing oral submissions from them following my review of the record.

[15] After my review of the record, including a review of the exhibits, listening to the audio recordings, reading the transcripts, and attentively reading the written final submissions and additional addendums filed by the parties, I sent a letter to the parties on May 24, 2018. In this letter, the parties were thanked for their comprehensive and thorough written submissions. I also stated that further oral submissions were not required. The parties did not communicate to the Tribunal to raise any objections to me deciding the merits of the complaint without hearing oral final submissions.

III. Facts

A. Ms. Emmett's Education and Employment History with the CRA

[16] Ms. Emmett received an Honours Bachelor of Arts Degree in Economics in 1974 and a Master of Arts Degree in 1978. She also completed accounting courses, which would have allowed her to write exams to acquire an accounting designation.

[17] Ms. Emmett was hired by the CRA in 1981 as an AU-01 Tax Auditor in Hamilton. Following a competition, she was promoted to an AU-02 Tax Auditor position in 1983 in Hamilton. In 1986, Ms. Emmett competed, and was found qualified for, an acting AU-03 Audit Manager's position in Hamilton. The duration of this acting assignment was between March 1986 and September 1986. That same year, Ms. Emmett was found qualified to participate in a Career Advancement Program (CAP). This program helped high potential employees advance their careers to senior management positions. Ms. Emmett's participation in this program allowed her to take on various challenging assignments within the CRA in several locations, notably in St. Catharines and in Ottawa. She graduated from the CAP in November 1988 and returned to her permanent AU-03 Audit Manager's Position in Hamilton. Ms. Emmett competed in a competition for an AU-04 District Manger's position in 1990 and was promoted to this position. Not long after, the position was reclassified to the EX-01 level. Ms. Emmett competed and was successfully promoted to the EX-01 Director's position in Hamilton in July 1992.

[18] In the meantime, considerable structural changes occurred to what is now the CRA from the mid-1990's to 2003. Originally structured and called the Department of National Revenue (DNR), it had two Deputy Ministers with two independently operating branches. There was what was described to me as DNR Taxation, which operated under one branch and DNR Customs and Excise, which operated under the other. Customs operated separately from Excise.

[19] The process of restructuring/merging these two branches into one single organization and under one Deputy Minister was known as "administrative consolidation".

Administrative consolidation resulted in the restructuring of geographical offices, reduction of senior and middle management positions, and the combining of corporate functions.

[20] Consolidation created challenges in terms of bringing different work cultures together and finding new positions for some employees. Consolidation also brought changes to leadership, senior management needs and to the delivery of the organization's mandate. Many employees were moved around as the new organization was being structured and organized. Subsequent to all of this, in 2003, the Customs branch (now the Canada Border Services Agency) was carved out to become a separate Agency. Ms. Ruby Howard, interim Assistant Deputy Minister at the time, testified that many managers were uncomfortable with the change since they saw themselves as becoming "small" fish in a large pond, when they had been "big" fish in a small pond.

[21] Following the consolidation, Ms. Emmett was found to be a "surplus" executive on a few occasions. Her position was eliminated and she was transferred to another position, which was also then subsequently eliminated.

[22] With the elimination of positions there was also the creation of new positions. According to the testimony of Ms. Gloria Reid, former TSO Director, as a result of administrative consolidation, the CRA sought expressions of interest for 17 newly created EX-01 positions in the SOR. Ms. Reid testified that Ms. Emmett only expressed an interest in 3 of the 17 positions advertised. She only applied to positions within the audit program area located in the GTA, with the exception of the position advertised in the Toronto East TSO office (TETSO). During cross-examination, Ms. Emmett testified that she did not express an interest in the TETSO position because she did not want to commute to that location.

[23] Ms. Emmett was eventually deployed, without competition, to the EX-01 Assistant Director of Verification and Enforcement (ADVE) position in the Toronto North Tax Service Office (TNTSO) on June 3, 1996. This position was later reclassified to the EX-02 level in 1998. Ms. Emmett remained in this position for the most part until her retirement on September 7, 2011.

[24] In that time period, Ms. Emmett alleges she was denied several acting assignments, a lateral transfer appointment and promotions to Director positions on the grounds of sex and/or age discrimination.

[25] Ms. Emmett was however assigned, on several occasions and without competition, to short-term acting assignments as the Director of the TNTSO office. In 2003, she was given a lengthier acting EX-03 Director assignment in the same office, which was for a period of three and a half months.

[26] In 2009, Ms. Emmett left the workplace and remained off work for over two years due to an undisclosed illness. She submitted her letter of resignation in May 2011, which indicated her decision to retire.

B. CRA Executive Staffing

[27] At the hearing, Ms. Carolyn Wlotzki, who worked in Human Resources for the CRA, provided testimony that after Customs became its own Agency in 2003, the CRA employed approximately 40,000 employees. Approximately 470 employees of those employees were at the executive level (representing approximately 1% of the total CRA workforce across the country). This number fluctuated over time as there was constant change and movement within the organization.

[28] Ms. Wlotzki also provided uncontradicted testimony that:

- Executives are a **national** resource¹
- Across Canada, there were approximately 51 TSOs and Tax Centres
- There were approximately 16 TSOs across Ontario, 4 of which were, and still are, in the GTA

¹ Despite neither party pointing to documentary evidence to support this, further to my review of the record, I note that section 5.3 of the 2005 *Policy Framework for the Executive Cadre* indicates that “Executives at all levels will be a corporate resource across the CRA, rather than a branch or regional resource. ...” (Exhibit C3 Tab 139, p. 29). This policy objective is similarly worded in the 2001 *Policy Framework for the Executive Cadre* (Exhibit R4 Tab 122, p. 25).

- The OR employed over 13,000 people, only around 88 of which were at the executive level
- In the OR, there were 18 EX-02 positions, **5 EX-03 positions**, 1 EX-04 position and 1 EX-05 position
- There were **only 4 TSO** Director positions in the GTA
 - The Director positions for TNTSO, Toronto Centre (TCTSO), and Toronto West (TWTSO) were at the EX-03 level
 - The Director position in TETSO was classified at the EX-02 level at the relevant time

[29] In addition, the CRA's human resources section provided executives with career counselling services. Executives could also opt to take advantage of counselling services provided by the Public Service Commission in areas such as interview preparation and coaching. Furthermore, executives were able to seek training from both government providers and external providers.

[30] It was suggested to Ms. Emmett that Ms. Howard could provide Ms. Emmett with mentoring, as Ms. Howard had become an Executive Coach with the CRA after retiring in March of 2003. Mr. Troy reached out to Ms. Howard on Ms. Emmett's behalf seeking to inquire whether Ms. Howard would act as a coach to Ms. Emmett. Ms. Howard agreed to work with Ms. Emmett in such a capacity, but Ms. Emmett refused Ms. Howard's offer.

IV. Issues

[31] In my view, the issues in this case are as follows:

1. Has the Complainant met her burden establishing systemic discrimination on the prohibited ground of sex under section 10 of the *Act*?
2. Has the Complainant met her burden establishing systemic discrimination on the prohibited ground of age under section 10 of the *Act*?
3. Has the Complainant met her burden establishing systemic discrimination on the compounded grounds of sex and age under section 10 of the *Act*?
4. Was the Complainant discriminated by the Respondent on the basis of sex and/or age contrary to section 7 of the *Act*?

V. Preliminary Matters

[32] Before dealing with the merits of the complaint, the Tribunal will address some preliminary matters.

A. Passage of Time/Delay

[33] It is not lost on the Tribunal that much time has passed since the first alleged act of discriminatory conduct took place in 1999.

[34] The Complainant initially filed her complaint with the Commission in June 2007 for a discrete period in 2006. Following a four year investigation by the Commission, the scope of the inquiry was significantly expanded to include alleged conduct occurring from February 22, 1999, to September 6, 2006. The matter was referred to the Tribunal for an inquiry in 2011.

[35] The passage of time has caused some evidentiary challenges in this case. Much, if not most, of the documentation pertaining to executive staffing processes, advertised job openings, job applications, and competition files at issue were destroyed pursuant to the CRA's document retention policy before the complaint was even filed at the Commission.

[36] In effect, Ms. Wlotzki testified that the only selection process files in existence are the 2006 TNTSO and 2006 TWTSO competitions. Evidence relating to the 2004 lateral process was also filed with the Tribunal.

[37] Ms. Wlotzki testified that all acting appointment files at issue were also destroyed pursuant to the CRA's retention policy. While Ms. Emmett takes issue with whether there were any acting appointment files to begin with, no evidence was brought forward demonstrating that such documents were in fact accessible and/or held back from the Complainant.

[38] In its amended written closing submissions, the CRA argues that the 15 year span, from the earliest alleged discriminatory act until the first day of hearing of the complaint, impaired its ability to provide a full answer and defence. This is largely due to the fact that

much relevant documentation was destroyed pursuant to the CRA's document retention policies.

[39] Ms. Emmett acknowledged during the hearing that she had begun selectively compiling numerous documents since 1996 in order to document incidences she perceived to be discriminatory against her. Some of the documents she compiled were in the nature of staffing announcements, committee membership lists, organization charts, corporate reports, internal employee newsletters and a number of other documents.

[40] The CRA asks this Tribunal to give more weight to the few documents it was able to retrieve in its electronic files relating to staffing processes coupled with the testimony of witnesses who were directly involved in the decision-making process.

[41] The Respondent also argues that the Tribunal should not give any weight to e-mails and acting assignment announcements filed into evidence by the Complainant because they are not official documents and do not contain justifications for the decisions made, they are simply announcements. The Tribunal notes that the authenticity of these documents is not contested by the Respondent. The issue is whether these documents, on their own and as Ms. Emmett argues, ought to be relied upon to explain the CRA's rationale for selecting one candidate over the others. Ms. Emmett submits that the announcements should speak for themselves and that any explanation provided by witnesses should be given little weight as they could be false explanations provided after the fact.

[42] I agree with the Respondent that the documents it filed relating to staffing processes coupled with the testimony of the Respondent's witnesses who were directly involved and knowledgeable of the circumstances, should be given greater weight than the interpretation of events provided by the Complainant. The decision-makers and/or those directly involved in the acting and staffing processes are best suited to explain the rationale for staffing decisions taken.

[43] It would be improper for the Tribunal to rely on Ms. Emmett's interpretation of the announcements because, as a third party to the appointment and staffing processes, Ms. Emmett's interpretation of the evidence is speculative at best. At the hearing,

Ms. Emmett acknowledged that she was not involved in the decision-making process, had no knowledge of whether interviews were held, whether there had been accommodation requests, whether other women or employees older than the selected employee were considered, or whether there were any specific reasons one person was chosen over another. In addition, I accept Ms. Howard's evidence that the Respondent would never, in a staffing announcement, describe the various challenges faced by an office or the reasons and discussions why a specific employee was selected in order to deal with the said challenges.

[44] I do however find that the announcements, which were created by the CRA, are still helpful to support witness testimony. I will accordingly give some weight to them. However, unless otherwise specified, the Tribunal will give more weight to the testimony of witnesses involved in the acting assignment and staffing processes where there are discrepancies between their testimony and that of Ms. Emmett.

[45] Finally, while the Complainant contests the CRA's claim that much documentation was destroyed and argues that the CRA deliberately withheld documents at the hearing, the Tribunal finds that it has no reason to doubt the validity of the CRA's retention policy. Furthermore, I was not provided with any convincing evidence demonstrating that the CRA deliberately withheld documents. I find that the Respondent provided a reasonable explanation for how it was able to produce documents that appeared to be from the period when documents were destroyed, namely that those documents were found in other places such as an employee's email system or other electronic filing systems. In this day and age of documents being transmitted and stored electronically, it is not unusual for copies to be found in multiple locations.

B. Audio Gap in Mr. Troy's Testimony

[46] On December 16, 2016, the Tribunal advised the parties that the audio recording device failed to capture approximately one hour of Mr. Troy's testimony on re-examination during the afternoon of December 8, 2016. Following concerns received by the Complainant, the parties submitted written submissions wherein the Complainant alleges

the gap in the audio recording could prejudice her “in a possible judicial review of the Tribunal’s decision.” She requests that actions be taken to remedy the said audio gap. However, the Complainant concedes that the audio gap does not create a prejudice with respect to “the Tribunal’s ability to make a decision”. The Respondent argues in its Reply that the Complainant failed to demonstrate any prejudice in these proceedings as a consequence of the said audio gap.

[47] Given that I personally presided over the December 8, 2016, hearing, and as I informed the parties at the relevant time, I heard the evidence of Mr. Troy directly, I am confident in my comprehension and recollection of the witness’ testimony. Since the Complainant’s right to have the decision-maker hear all the evidence has been respected, I find that the Complainant has not demonstrated any prejudice caused by the audio gap. It is therefore not necessary for me to take any remedial action. Any contradictions or discrepancies of fact regarding the witness’ testimony, which are material to the complaint, shall be dealt with further below.

C. Scope of the Complaint

[48] Despite Member Bélanger’s previous ruling (*Emmett 2013*), Ms. Emmett argues in her amended final written submissions that the Tribunal ought to find that the CRA engaged in a discriminatory practice against women in non-executive positions, and especially women within the AU group. Consistent with the Tribunal’s previous ruling in this matter, I find that alleged discrimination against women in non-executive positions is not part of the inquiry.

[49] Member Bélanger stated as follows in *Emmett 2013*:

[30] As this statement indicates, the under-representation of women in the CRA is not the basis of the Complainant’s allegations of systemic discrimination. Rather, it is the “...engrained attitudinal and cultural barriers that negatively stereotyped women from the audit field [...] from advancing to key executive positions in the CRA’s organization” that forms the basis of the Complainant’s allegations of systemic discrimination. The Complainant points to statistical information of women auditors being historically under-represented in the CRA, whether in the executive group or other

occupational groups, as evidence in support of her allegations of systemic discrimination. Whether that evidence supports the Complainant's allegations or establishes a prima facie case of discrimination will be determined following the hearing of this complaint.

[31] [...] I see no prejudice to the Respondent if the Complainant advances statistical information regarding the under-representation of women in other occupational groups at the CRA to support her allegations of systemic discrimination.

[50] Contrary to Ms. Emmett's assertions, these passages do not recognize that the complaint includes allegations of systemic discrimination in non-executive groups. It is clear to me that the Tribunal allowed the Complainant's allegations relating to attitudinal and cultural barriers and statistical information with respect to women in occupational groups other than the executive **as support for the Complainant's allegations of systemic discrimination in the executive group**. In effect, Ms. Emmett's only allusion to other groups in her initial complaint is where she refers to a "negative stereotype that women with an audit background are less capable of holding the most senior level positions in the field organization." It would therefore be inappropriate for the Tribunal to expand the scope of the complaint to include allegations of systemic discrimination with respect to staffing practices in the non-executive group, including auditors, so late in the inquiry.

VI. Applicable Legal Principles

A. Section 7 of the Act

[51] Under paragraph 7(b) of the Act, it is a discriminatory practice to adversely differentiate an employee on a prohibited ground of discrimination.

[52] Much ink has been spilt trying to explain the burden that lies on the complainant. The Tribunal finds that it is necessary to explain this burden in greater detail for the benefit of the parties with the hope of bringing greater clarity to this area of law.

[53] First, the Tribunal agrees with the reasons adopted by the British Columbia Human Rights Tribunal for refraining from describing a complainant's burden of proof as a "*prima*

facie” one. We adopt the same practice for the same reasons set out at paragraphs 48-50 of *Vik v. Finamore (No. 2)*, 2018 BCHRT 9:

[48] I pause here to make an observation about language. In my view, the terminology of “*prima facie* discrimination” is not helpful and, in some cases, may create fundamental misconceptions about the law of discrimination. First, Latin phrases which describe legal tests takes the law away from the people it is meant to serve. Without specialized legal training, the words “*prima facie*” are unlikely to carry much meaning for the majority of people trying to understand their rights, and comply with their obligations, under the law. As decision makers, we should be striving to make our decisions understandable and to speak as plainly as possible to achieve that purpose. Using Latin is not helpful to that goal.

[49] Second, using the term “discrimination” at this stage is misleading. Participants, rightly, may think that a finding of *prima facie* discrimination is the same as a finding of discrimination. For complainants, it is then difficult to understand how a respondent could justify the discrimination. Respondents, for their part, carry the stigma of having discriminated before having the opportunity to justify their behaviour. In fact, discrimination may only be found to occur after both the *prima facie* and the justification analysis, if one is advanced. Where there is a justification, there is no discrimination: Moore at para. 33. It is, in my view, unhelpful to introduce the value-laden term of “discrimination” until the whole analysis is complete.

[50] The significance of the *prima facie* test for discrimination is that it describes the complainant’s burden of proof under the discrimination analysis. This concept can, and in my view should, be described in much plainer terms – for example, as simply “the complainant’s case”. Doing so might bring the Code slightly closer to being the “law of the people”: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII) at para. 33.

[54] A complainant’s case is “...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour” (see *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 (SCC) at para. 28 [O’Malley]).

[55] For Ms. Emmett to meet her case, she is required to show that she; (1) has a characteristic or characteristics protected from discrimination under the *Act*; (2) that she experienced an adverse impact; and, (3) that the protected characteristic or characteristics

were a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

[56] The Tribunal notes the Complainant's reliance on *Shakes v. Rex Pak Ltd.*, (1982), 3 CHRR D/1001 [*Shakes*] and would like to make the following comments. Under *Shakes*, a complainant's case is met where (1) the complainant was qualified for the particular employment; (2) the complainant was not hired; and, (3) someone no better qualified but lacking the distinguishing feature, which is the basis of the complaint of discrimination, subsequently obtained the position.

[57] It is well established that this framework serves only as a guide and should not be applied in a rigid or arbitrary fashion in every hiring case (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 77 [*Bay Ferries*]; see also *O'Bomsawin v. Abenakis of Odanak Council*, 2017 CHRT 4 at paras. 46-48).

[58] Ultimately, the issue for the Tribunal to decide is whether the Complainant has met her burden of establishing that her sex and/or age was a factor in the CRA's decision not to award her with the staffing opportunities at issue. The *Shakes* framework is helpful to decide this, but is not binding. In deciding this issue, I have considered all the evidence adduced by the parties, including elements related to the *Shakes* test.

[59] All three elements of the *Moore* criteria must be established on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 56 [*Bombardier*]). Moreover, evidence of discrimination, "even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct" (*Bombardier* at para. 88).

[60] Ms. Emmett relies on *Bay Ferries* to support her contention that the Tribunal cannot take into account a respondent's explanation in determining whether a complainant has made their case (*Bay Ferries* at paras. 18, 22). Effectively, in relying on *O'Malley*, the Federal Court of Appeal found that the Tribunal erred when it took into account the respondent's answer before concluding that the complainant's case had not been established (*Bay Ferries* at para. 22).

[61] However, since *Bay Ferries*, the Supreme Court of Canada issued *Bombardier* wherein the Supreme Court clarified the complainant's burden of proof in discrimination cases and explained that a tribunal is to consider the evidence as a whole, including the respondent's evidence, in deciding whether a complainant has made their case. In light of the decision in *Bombardier*, it is apparent to the Tribunal that the burden, as set out in *O'Malley*, has been misinterpreted for a number of years (see *Bombardier* at paras. 55-59). The Supreme Court explained that in the context of discrimination "the expression '*prima facie*' refers only to the first step of the process and does not alter the applicable degree of proof" (at para. 59). It further explained:

[64] ... the use of the expression "*prima facie* discrimination" can be explained quite simply on the basis of the two-step test for complaints of discrimination under the *Charter*. This expression concerns only the three elements that must be proven by the plaintiff at the first step. If no justification is established by the defendant, proof of these three elements on a balance of probabilities will be sufficient for the tribunal to find that s. 10 of the *Charter* has been violated. If, on the other hand, the defendant succeeds in justifying his or her decision or conduct, there will have been no violation, not even if *prima facie* discrimination is found to have occurred. **In practical terms, this means that the defendant can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both.**

[Emphasis added]

[62] It is clear from the above quoted passage that the Supreme Court rejected the narrow interpretation of the requisite burden of proof ascribed to *O'Malley* by the Federal Court of Appeal in *Bay Ferries*. The Supreme Court's explanation also makes it clear that the complainant's burden is not one "on its face" and therefore, there is nothing "*prima facie*" about it. This is another reason to move away from describing the complainant's case as being a "*prima facie*" one.

[63] The Tribunal understands the Supreme Court's directions in *Bombardier* to mean that the Tribunal can find that a complainant has not established their case where he or she: (1) in the absence of an answer from the respondent, failed to adduce evidence to meet the burden or, (2) the respondent was able to adduce evidence to the contrary (see also Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed (LexisNexis,

2009) at 101-105; see also *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 63-77).

[64] It is also my view that allowing the responding party to present evidence that contradicts the complainant's evidence of discrimination in the first stage of the discrimination analysis is consistent with the text and scheme of the *CHRA* and the Supreme Court's teachings in *Bombardier*.

[65] While *Bombardier* explained the concept of the complainant's case in the context of section 10 of the *Québec Charter of Human Rights and Freedoms*, CQLR c C-12 (*Québec Charter*), I believe that the Supreme Court's directions equally apply to the Canadian Human Rights Tribunal.

[66] In this respect, the Tribunal notes the Supreme Court's directions in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 [*Schrenk*], which reminds human rights tribunals that, in interpreting their enabling legislation in accordance with the modern principle of statutory interpretation and the rules particular to human rights legislation, tribunals must not ignore the text or scheme of the statute itself (*Schrenk* at paras. 29-32).

[67] In effect, like the *Québec Charter*, the *CHRA* also contemplates a two-step test for complaints of discrimination. Once a complainant has satisfied their burden under the first step of the test, the respondent can choose to justify its practice(s) under section 15 of the *Act*. The *CHRA* is also silent as to the degree of proof a complainant must meet to make their case, which indicates that the applicable standard is the civil standard of proof (i.e. proof on a balance of probabilities). The Tribunal therefore sees no reason to depart from the Supreme Court's teachings on the complainant's burden of proof as expressed in *Bombardier*.

[68] While *Bombardier* was released following the filing of the parties' submissions, it is my view that the Supreme Court's clarification does not have any impact whatsoever on the parties' respective cases or the burden of proof that lies on the Complainant. Instead of addressing the parties' submissions going to discrimination in silos, I relied on *Bombardier*

to consider the parties' submissions together as a whole in assessing whether the Complainant has met her burden.

B. Section 10 of the Act

[69] The difference between complaints made under section 7 and section 10 of the *Act* is the number of people affected (*Moore* at para. 58).

[70] Discrimination is systemic where an employer establishes or pursues a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination (para. 10(a) of the *Act*).

[71] The Complainant must establish credible evidence that the CRA is pursuing a policy or practice that deprives or tends to deprive women and/or individuals over the age of 50 of employment opportunities, on a balance of probabilities (*Walden v. Canada (Social Development)*, 2007 CHRT 56 at para. 7; *Gravel v. Public Service Commission of Canada*, 2010 CHRT 3 at para. 226; *Gaz métropolitain inc. c. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 at para. 38 [*Gaz métro QCCA*]).

[72] In *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109 (SCC) [*Action Travail*], the Supreme Court defined systemic discrimination as follows at page 1139:

Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10).

[73] Recently, in *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.*, 2008 QCTDP 24 [*Gaz métro QCTDP*], aff'd 2011 QCCA 1201, the Human Rights Tribunal of Québec defined systemic discrimination as:

[36] [...] the cumulative effects of disproportionate exclusion resulting from the combined impact of attitudes marked by often unconscious biases and stereotypes, and policies and practices generally adopted without taking into consideration the characteristics of the members of groups contemplated by the prohibition of discrimination.

[74] Systemic discrimination is characterized by “the disproportionate exclusionary effects stemming from institutional recruitment, hiring and promotion policies that are, in general, apparently neutral” (*Gaz métro QCTDP* at para. 72). The consequences of the policies or practices themselves can be evidence of systemic discrimination (*Gaz Metro QCCA* at para. 38). Evidence of systemic discrimination can also be informed and supported by various factors such as “institutional policies, decision-making processes, behaviours and attitudes” (*Gaz métro QCTDP* at para. 67). Oftentimes these factors appear innocuous. However, where it is shown that these factors, when combined, deprive or tend to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination, a finding of systemic discrimination is substantiated (see for example *Gaz métro QCTDP* at para. 67; see also *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 at para. 513).

[75] The Tribunal notes that the Complainant relies on extensive statistical evidence in support of her allegations of discrimination. It is important to recall that a complainant’s case cannot be made out on statistical evidence alone (*Canada (Attorney General) v. Walden*, 2010 FC 490 at paras. 109-112 [*Walden 2010*]).

[76] Statistical evidence is not even essential to prove systemic discrimination (*Gaz métro QCTDP* at para. 67). However it goes without saying that statistical evidence may be helpful in human rights cases. As reiterated by the Honourable Madam Justice MacTavish in *Walden 2010*:

[114] [...] Such evidence **may constitute circumstantial evidence** from which inferences of discriminatory conduct may be drawn: see para. 21, citing *Blake v. Minister of Correctional Services* (1984), 5 C.H.R.R. D/2417 (Ont.), which was in turn citing *Davis v. Califano*, 613 F. 2d 957 (1979) at 962.

[115] Statistical evidence can also be an important tool for placing seemingly inoffensive employment practices in their proper perspective [citations omitted].

[emphasis added]

[77] That being said, for statistical evidence to constitute circumstantial evidence of discrimination, the evidence must have a direct relationship to the decision that is the subject matter of the complaint (see *Blake v. Mimico Correctional Institute* (1984), (1984) 5 CHRR, D/2417 [*Blake*]; *Chopra v. Department of National Health and Welfare* (2001), [2001] CHR D No. 20 at paras. 208-212, 2001 CanLII 8492 (CHRT) [*Chopra*]; *Dhanjal v. Air Canada* (1996), 1996 CanLII 2385 (CHRT) at 36 [*Dhanjal*]). The statistics must also be both reliable and relevant (*Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113 at para. 29).

C. Compound Discrimination

[78] Section 3.1 of the *Act* provides that “a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”

[79] Ms. Emmett submits that the Tribunal ought to apply this section to the facts of her case in order to support a finding of compound discrimination on the prohibited grounds of both sex and age.

[80] The application of s. 3.1 of the *Act* was recently explained by the Tribunal in *Mr. X v. Canadian Pacific Railway*, 2018 CHRT 11. In that decision, Member Luftig explained that s. 3.1 “may be used by complainants in situations when they may be unable to satisfy the test for prima facie discrimination on one ground alone” (at para. 296). She further explained that the purpose of the provision is to assist the Tribunal in assessing subtle forms of discrimination in a manner that is both holistic and flexible (at para. 296; see also *Turner v. Canada (Attorney General)*, 2012 FCA 159 at paras. 48-49).

D. Tribunal's Holistic Approach

[81] Generally speaking, paragraph 10(a) of the *Act* prohibits an employer from pursuing discriminatory **policies or practices**. Individual acts of purported discrimination in the context of employment are prohibited under section 7 of the *Act*. However, the Tribunal is guided by the teachings of the Supreme Court, which explain that it is not necessary or conceptually helpful to divide discrimination into these two discrete categories; the inquiry is into whether there is discrimination, period (*Moore* at paras. 58, 60).

[82] Decisions rendered in the context of human rights instruct us that we ought to consider evidence of systemic discrimination to support findings of discrimination under section 7 of the *Act* (*Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra)* (1998), 1998 CanLII 7740 (FC) at para. 22, 146 FTR 106 [*Chopra FC*]; *Khiamal v. Canada (Human Rights Commission)*, 2009 FC 495 at paras. 98-102). Conversely, and consistent with the Supreme Court's teachings in *Moore*, I have also considered allegations made by Ms. Emmett regarding her individual grounds of discrimination in my assessment of allegations going to systemic discrimination.

VII. The Witnesses

[83] Several of the Respondent's witnesses provided consistent testimony about the CRA's executive staffing program. The Tribunal finds that the Respondent's witnesses were extremely knowledgeable in the subject matter. For example, Ms. Wlotzki had 27 years of experience working in human resources. She spent 12 years working specifically in executive resourcing for the CRA. At the time she provided her testimony, she was the Acting Director General of Executive Programs and Services. I found Ms. Wlotzki to be consistent, extremely knowledgeable and unshaken in her testimony.

[84] Former Assistant Commissioners, Ms. Ruby Howard (1999-2003) and Mr. Lawrence Hillier (2003-2008) also provided testimony specific to decisions regarding staffing TSO Director positions in the SOR/OR. The Assistant Commissioner was the highest ranking CRA official in the SOR/OR. Both Ms. Howard and Mr. Hillier were

responsible for approving and/or recommending acting Director level positions. Ms. Howard had **direct knowledge** of the organizational structural changes which occurred at the CRA, experience with executive staffing and was directly involved in some of the staffing decisions at issue in this case. She was consistent and non-evasive in her testimony and did not appear to be selective in her evidence.

[85] Mr. Hillier was knowledgeable on a number of human resources/staffing matters. He was directly involved with a number of the staffing decisions at issue in this case and was also directly involved with succession planning and senior management matters. His testimony was forthright and he had a good recollection of events and decisions.

[86] Mr. Troy was Ms. Emmett's direct supervisor for much of the period of time covered by Ms. Emmett's complaint. Because of this, he had direct knowledge and experience working with Ms. Emmett. He was also directly involved in a number of the incidents at issue in this complaint. I found him to be quite genuine and confident in his testimony. As such, I place a lot of weight on his testimony, especially regarding his recollection of events concerning Ms. Emmett.

[87] Ms. Barb Hébert was retired from the public service at the time of her testimony. She had been the Deputy Assistant Commissioner for the SOR, which was the second highest position in the SOR when she left to become the Vice-President of the CBSA in 2003. Ms. Hébert notably gave evidence of her experience as a female executive at the CRA, what her experience was with respect to age and CRA decisions, and the steps she took to assist her in moving up in the organization. I found Ms. Hébert to be candid and consistent in her testimony.

[88] Ms. Alice Shields began her career with the CRA in 1974. She held various Director level positions in her career and retired in 2006 after 32 years of service. She notably testified to her career progression, her experience with respect to age issues, women in the CRA, and her experiences with Ms. Emmett. Ms. Shields was direct and responsive with her testimony.

[89] Ms. Reid worked with the CRA for 26 years from 1972 to 1998 when she left to continue her career with the International Monetary Fund (IMF). She was the Director of

the TCTSO when she retired from the CRA. Ms. Reid notably testified to her progression through the CRA, her experience working with Ms. Emmett, her experience on whether there were issues for women within the CRA, and her recollection of conversations between herself and Ms. Howard on Ms. Emmett. Ms. Reid was confident in her testimony, which was consistent with the testimony of the Respondent's other witnesses. I found her to be a credible and reliable witness.

[90] Diane Desrochers began her career with the CRA in 1971 and had been working with the CRA for 41 years by the time of her testimony. She worked her way up from a stenographer to progressively higher level positions. In 1998 she began her work with the CRA's Employment Equity Division. Although she was never qualified as an expert, Ms. Desrochers had almost 2 decades of experience in employment equity matters at the time of her testimony. She had much training in the area of employment equity, and was responsible for the women's program within CRA's Employment Equity Division from 1998-2011. Ms. Desrochers provided much evidence on statistics in relation to various government documents dealing with employment equity groups and how such data should/should not be interpreted. Ms. Desrochers had never met Ms. Emmett or had any dealings with any of the staffing matters raised in this complaint. I place a great deal of weight on Ms. Desrochers' evidence as she appeared to be genuine, was very knowledgeable, direct and was confident and unwavering in the evidence she provided.

[91] Deborah Danis was the Director of the TNTSO when she appeared before the Tribunal. She began her career in 1980. Ms. Danis notably testified to her career progression through the CRA, her experience with how acting opportunities were awarded at the CRA, staffing and human resource matters, several competition processes at issue in this complaint, and her experience with how the gender and age of employees were treated by CRA. Ms. Danis was candid and I found her evidence to be reliable.

[92] Karen Ellis was the Assistant Commissioner of the CRA's OR from 2008-2011, having taken over from Mr. Hillier. Ms. Emmett reported to Ms. Ellis when Ms. Emmett was the Acting Director of the TNTSO. Ms. Ellis testified to her experience working with Ms. Emmett. Ms. Ellis' evidence was very detailed. She was firm, confident and meticulous in her answers. I found her evidence to be reliable and consistent with others.

[93] Furthermore, the testimony provided by these witnesses was consistent amongst them, and was supported by exhibits entered into evidence by the parties in many instances.

[94] Ms. Emmett was the only witness for her case. While Ms. Emmett has some human resource experience as an Assistant Director, the Tribunal finds that her experience is not as extensive or at the same depth as the human resources experience held by Ms. Wlotzki and Ms. Desrochers. Throughout the course of the hearing it became apparent that many of Ms. Emmett's allegations were not grounded in fact, but based on mere bald assertions. Moreover, Ms. Emmett's testimony was sometimes presented in a selective or misleading manner. For example, Ms. Emmett asserted and gave evidence in chief that the Succession Planning Committee (SPC) was composed of **only men**. Under cross-examination, she acknowledged that Ms. Howard was a member of the committee and then changed her testimony, indicating that she had intended to say there were only **male directors** sitting on the SPC.

[95] I found Ms. Emmett to be very selective on which documents she would agree to give testimony on. For example, in instances where she wanted to introduce a document that she did not author, she was okay with giving testimony. However, whenever the CRA asked her about a document she did not author, she refused to speak to it. Additionally, on numerous occasions Ms. Emmett's testimony on certain topics changed depending upon whether it was beneficial to her or not. For example, when she was an Assistant Director and her Director required someone to act, Ms. Emmett testified it was most reasonable for her to be assigned the acting assignment. In similar instances in other offices when such decisions were made, she indicated it was unreasonable for the Assistant Director of that office to be selected to act and that she should have been selected instead. In other instances, when asked if a certain colleague was well respected she indicated she did not know, even though she spent her career with the CRA and knew these colleagues for many years, and whom she claimed to network and collaborate with.

[96] As such, given the consistent testimony of the Respondent's witnesses, their extensive experience in human resources at the CRA and direct involvement in the staffing processes at issue, unless otherwise specified, where there are contradictions in

evidence provided by the Complainant and the Respondent regarding CRA executive acting and selection processes, the Tribunal gives greater weight to the testimony provided by the Respondent's witnesses.

VIII. Position of the Parties and Analysis

A. Has the Complainant met her burden establishing systemic discrimination on the prohibited ground of sex under section 10 of the Act?

[97] Under this heading, the Tribunal will assess Ms. Emmett's claim that men almost exclusively occupied executive positions in the CRA and, especially, in the SOR/OR where she worked.

[98] In short, the Complainant argues that the CRA's staffing practices, namely the competition process for promotions and the process for the appointment of acting assignments disproportionately negatively affected the career opportunities of female executives, "***especially in the SOR/OR at the top levels of the organization, i.e., TSO Director positions, Corporate Director positions and Assistant Director positions***".

[99] Ms. Emmett also filed statistical and organizational evidence, which she claims is suggestive of systemic gender discrimination. She also filed evidence purporting to show the underrepresentation of women in what she alleges to be "key occupational groups" outside the executive group. Furthermore, Ms. Emmett claims that the CRA, once consolidated, adopted the culture and attitude of the former DNR Taxation Branch, which she alleges was unfavourable to the career advancement of women in executive positions. She claims these factors affected her personally by blocking her from being awarded a promotion to a TSO Director position.

[100] The Respondent, for its part, claims that its success in increasing the representation of women in the executive group is evidence that its staffing and acting processes are non-discriminatory. It claims that this evidence, coupled with witness testimony, demonstrates that there was no "old boys club" culture at the CRA. It further submits that there is nothing incorrect with the use of subjective criteria when assessing candidates. Moreover, the Respondent alleges that the statistical evidence only shows a

relatively small degree of disparity, which is not enough to constitute compelling evidence of systemic discrimination.

[101] Regarding the representation of women in groups other than the executive, the Respondent argues that Ms. Emmett has not met her burden of proof because she failed to point to any discriminatory policies or practices.

[102] For the reasons that follow, the Tribunal finds that while the process for staffing executive positions within the CRA could have been more transparent, the Complainant has not established that the CRA's staffing policies and/or practices deprived or tended to deprive women of executive employment opportunities.

(i) Culture, Attitude and Cross-Organizational Expertise

[103] Ms. Emmett asserts that the CRA had a culture of being an "old boys club," which continued post-administrative consolidation. Following a review of the evidence, the Tribunal finds that Ms. Emmett provided little to no evidence to demonstrate that the Taxation Branch had an "old boys club" culture. Moreover, no other witnesses were called by Ms. Emmett to attest to the culture of the organization and whether it was biased or discriminatory against women.

[104] One of the few examples Ms. Emmett provided was her testimony that in 1996 when discussing deployment opportunities with her Director, Ms. Reid, Ms. Reid had told her that Ms. Howard suggested Ms. Emmett seek a deployment to the TETSO as it was a smaller office and it would be easier for her to manage men there. Both Ms. Reid and Ms. Howard denied such comments were ever made during their respective examinations-in-chief. I find that Ms. Howard and Ms. Reid's testimony on this issue was genuine. I also note that while Ms. Emmett had the opportunity to cross-examine these witnesses on the alleged incident and circumstances, but she chose not to.

[105] I also note Ms. Howard's testimony that she may have used the term "old boys club" when referring to what she was told when she first joined the organization in 1990. She testified that she was told by her Deputy that the organization was growing from within, with many believing that if they stayed in a position long enough, they would move

up. Her Deputy at the time wanted change to ensure that there was movement. Ms. Howard testified that she disagreed with any assertion that there was an “old boys club” during the period of this complaint.

[106] The Respondent’s evidence was that administrative consolidation brought about much change to the culture of the organization. As previously highlighted, with a bigger organization came an increased number of opportunities for women. Ms. Danis testified that prior to consolidation, the CRA hired executives within their knowledge or program discipline. Several witnesses testified that following the administrative consolidation, there was a renewed focus on selecting candidates for executive positions with leadership and management experience. No longer was the organization looking to promote people within their subject matter expertise discipline or program discipline. With only one “pyramid” of executives within the new organization post-administrative consolidation, there was a broader pool of potential executives to consider. Consolidation led to a culture shift with an emphasis on different skillsets, which were especially developed and acquired by working in different roles within the organization via lateral and cross-organizational opportunities. Ms. Reid echoed this sentiment in her testimony and added that the administrative consolidation allowed a number of women without any audit or tax experience to become Directors in the new organization.

[107] That being said, several witnesses testified that in their observations and experience working with Ms. Emmett during this time, she was having difficulty adapting to the changes brought on by consolidation as well as the new way of doing business, including what was important when it came to selection processes and promotions.

[108] The CRA also showed that there were a number of development programs, either created by or which the CRA participated in, including CAP, the Executive Development Program (EXDP) and the Accelerated Executive Development Program (AEXDP). There were additional programs that assisted non-executives in moving up to higher levels within the organization. The statistical evidence shows that in many years, women outnumbered men in some of these programs, while in other years there were no significant gaps in representation between men and women. The Tribunal notes that Ms. Emmett chose not to apply to the EXDP or AEXDP. She testified that she did not apply to either executive

developmental program because there was a strong possibility that participants were relocated across the country, which she was not prepared to do.

[109] A number of female witnesses testified that such programs greatly benefitted their career development. Furthermore, they testified that such programs helped women by providing them with broad exposure throughout the organization and access to assignments in different functional areas within the CRA. Ms. Danis testified that when the EXDP started, the CRA wanted to ensure that the representation of women in the workforce was relative to the labour market average (LMA), and thus, efforts were made to ensure gender representation in the program.

[110] Many of the female witnesses gave testimony of the mentoring and support they received from various individuals within the CRA at higher levels. These witnesses attributed the support and mentoring from their colleagues to their successful development of their careers. Mr. Hillier testified that he worked hard during his time to increase gender balance within the CRA. Other evidence demonstrated that Mr. Hillier identified gender balance during selection process competitions on several occasions, specifically, his commitment to such balance and inclusivity. On several occasions when Ms. Emmett was asked under cross-examination about whether the Respondent, specifically Mr. Troy and Ms. Howard, were supportive of her career, she indicated they were not. The reason for her forming such an opinion was that she claimed neither of them promoted her to a TSO EX-03 position she aspired to. That is the measurement she used to assess whether someone had supported her.

[111] Finally, Ms. Emmett points to two employee surveys wherein a small percentage of CRA employees self-identified as being victims of discrimination on the grounds of sex. Additionally, the surveys captured employee dissatisfaction in the competition process, raising issues going to fairness and lack of opportunity. I put little weight on this evidence as it was perception based. Ms. Emmett herself acknowledged that the survey results were never validated and that they are merely reflections of opinions.

[112] Viewing the evidence as a whole, the Tribunal finds that while there may have been an “old boys club” in the past, the CRA’s culture and attitude during the time period of the

complaint was demonstrably inclusive and emphasized the promotion and development of women.

(ii) Executive Policy Framework

[113] The CRA has the legislative power to develop its own program governing staffing, including the appointment of employees (section 54 of the *Canada Revenue Agency Act*, SC 1999, c 17). The parties agree that the CRA's executive staffing program is governed by the 2001 and 2005 Policy Framework for the Executive Cadre [*Executive Policy Framework*]. The 2001 and 2005 documents contain information that is nearly identical. Unless otherwise indicated, I refer to the 2005 document throughout these reasons.

[114] According to section 5.1 of the *Executive Policy Framework*, hiring managers "are responsible for developing selection criteria, for determining conditions of appointment and for choosing selection techniques".

[115] Section 5.2 of the *Executive Policy Framework* provides that, as a policy objective, CRA selection processes will notably include lateral movements, competitions for individual positions, competitions for prequalified pools, reclassifications and external recruitment.

[116] Per section 5.0 of the *Executive Policy Framework*, staffing policies and practices are based upon the principles of "fairness, adaptability, productiveness, efficiency, transparency, competency, non-partisanship and representativeness". These seven principles apply to both executive and non-executive staffing.

[117] Section 5.0 also stipulates that additional flexibilities in staffing the Executive Cadre is **necessary** for the "successful management of the Agency". Additional flexibilities are **not** provided for under the non-executive staffing policy. During the hearing, Ms. Wlotzki testified that because executives are a national resource, flexibility in staffing processes (including temporary, acting and lateral assignments) is necessary to ensure that the right executive is placed in the right job when needed (i.e. the "best fit" principle; see also section 8.1 of the *Executive Policy Framework*). Ms. Wlotzki further explained that the Commissioner needs flexibility in assessing "best fit" because of the small pool of

executives and because executives are responsible for influencing the direction of the organization.

[118] Ms. Wlotzki also testified that the hiring executive could consider a number of different factors when assessing “best fit” such as: (1) whether there were specific operational challenges in a particular office at the time that needed to be addressed; (2) the length of the opportunity; and (3) if there were any specific skillsets for the position that were required to achieve certain goals.

[119] Executives at the CRA are responsible for managing their own careers and making their career interests known to their managers. The *Executive Policy Framework* states that **executives are responsible for “taking a proactive role in managing their own learning; acquiring and enhancing their competencies; and keeping informed of and seeking information about the competencies required in their roles”** [emphasis added].

[120] As a national resource, executive positions could be staffed by candidates across the public service or from the public sector. A background in taxation or in auditing was not required.

[121] Ms. Emmett does not allege any grounds of discrimination with respect to the policies themselves. Rather, she claims the policies were not complied with in practice and that the practices themselves were discriminatory by depriving women of advancement opportunities.

(iii) Selection Process

(a) Employment Equity Champion

[122] The role of a “Champion” within the CRA governance model, at least in 2004 according to the documentary evidence provided, was described as being the leader of that role in collaboration with the Director of Programs. For example, an Assistant Director could turn to the person occupying the role of a Champion instead of their own Director if there was a specific substantive issue to be addressed that may have an impact

regionally. Examples of other Champion roles are Champion of Verification and Enforcement, Champion of Investigations, and Champion of Revenue Collections.

[123] Ms. Emmett asserts that the fact that the CRA's regional Employment Equity Champion in the SOR/OR was always male during the period of her complaint (1999-2006), is evidence supporting her claims of systemic gender discrimination. I find that this allegation is inaccurate because Ms. Danis testified that she herself had been Employment Equity Champion in the SOR when she had occupied the role of Director of Human Resources between 1997 and 2004. While she could not recall the exact dates she held this role, Ms. Danis testified that she had always been involved in employment equity committees. Moreover, Ms. Emmett did not provide much evidence (if at all) demonstrating that male Employment Equity Champions at the CRA brought less commitment to the values of employment equity within the CRA or that they hindered the goals of advancing employment equity groups within the CRA. In fact, the evidence demonstrates that Mr. Troy mentored several female executives within the organization when he was Employment Equity Champion.

(b) Succession Planning, Regional Management and Agency Management Committee

[124] Ms. Emmett argues that over the period of 1999-2004, the SPC, which she described as being the committee tasked with recommending executive acting appointments and promotions, was exclusively made up of male members. She further claims that the Regional Management Team (RMT) was mostly composed of men during the period of her complaint. Under cross-examination she modified her argument to say that only the Directors sitting on the SPC were all-male. She also alleges that there was an underrepresentation of women in the Agency Management Committee (AMC).

[125] One role of the SPC was to provide advice to the Assistant Commissioner on succession planning for the SOR/OR. Some of the matters the SPC discussed included ensuring that the organization was taking steps to have strong and well prepared feeder groups for executive positions and to ensure there was a pool of candidates available to fill future vacancies. This was required as the organization could not always anticipate when

people would move or vacate positions due to any number of reasons including: movement to another Federal department, promotions to other regions, illnesses or retirements. For example, the SPC had identified Ms. Emmett as a potential successor to take over a position at the EX-03 level.

[126] Following a review of the record, I find that the assertions made by Ms. Emmett regarding the SPC and included processes are inaccurate. Assistant Commissioners relied on several human resource advisory groups and tools for staffing matters. The SPC did not have any decision-making authority with respect to staffing processes or the appointment of acting assignments. The evidence also demonstrates that the SPC could suggest names to the Assistant Commissioner, but the SPC did not have a vote in the decision-making process.

[127] Moreover, the evidence demonstrates that the SPC was not an “all-male” committee. Contrary to Ms. Emmett’s assertions, the Respondent’s witnesses testified that there were women on the various succession planning committees, including the SPC. Ms. Howard testified that the SPC was led by Ms. Danis at one time. She explained that there were times when the SPC could have been composed of only men, that any documents listing members were only a “snapshot in time,” and that membership changed as people moved around the organization. I also accept Mr. Hillier’s testimony that there were female Directors sitting on the committee, such as Ms. Wlotzki. I give more weight to the Respondent’s witnesses on this issue as they were directly involved with succession planning responsibilities and therefore would have better knowledge of who was on the respective committees. Furthermore, Ms. Emmett acknowledged that her knowledge of the committees only came from two documents filed in evidence. She admitted under cross-examination that she did not know when the SPC was created, that she did not know what the committee specifically addressed and had no knowledge of the committee’s discussions.

[128] The RMT functioned as an information sharing committee of the direct reports to the Assistant Commissioner. It was composed of Regional Directors, Corporate Services Directors and TSO Directors. Beyond its broader purpose, the evidence shows that the RMT sometimes discussed executive staffing, however, the RMT did not discuss specific

competitions and did not make any decisions with regards to executive staffing. While RMT members could provide input on acting assignments, the recommendation for specific appointments to assignments rested with the Assistant Commissioner. The Commissioner was the decision-maker for all promotional selection processes. In 1997, when Ms. Danis became Director of Human Resources, she became a permanent member of the RMT. Sometime after 2004 Mr. Hillier disbanded the SPC and succession planning became an agenda item at RMT. Mr. Hillier was clear in his evidence that at no time did the SPC share his responsibilities in deciding promotions or acting assignments. Accordingly, I find that the only role the RMT played with regards to staffing was as a consultative body for the Assistant Commissioner.

[129] I find that Ms. Emmett did not produce reliable evidence regarding the composition of the committee. Moreover, she acknowledged under cross-examination that the composition of the RMT changed over time and that there were women on the team. While there was limited evidence filed at the hearing demonstrating the composition of the RMT, I accept the Respondent's evidence demonstrating that women were members of the team, including time periods where Ms. Emmett was competing in selection processes. For example, Ms. Hébert was a member of the RMT from 1994-2004 and Ms. Shields was on it for 8 out of the 12 years between 1992 and 2004 depending on the role she held at the time. Finally, I note that there was no evidence presented that would cause one to conclude that any individual outside of the selection process' hiring panel had any kind of role in assessing candidate's success in a given competition process.

[130] The AMC is the national executive committee of the CRA. It is composed of Assistant Commissioners from all the regions, and heads of various corporate divisions, including IT, Finance and Legal. On average, about 21 people sat on the committee at a given time. Thus, a vacancy of an Assistant Commissioner position or the change of gender of one single member of the committee represents 4.8% of the committee's total composition. Figures demonstrating gender composition of members were presented for the years 2001 to 2014. The Tribunal notes that gender representation increased over that period of time and in some years the percentage of women was greater than 50% while in

other years it was close to 40%. Therefore, Ms. Emmett's claims of underrepresentation in the AMC are unsubstantiated.

(c) Interview, Reference Checks, "Best Fit" and Final Selection

[131] Ms. Emmett alleges that the CRA's selection process tended to deprive women of employment opportunities within the executive group because the staffing practices did not use valid or reliable techniques for the objective assessment of candidates' competencies. She also alleges that the CRA's use of reference checks was inconsistent and arbitrary. In addition, Ms. Emmett relies on several cases to support her position that the use of subjective and discretionary criteria in hiring decisions may be a pretext to mask discriminatory conduct.

[132] Relying on *Folch v. Canadian Airlines International* (1992), [1992] CHR D No. 5, 1992 CanLII 7197 (CHRT) [*Folch*], the Respondent submits that the Tribunal's only task is to determine whether the complainant has demonstrated that the usage of "subjective" job criteria tends to discriminate against a protected group. It argues that its success in increasing the representation of women demonstrates that its selection process practices did not deprive or tended to deprive women of employment opportunities within the executive group.

[133] In my view, the Tribunal's task at this stage of the analysis is to decide whether the CRA's staffing process, when viewed together with the other evidence, deprived or tended to deprive female executives of employment opportunities. In doing so, I considered whether a prohibited ground was a factor in any of the irregularities found in the staffing processes at issue. It is well established that it is open for the Tribunal to scrutinize hiring decisions carefully "to ensure that subjective assessments are not being used to mask discrimination" (*Folch*; see also *Premakumar v. Air Canada*, 2002 CanLII 23561 at paras. 87-89, 42 CHRR 63 [*Premakumar*]; *Canada (Attorney General) v. Brooks*, 2006 FC 1244 at paras. 25-32). However, it is not the Tribunal's duty to determine the merits of the CRA's choice of candidates. As explained by Member Doucet in *Salem v. Canadian National Railway*, 2008 CHRT 13, "[t]here is a subjective element in every hiring

process. The mere fact that the respondent used subjective criteria to assess the candidates and that it may have erred in doing so does not in itself expose its decision to challenge on grounds of discrimination” (at para. 63, citations omitted).

[134] It goes without saying that I had these principles in mind in conducting my assessment of the evidence under Section D of these reasons.

[135] For entry into the executive group, and promotion within it during the relevant time, the CRA generally ran an advertised competition process with selection criteria, an interview and sometimes, a reference check. A selection board assessed the candidates’ interview performance to determine if they demonstrated the required competencies. The selection criteria set out the requirements of candidates in the areas of education, competencies, knowledge, experience, language requirements and conditions of employment. An applicant had to meet all of the criteria in order to make it to the next stage of the selection process. The screening of applicants was performed by an executive resourcing advisor. The hiring executive also defined what the terms “recent” and “significant” meant in the selection criteria. The hiring executive made the final decision on which candidate to select.

[136] Candidates were assessed on the leadership competencies and specifically their ability to **demonstrate** their leadership skills during the interview. All candidates were asked the same questions during their respective interviews. Additionally, Ms. Shields testified that the CRA always tried to have at least one female representative on the selection panel for senior executives whenever a woman was interviewed. This practice was consistent with the CRA’s 2005 *Executive Policy Framework*.

[137] These processes could be highly competitive. While outside of the scope of this complaint, the selection process in 2008 for the Director of the TCTSO is illustrative. The process was open to CRA employees, employees with the federal public service, employees of Crown corporations and employees from the Ontario provincial government. The evidence showed that while 16 people applied, only 5 applicants were screened in.

[138] Both parties agreed that there was no predetermined rating scale or scoring grid to guide the assessment of a candidate’s competencies during the oral interview. The

answers to interview questions were not assigned a mark or a rating. At the end of each interview, the selection board “holistically” assessed whether the candidate “met” or “did not meet” the competencies during a roundtable discussion that lasted about 15 minutes. The board would discuss the applicant’s answers in terms of what was strong or what was lacking. Once all candidates were interviewed, the selection board convened to discuss the relative performance of each candidate and to find consensus on which candidate(s) ought to be selected for promotion following the process. Mr. Hillier indicated that a candidate’s performance at the interview was extremely important because it was essential that candidates demonstrated how they met the qualifications for the position. Mr. Hillier testified that demonstrating competencies with real work examples was key as the examples validated a candidate’s competencies.

[139] Once candidates were assessed and found to be qualified, the panel sometimes decided on who was “best fit” for the position from amongst the successfully qualified candidates. The “best fit” principle was especially used for acting assignments and for lateral opportunities where candidates were evaluated at the same level. A brief report (Report on Selection Process) was later prepared to document the selection panel’s decision.

[140] With respect to the interview process, specifically, the marking or lack of scoring, I find that such a process, in and of itself, does not discriminate against individuals based on gender or age. While a scoring grid may be helpful to decrease the chance of subjective bias from entering into selection processes, recording marks is only one such method. The Complainant argues that without a marking grid or assigning marks to answers, a candidate is unable to know whether they “passed” an interview. I do not accept this argument.

[141] The purpose of the interview process for staffing executive level positions was to provide candidates with an opportunity to demonstrate their knowledge of the competencies by providing concrete examples of how they would apply the competencies to a given situation or problem as part of their daily work. Having reviewed the few summaries of the interviews that were provided during the hearing, it is clear that the selection panel sufficiently documented and justified their observations and assessment of

the candidates' performance in answering the interview questions. Concrete examples of what was answered well, as well as, what was not answered well and how the candidates' answers did not sufficiently demonstrate the competencies were also documented in these reports. Despite not having a scoring grid, the Tribunal was able to discern how one candidate performed relative to the others. Whereas a mark would only tell a candidate, for example, that they had received 7 out of 10, the CRA's method of documenting performance on interviews actually provides more information because it explains why a candidate met or did not meet the competencies for the position.

[142] Reference checks were sometimes used to assess competencies or corroborate a candidate's interview performance. According to the CRA's *Executive Policy Framework*, hiring executives had the discretion to use reference checks as one of the tools to assess candidates. They were not a mandatory tool. Reference checks were usually conducted in writing with a list of questions being sent to the referee to respond to. Referees could also choose to answer the questions orally. The practice of reference checks varied from one process to another depending on the specific circumstances of a given competition. For example, where a candidate competed against his or her own supervisor, the selection panel could rely on its own knowledge of the candidate or use a reference check that was already on file from another competition. Where a candidate reported directly to one of the selection panel members, that selection panel member could rely upon their knowledge and experience working with the candidate and share such information with the other selection panel members.

[143] In my view, it was open to the Respondent to use different types of reference checks under their policies. The record demonstrates that the Respondent's choice in how to apply this discretion was dependent on the particular circumstances of each selection process at issue. In my view, this discretion was not exercised in an arbitrary or inconsistent manner. For example, when Ms. Emmett was in a competition that her own direct supervisor was also competing in, the Respondent chose not to obtain a reference from that supervisor. Instead, it used one of the selection panel member's own direct knowledge of Ms. Emmett and a previous reference check.

(iv) Acting Assignments

[144] While there was no specific policy governing the steps a supervisor must take for the appointment of acting assignments within the CRA, any staffing matter had to comply with the *Executive Policy Framework* and the objectives found within. The policy allowed for staffing decisions to be made based on business requirements, including the “best fit” principle.

[145] Ms. Emmett argues that executive acting appointments were made in an informal, subjective and discretionary manner, which violated the CRA’s general staffing principles outlined previously. She alleges that lengthy acting opportunities were informally awarded more favourably to men than women, and that this gave men an advantage over women in competition processes. She claims that this practice sustained the gender imbalance in those positions because obtaining acting appointments was a critical experience required to move to higher levels in the CRA.

[146] The CRA argues that Ms. Emmett’s evidence, based on her own personal experience and statistical evidence (that the CRA purports to be inaccurate), does not demonstrate that a “significantly” disproportionate number of executive-level acting assignments were given to men. The CRA also submits that, given that women’s representation in the executive group grew significantly between 1999 and 2013, any imbalance in the provision of acting assignments did not have a negative impact on the promotion of women in the executive group.

[147] Most acting assignments were short term and temporary (i.e. in situations where a Director would be away for a few days or weeks). As a general practice, executive acting assignments were not advertised and there was no formal competition process held to assess the competencies of interested parties. For short term acting assignments, the Director could select from one of his or her direct reports to fill in while he or she was away.

[148] However, Ms. Wlotzki did testify that where the length of an acting assignment was greater than 3 months, they were sometimes advertised by call letter. When a call letter was not used, the CRA’s witnesses testified that the names of interested candidates were

received from different sources and that the Assistant Commissioner would discuss who was “best fit” for the assignment with the RMT. Although Mr. Troy testified that in one instance the RMT was not consulted, this does not lead me to conclude that consultation on acting assignments was not part of the regular discussion items brought to RMT.

[149] Witnesses testified that deciding who was “best fit” included considering issues such as management continuity, the skills needed to address specific office issues, career development, and the relative strengths of the on-site management team. Both Ms. Howard and Mr. Hillier emphasized in their testimony that the organizational needs of the CRA (i.e. organizational shifts, program priorities, continuity or changes, any ongoing issues with unions, and developmental needs) were the most important guiding factors in selecting who would act in a vacancy. Witnesses also testified that assessment of leadership competencies were not required when appointing employees to acting assignments.

[150] I find that, in the processes at issue, candidates were evaluated in accordance with the *Executive Policy Framework*, which emphasized filling executive positions in accordance with business requirements and the “best fit” principle. I am also satisfied that the factors considered by supervising executives are not as subjective and arbitrary as Ms. Emmett purports them to be. Moreover, no evidence was filed to demonstrate that not assessing leadership competencies in all cases created a disadvantage for women.

[151] Ms. Emmett is concerned that in most instances, she only found out about acting assignment opportunities, especially in offices other than her own, after the position had already been filled. The Tribunal recognizes that not advertising acting assignments could lead to bias and discrimination in the selection process if we were to assume that the supervising executive selects a candidate without knowledge of who might be interested in the assignment. However, the evidence throughout the hearing demonstrated that many opportunities were provided for executives to show their interest in acting opportunities. For example, executives could make their desire known during the performance review process, when filling out the retirement planning survey and when filling out the succession planning documents. Executives could also reach out to Ms. Wlotzki directly to express an interest and seek out advice on how to obtain acting assignments.

[152] Ms. Emmett expressed her interest in acting opportunities on many occasions in such documents and through communications with her Director and other higher-ups in the organization. Evidence was also provided that the supervising director consulted with RMT where interested candidates' names were brought forward and catalogued. Therefore, the evidence demonstrates that the process for selecting acting appointments was more transparent and accountable than Ms. Emmett claims.

[153] Additionally, I find that the parties' evidence relating to gender representation in awarding acting assignments is limited at best. The Tribunal finds that it cannot draw any conclusions regarding gender representation on the evidence filed. Unfortunately, the CRA only captured information pertaining to acting assignments that exceeded 3 months. Ms. Wlotzki testified that because of this, evidence relating to the vast majority of acting opportunities made available to executives was not before the Tribunal.

[154] In the few instances where the Tribunal was provided with an explanation for a chosen individual, I accept the rationales provided by the Respondent as being valid and without discriminatory motives as will be discussed in greater detail under Section D of these reasons.

[155] Finally, I find that the more important issue for the Tribunal to decide is whether awarding lengthy acting opportunities to one individual over another provided that individual with an advantage in selection processes. I find that it did not. The evidence demonstrates that there was no correlation between the awarding of acting assignments and who was later selected for the same position after a staffing process. In fact, in a number of instances, the acting individual did not go on to be selected as the winning candidate for the position they were acting in. Moreover, the Respondent's witnesses consistently testified that obtaining lateral experience is what increased an individual's chances of obtaining the required competencies to become Directors of TSOs in the SOR/OR, and not necessarily their experience in acting in a TSO Director position.

(v) Statistical Evidence**(a) Executive Group**

[156] In my view, the statistical evidence provided by the parties is of limited probative value in support of the Complainant's case of systemic sex discrimination.

[157] Ms. Emmett claims that the CRA's employment equity reports show that women executives were underrepresented from April 1, 2000, to March 31, 2005. The Respondent does not contest this, but points to the fact that at its highest, the gap of this underrepresentation represented only 17 out of 425 employees.

[158] Ms. Emmett also argues that the percentage of women executives in SOR/OR has historically been below or "significantly behind" the national average. In effect, according to Ms. Emmett, from 1999 to 2002, there were no female Directors at the TSOs located in the SOR. Ms. Emmett claims that very few Assistant Director positions in the SOR/OR were held by women at the relevant time.

[159] In response, the CRA argues that the Complainant's submissions are not an accurate reflection of the statistical evidence before the Tribunal. It submits that Ms. Emmett has not made out a case of systemic sex discrimination because the statistical evidence demonstrates that the representation of women within the executive group has substantially increased over time.

[160] The following chart demonstrates the representation of female executives across the CRA during the relevant time period:

Representation of Women in the Executive Group at the CRA, March 31, 2000 to March 31, 2013					
Fiscal Year (EE Annual Report)	Total Number of Executives (Both Genders)	Women			Gap (# of employees)
		Number	LMA	Int. Rep.	
1999-2000	N.A.	N.A.	28.8%	29.0%	No Gap
2000-2001	425	118	31.7%	27.8%	-17
2001-2002	514	149		29.0%	-14
2002-2003	564	171		30.3%	-8

2003-2004	445	150	35.9%	33.7%	-10
2004-2005	451	155		34.4%	-7
2005-2006	449	173		38.5%	No Gap
2006-2007	470	183		38.9%	No Gap
2007-2008	527	219		41.5%	No Gap
2008-2009	529	222	37.1%	42.0%	No Gap
2009-2010	538	238		44.2%	No Gap
2010-2011	531	243		45.8%	No Gap
2011-2012	501	229		45.7%	No Gap
2012-2013	478	219		45.8%	No Gap

[161] This chart was produced in the Respondent's final revised written representations and is based on evidence filed at the hearing. I give great weight to it as the information contained therein comes directly from the CRA's official corporate records. In my view, the CRA is in the best position to furnish such data since it is in control of such records. Moreover, its accuracy is not contested by the Complainant. I also note that the data contained therein reflects some of the information contained in the Complainant's submissions.

[162] In addition to these corporate records, the Complainant relies upon a number of various documents such as lists of committee members, emails, pictures and other documents in order to arrive at her own calculation of gender representation of female executives. I give less weight to those documents because several of the Respondent's witnesses testified that they were either incomplete or unreliable sources of information.

[163] The data presented demonstrates that the internal representation of women within the executive group of the CRA increased steadily over time. In 2000-2001, around the time administrative consolidation took place, there was a 3.3% underrepresentation of women, which represents a gap of 17 women nationally. This represents the greatest underrepresentation of women at the CRA at the executive level nationally. By 2005-2006, the underrepresentation of women was eliminated entirely at the national level. In fact since 2005-2006, the CRA has a surplus of female executives in comparison with the labour market availability (LMA). Looking at years falling outside the scope of the complaint, we can see that there was a dramatic increase of female representation within the executive group. By 2012-2013, women represented 45.8% of the executive group

while the LMA was 37.1%. In my view, the underrepresentation of women nationally, when compared to the LMA, at the executive level, is not significant.

[164] The LMA is meant to represent the share of women within the wider labour market from which the CRA can expect to draw its employees from. The LMA is produced by Employment and Social Development Canada (ESDC) based on statistics collected by Statistics Canada. ESDC produces LMA data per occupational group and the data is updated every 5 years when new data is collected through census. Ms. Desrochers testified that, the LMA is calculated on the basis of a particular geographical area. However, LMA data for executives is only available at the **national** level.

[165] It is to be recalled that the crux of Ms. Emmett's complaint is discrimination against women in the SOR/OR. However, both parties acknowledge that LMA is not calculated for executives at the regional level. No reason was provided to explain why the LMA is not calculated regionally other than the fact that executives are considered to be a national resource and therefore the LMA is calculated on a national level. The Tribunal finds this statistical anomaly to be unfortunate because without a regional LMA for executives in the SOR/OR, we cannot say with certainty whether there was an underrepresentation of women in the executive group in the SOR/OR. However, the Tribunal is reminded that a comparator group is not necessary for it to make a finding of discrimination (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras. 290,301, 318-322).

[166] That being said, the Tribunal notes that the CRA's own annual reports describe the SOR/OR as being "significantly behind" the national CRA average. The Demographic Analysis of Executive Cadre and Feeder Group reports for the period 2003-2008 shows that the percentage of women executives in the SOR/OR was below the percentage of women executives **nationally**. The Tribunal roughly calculates that between 2003 and 2005 female representation in the executive group in the SOR was about 15% below the national LMA (35.9%). There were approximately 20 female executives in the SOR out of 87 executive positions in total. This means the SOR would have needed approximately 11

additional female executives to bring the region in line with the national LMA². I do not find that this gap in female representation is significant, especially when one considers that there was much movement at the executive level and since the data presented is but a “snap shot” of the composition of the executives in the SOR/OR at precise points in time.

[167] It should also be noted that when the NOR and SOR merged in 2006, female representation in the executive group rose to 30% in the OR. While this was still below the national LMA of 35.9% and internal representation of 38.5% at the time, I do not find that this gap in female representation is significant.

[168] At the hearing, Ms. Emmett argued that the Tribunal ought to rely on logic for finding that there should not be underrepresentation of female executives in the SOR/OR because Ontario is the most populated province with the largest labour pool and should therefore have enough available female candidates to draw from to fill executive positions within the CRA. The Tribunal declines to draw such an assumption. In my view, evidence, not logic, is required to draw any meaningful inferences from the data (*Bombardier* at para. 88). The inferences that Ms. Emmett wants drawn, simply cannot be based on the evidence before me.

[169] For example, missing from the evidentiary record is how many times executive positions became vacant in the CRA or in the SOR/OR, specifically, how many **available and qualified** women compared to men applied to fill those vacancies, and the total instances in which women were passed over for promotional opportunities compared to men (see for example *Morris v. Canadian Armed Forces* (2001), 2001 CanLII 20690 at paras. 119-123, 42 CHRR 443 [*Morris*]; see also *Agnaou v. the Deputy Minister of Justice*, 2012 PSST 16 at paras. 55-61 aff'd 2014 FC 850 at paras.132-135). We also do not know, based on the record, whether men were staying longer in executive positions because they had not retired yet in order to make way for more qualified female candidates to join the ranks.

² These calculations are based on the data found within the Demographic Analysis of Executive Cadre and Feeder Group documents for the years 2003-2005, evidenced during the hearing.

[170] If Ms. Emmett is asking the Tribunal to find discrimination on the basis that the 4 Director TSO positions in the SOR/OR were generally staffed by men, the Tribunal finds that it is unable to make such a finding based on the statistics alone without further context or explanation regarding the selection processes that staffed these 4 positions in the period preceding the period of the complaint. The Tribunal finds that it cannot make any reliable findings related to systemic gender discrimination in staffing these 4 positions without information spanning a greater time period (*Morris* at paras. 119-123). However, the Tribunal notes that of the 4 competition processes discussed during the inquiry, 2 were awarded to women and 2 to men, which raised the representation of women to 50% in the 4 Director TSO positions in the SOR/OR. This may be indicative of the CRA's commitment to gender equality.

[171] Ms. Emmett also argues that the Tribunal ought to draw a negative inference because of the CRA's failure to disclose reports showing the percentage of women executives in the SOR between 1999 and 2002. I decline to draw such an inference as the record demonstrates that there simply were no reports to disclose in the first place because the data was not captured to begin with. However, I do find that the failure of the CRA and/or ESDC to capture such information could be indicative of a neutral policy or practice, which, seemingly neutral, may be circumstantial evidence of systemic sex discrimination. I pause to draw any conclusion on this at this point in the analysis as I must look at the system as a whole, which is done at the conclusion of this Section.

(b) Employment Equity

[172] The Complainant submits that the CRA failed to address the underrepresentation of women in its 2001-2004 employment equity strategic direction plan. She claims that this is circumstantial evidence raising a strong inference of the existence of, and acceptance of, gender prejudice in the CRA's workplace culture. She also submits that the CRA's inaction breached section 10 of the *Employment Equity Act*, SC 1995, c 44 (*EE Act*).

[173] At the hearing, Ms. Diane Desrochers, HR Corporate Project Consultant within the CRA's Employment Equity Division since 1998, acknowledged that based on the data

provided at the time there were no gaps in the representation of women executives at the CRA to be addressed in its 2001-2004 employment equity plan. This was because the CRA had just become an Agency and was relying upon its 1999/2000 employment equity report in reference to the LMA data provided by Treasury Board. Based on that LMA, there was no underrepresentation of women in the executive group. Had there been underrepresentation based on the data, Ms. Desrochers testified the matter would have been addressed in the plan.

[174] The CRA also points to the fact that the Commission reviewed and approved its employment equity practices in 2003 and again in 2013. In effect, Ms. Desrochers testified that in 2013, the Commission found that the CRA achieved very good results through its employment equity program, including full representation of women within the workforce.

[175] Contrary to Ms. Emmett's claims, the Tribunal has no authority to review the CRA's compliance with its employment equity plan or the various obligations imposed on it under the *EE Act*, including the obligation to identify employment barriers against persons in designated groups (s. 5 *EE Act*).

[176] The purpose of the *EE Act* is to "achieve equality in the workplace [...], to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities" (s. 2 *EE Act*). The Commission is responsible for enforcing the obligations imposed on employers under sections 5, 9 to 15 and 17 of the *EE Act* through compliance audits (s. 22). If the Commission is of the opinion that an employer has failed to comply with a direction issued by it, the Employment Equity Review Tribunal may be established to confirm the Commission's direction (s. 27-28 *EE Act*).

[177] The case law explains in clear terms that the *EE Act* operates independently from the *CHRA* in that it imposes duties and obligations that are specific to that legislation, that are enforced by that legislation and that are unrelated to complaints filed under sections 7 or 10 of the *Act* (see *Bay Ferries* at paras. 26-27; *Abi-Mansour v. Canada (Attorney General)*, 2015 FC 882 at paras. 53-58; *Murray v. Immigration and Refugee Board*, 2013 CHRT 2 at paras. 40-57; rev'd on other grounds 2014 FC 139 [*Murray*]).

[178] As explained in *Murray*, consequential amendments made to the *Act* in 1995 removed the Tribunal's jurisdiction over complaints concerning the underrepresentation of designated groups (at para. 40). Despite this, it is still open for the Tribunal to consider employment equity plans as evidence that a particular practice was or is discriminatory (see *Emmett 2013* at para. 25).

[179] Given the above, it is not for the Tribunal to decide whether the CRA was fully compliant with its obligations under the *EE Act* or whether the CRA failed to address the underrepresentation of women in the executive category in its employment equity plan for the period 2001-2004. The Commission is the appropriate body to decide these matters. Moreover, as limited evidence was led as to the process undertaken between the CRA and the Commission in crafting the 2001-2004 employment equity plan, the Tribunal declines to draw an inference of discrimination solely by virtue of the fact that the underrepresentation of women in the executive category was not addressed by the CRA in its 2001-2004 equity plan. This is but one factor that must be considered within the context of the entire evidentiary record. Finally, as stated above, the data available at the time the CRA put together its 2001-2004 employment equity plan did not show any underrepresentation of women in the executive group.

(c) Non-Executive Groups

[180] Aside from executive positions, Ms. Emmett points to statistics that purportedly demonstrate that women were underrepresented in what she describes as "other key occupational groups" within the CRA over the period of her complaint, including in middle and other management groups, the professional group (specifically AU group), and the program administration and senior clerical personnel group. She submits that this evidence demonstrates that women were disproportionately excluded from advancing in their careers to higher levels in the organization compared to men, especially in the SOR/OR. She also claims that this underrepresentation is reflective of entrenched cultural and attitudinal barriers that prevented women, including herself, from advancing to executive positions in the CRA for a number of years.

[181] With respect to employees in the AU group specifically, Ms. Emmett alleges that no woman with an audit background was appointed to TSO Director positions in the SOR/OR between 1996-2006. She claims that female auditors were negatively stereotyped as not being strong or as capable as men in leadership roles, and were historically underrepresented in higher levels of the CRA, especially in the executive group. Ms. Emmett submits that her background in audit was another factor impeding her advancement to a Director position.

[182] The Respondent argues that the Complainant failed to furnish any evidence of a specific discriminatory policy or practice with respect to the staffing of non-executive positions and that her evidence is only based on statistics which is not enough to meet her burden.

[183] First, since Ms. Emmett provided limited evidence of the alleged cultural and attitudinal barriers impeding women in the AU group, the Tribunal gives little weight to these claims.

[184] Second, while the CRA's employment equity records recognize that there was an underrepresentation of women in the AU group, the records also indicate that the underrepresentation of women in the OR in the EEOG3 group was steadily decreasing over the years as more women pursued higher education and as men in the group retired.

[185] Third, the Tribunal finds that Ms. Emmett failed to demonstrate any correlation between the underrepresentation of women in non-executive groups and the representation of female executives in the CRA.

[186] The bulk of Ms. Emmett's evidence related to statistics from the CRA's employment equity reports regarding the EEOG groups, especially the reports relating to the EEOG3 professional group. However, these groupings are only tangentially related to the movement and promotion of auditors. The EEOG3 group contains professionals such as auditors, financial advisors, financial analysts, human resources professionals, and computer systems analysts. Ms. Desrochers testified that there was no direct relationship between the EEOG3 professional group and AUs. Expanding on this, Ms. Desrochers explained that the statistical data did not provide a full picture of AUs because not all

auditors fall within the EEOG3 group. For example, when one looked at the statistics for the AU1 to AU4 group, some of the AU4s could be counted in either the EEOG2 or EEOG3 group depending on the tasks they performed. Also, AU5s and AU6s with managerial functions could fall under the EEOG2 group (Middle and Other Managers).

[187] With the evidence that was provided, the Tribunal simply does not know how many of CRA's executives came from the AU stream (male and female) prior to becoming an executive. Moreover, as stated above, audit and/or tax experience was not necessary for a person to be selected to be an executive at the CRA. The Tribunal does not know how many within the executive category came from each of the respective feeder groups. The evidence shows that the AU group was not the only feeder group for the executive group. Those from the MG5, MG6, PM6, PE6, IS6, FI4, AS7 and AS8 could also compete for entry into executive positions within the CRA. Such data may have allowed the Tribunal to determine if there was an underrepresentation or discrimination against women auditors progressing to the executive group. Moreover, limited evidence (if at all), was filed to explain how non-executives were promoted to executive positions across any of the feeder professional groups.

[188] The Tribunal recalls that for statistical evidence to constitute circumstantial evidence of discrimination, the evidence must have a direct relationship to the decision that is the subject matter of the complaint (see *Blake*; *Chopra* at paras. 208-212; *Dhanjal* at para. 173). The gaps in the Complainant's evidence prevent the Tribunal from drawing such a relationship in this case. As such, I find that Ms. Emmett has not established a link between the underrepresentation of AUs at the higher level and alleged underrepresentation or discrimination in the executive group. I also find that Ms. Emmett failed to demonstrate that she was being passed over for employment opportunities because of her background in the audit field. There was no evidence presented that her, or any other candidate's audit background was ever a consideration in decisions on staffing.

(vi) Conclusion

[189] I find that, as indicated above, successful candidates in competition processes were selected based on their ability to demonstrate their leadership skills during interviews. The CRA's method of assessing the candidates' competencies allows one to understand how the successful candidate performed better than the others. I also find that the use and methodology applied for reference checks were not arbitrary. Furthermore, I find that acting assignments were awarded based on the CRA's operational requirements and "best fit" principle.

[190] The Tribunal recognizes that there were certain elements of discretion in the CRA's hiring policy and practices. The Tribunal also recognizes that discretion leaves open the possibility for discrimination to be a factor in the hiring process (*Folch; Premakumar*). However, when viewing the CRA's policies and practices in conjunction with the evidence on record, it is my view that the Complainant has not demonstrated that the CRA systemically discriminated against women by preventing them from attaining promotions within the executive group, especially in the SOR/OR, and more particularly in the 4 Director TSO positions located in the GTA. On the contrary, the evidence demonstrates that the CRA was aware of the slight underrepresentation of women in the executive group and was taking concrete steps in its hiring practices to bridge the gap. The Tribunal recognizes that attaining employment equity takes time, which is a fact Ms. Emmett herself acknowledged in her testimony and in correspondence she submitted to senior management. It takes time for an executive to change position or retire in order to make way for different employees to take their place. The statistical evidence demonstrates that the CRA was able to attain gender representation within the executive group within a few years.

[191] The evidence also demonstrates that the culture and attitude of the organization was not discriminatory towards women. Those in positions related to human resources, employment equity and succession planning at the CRA actively mentored both men and women to help them gain the skillsets required for career advancement.

[192] Regarding Ms. Emmett's assertion that the CRA specifically discriminated against female executives in the SOR/OR, despite the failure to capture regional LMA data, even if the Tribunal were to assume that there was an underrepresentation of female executives in that region (especially an underrepresentation of TSO Directors in the GTA), underrepresentation on its own, is not indicative of systematic sex discrimination. The Tribunal must take care to assess the entire system as a whole. As explained above, the Tribunal finds that Ms. Emmett failed to demonstrate that the CRA's culture, attitude or staffing practices discriminated against women seeking promotional opportunities within the executive group, including female executives in the SOR/OR and in the 4 TSO Director positions in the GTA.

B. Has the Complainant met her burden establishing systemic discrimination on the prohibited ground of age under section 10 of the Act?

[193] According to Ms. Emmett, during the period of her complaint there was a prevailing mindset in the CRA that an employee's career ended at 55 and that the CRA started to manage retirement once employees turned 50. Ms. Emmett points to statistical evidence, the CRA's pre-retirement flex policy, practices in the hiring process, and some anecdotal evidence of CRA attitudes in support this assertion.

[194] The Respondent argues that Ms. Emmett failed to identify any staffing policy or practice with respect to age that might support a case of discrimination under section 10 of the Act. According to the CRA, its succession planning was focused on both retention and renewal. Given the CRA's demographics and operational challenges, it was not in a position to encourage early retirement. The CRA also alleges that executives who left the CRA in their 50s did so to pursue other employment opportunities.

(i) Selection Process

[195] Ms. Emmett testified that an executive's age is easily retrievable from the CRA's computerized system. She believes that this, coupled with the CRA's subjective and discretionary staffing process, raise a strong inference that age was taken into account in

staffing decisions. Ms. Emmett also points to her own experience in 2 selection processes wherein her candidacy was passed over for a younger female candidate.

[196] In response, the Respondent argues that age was never considered in staffing decisions and submits that the mere existence of personnel records is not evidence of systemic age discrimination.

[197] I find that Ms. Emmett failed to meet her burden of establishing that a candidate's age was a factor in selection processes at the CRA. I also find that she failed to demonstrate that the CRA had a policy or practice of considering the age of a candidate in staffing positions.

[198] First, the fact that the age of employees is available and stored in the CRA's corporate administrative databases does not allow one to conclude that such information was ever looked at by hiring managers when making hiring decisions. There is no evidence on record demonstrating that any such information had been accessed for the purposes of hiring decisions.

[199] Second, not one of the CRA's witnesses testified that they had ever felt pressured or seen someone pressured to leave the organization because of their age, not apply or seek a promotion or another position because of their age nor of any mindset that older employees were not welcome to continue working. At the hearing, Ms. Wlotzki testified that age was not a relevant factor considered in staffing decisions, that there were no policies dictating mandatory retirement and that in fact her experience had been that the CRA encouraged executives to work as long as they felt they wanted or needed to.

[200] Ms. Shields testified that the CRA wanted to retain corporate history, expertise and knowledge and that both female and male employees were encouraged to stay employed with the CRA as long as possible. Both Ms. Reid and Ms. Shields testified that when they chose to retire at the age of 51 and 52 respectively, the CRA asked them to reconsider as it hoped they would stay longer. This is consistent with Mr. Troy's testimony, as he stated that as employees got older, they were given an increasing amount of responsibilities within the CRA. There was also evidence of a number of employees who were hired after

the age of 50. For example, the 2004 competition for the TCTSO Director position was won by a 54 year old employee.

[201] Finally, Ms. Emmett did not testify that she had been pressured to retire due to her age.

(ii) Pre-Retirement Flex Policy

[202] Ms. Emmett argues that the flex policy constitutes age discrimination because it excludes an executive from continued employment by forcing them to retire following the end of the flex term.

[203] I disagree with Ms. Emmett's interpretation of the CRA's pre-retirement flex policy. Having reviewed the policy and the evidence given by the Respondent's witnesses, I find that the policy was not used as a tool to force employees to retire. Rather, it was a tool that allowed the CRA to retain corporate knowledge and expertise, while at the same time allowing it to staff positions and continue operations.

[204] According to section 5.2 of the *Executive Policy Framework*, when flex arrangements are used for pre-retirement purposes, the executive "must make a written commitment to retire and the delegated manager must accept the resignation in writing on a specified date."

[205] According to testimony by Mr. Hillier, the primary objective of a pre-retirement flex is to allow the CRA to retain the knowledge and expertise of an employee. He gave the example of a Director of a TSO whose office was amalgamated, thus causing the Director's position to be surplus. With no other director positions available and as the employee was approaching retirement, a pre-retirement flex position was created so the CRA could continue to benefit from her work in the management group and the employee could continue working to retirement.

[206] Ms. Wlotzki testified that flex agreements were entered into voluntarily. She also testified that the CRA has no standard or preferred retirement age, no policy regarding mandatory retirement and no policy limiting how long an executive can stay in their

position. The policy is quite clear that it requires the consent of both parties to be effected – the employee and the employer – except in very special circumstances such as harassment, conflict of interest or incapacity (*Executive Policy Framework*, section 5.2).

[207] Through cross-examination of Ms. Wlotzki, Ms. Emmett attempted to show that the CRA refused to rescind a pre-retirement flex of an individual thus causing that employee to retire from the CRA. Ms. Wlotzki testified that she was aware of the case and that withdrawal of the pre-retirement flex was denied by the CRA, but not based on age. No further questions were asked about this incident. I therefore give Ms. Emmett's testimony on this issue little weight.

[208] In light of the above, I find that there was no evidence on record demonstrating that any executive was forced to give up their position because of their age or forced into a pre-retirement flex position.

(iii) Culture and Attitude

[209] At the hearing, Ms. Emmett testified there was a prevailing mindset at the CRA that once an employee reached the age of 55, it was time to start managing their exit.

[210] Ms. Emmett also points to her recollection of a speech given by the CRA's Commissioner in May 2007. Neither the Complainant nor the Respondent was able to provide a copy of the Commissioner's speech. According to Ms. Emmett, the Commissioner at the time recognized that the CRA had a responsibility to keep employees over the age of 50 engaged in the organization rather than manage their exit. The Respondent contests this interpretation of the speech, arguing that the message shared with staff was to encourage executives to continue working at the CRA despite having reached retirement eligibility.

[211] I give little weight to Ms. Emmett's interpretation of the former Commissioner's speech. The Tribunal notes that Ms. Emmett failed to call the former Commissioner as a witness to testify to his statements. Even if I were to find that such a statement was made with the connotation attributed by Ms. Emmett, I find that one statement does not, in and of itself, speak to the culture and attitude of an entire organization. Without more evidence

regarding what was said in the former Commissioner's speech, I place little weight on Ms. Emmett's interpretation of what was said. Moreover, Ms. Emmett's assertion was contradicted by the testimony of Ms. Danis and Ms. Wlotzki who testified that the Commissioner at the time made statements encouraging employees to stay within the organization past the age of retirement.

[212] Several of the Respondent's witnesses also testified that they were provided with more responsibilities as they got older and were even encouraged to keep working rather than retiring early as the CRA was interested in retaining the corporate knowledge of the organization. Ms. Emmett herself indicated that she had planned to work until 2011 when she would have been about 58 or 59 years old. The Tribunal also notes that she provided little evidence, if at all, that she felt pressured to retire or that retirement was even suggested to her as she got older.

[213] Ms. Emmett also points to the CRA's letter seeking approval to appoint Ms. Danis to the TNTSO Director's position in 2009 as evidence that age was a consideration in the CRA's staffing decisions. In the letter, the CRA states that "Ms. Danis is 50 years of age and has over 28 years of service." I find that the inclusion of Ms. Danis' age in this letter and in the document announcing Ms. Danis as the new Director of the TNTSO does not support the claim of a discriminatory culture based on age. Rather, I find that such information was purely factual and included only to describe to the Commissioner who the Assistant Commissioner was recommending for appointment.

[214] Ms. Emmett also relies on the results of CRA public service employee surveys taken in 1999, 2002, and 2005 as circumstantial evidence of age discrimination. In the 2005 survey, 31% of employees indicated they were subjected to age discrimination. Unfortunately, I do not have details about those opinions or the survey results. No witness was called by Ms. Emmett to provide more detail on the survey results and the methodology of collection, or if more granular information was available that could assist in explaining the answers. For example, it is unclear whether those who responded to the survey felt they were discriminated based on their younger age in favour of older and more senior employees. Moreover, the survey is not broken down by job classification (i.e. executives vs. non-executives) or by geographical region. As such, while I accept that

Ms. Emmett was part of various working groups and steering committees established as a result of the survey results, and, thus she had more knowledge than many at the CRA, she was not able to demonstrate the meaning of the results or that they should be given any significant weight to support her claim of age discrimination in the SOR/OR.

[215] Lastly, Ms. Emmett refers to a decision rendered by the Public Service Labour Relations Board (PSLRB), *Wong v. Canada Revenue Agency*, 2006 PSLRB 133, wherein a senior manager was purportedly denied full time French language training by a manager. The Complainant claims that Mr. Wong was denied training because he was close to retirement. However, I agree with the Respondent's assertion that this decision is entirely unrelated to age. The PSLRB never made a finding related to age discrimination, instead, Mr. Wong alleged discrimination on the ground of race. I also note that the adjudicator in that case had found that the grievance filed by Mr. Wong was not properly referred to adjudication. I therefore find that Ms. Emmett's claims are merely speculative in nature and give the *Wong* decision no weight.

(iv) Statistical Evidence

[216] Ms. Emmett alleges that the statistical evidence demonstrates that large numbers of executives left the CRA after the age of 55 and that the drop in executives is more pronounced for women.

[217] The Respondent argues that the statistics demonstrate that the 50-54 age group represented the largest age bloc within the executive group and that there was a higher concentration of older employees in more senior positions. Moreover, it contends that many executives began to retire after the age of 55 because they had become eligible to retire without penalty. Ms. Wlotzki also testified that some executives chose to leave in order to start second careers in the private sector.

[218] The evidence demonstrates that more female executives left the CRA after the age of 54 than men did. It also shows that, in general, there were fewer executives in the CRA falling within the 55-59 age group. I also note that the federal public service had a higher percentage of employees in the 55-59 age bracket than the CRA. However, I give the

statistical evidence little weight because it does not show the full movement of CRA employees. I accept the Respondent's evidence that some employees, including female executives, left the CRA to pursue careers in the private sector. For example, Ms. Reid left the CRA at the age 51 for an opportunity with the IMF, where by the date of her testimony, she had been working for 16 years. Ms. Hébert also left the public service at the age of 57 to work for the IMF. Thus, there is a gap in the evidence as it does not show whether less employees are in the 55-59 age group at the CRA because they had moved to other departments, to the private sector, because employees opted to end their careers once they had become eligible for pension without penalty, or for some other reason. I find that there are a number of other reasonable and non-discriminatory explanations for why there would be a decrease in the number of executives from the 50-54 age group to the 55-59 age group. Ms. Emmett did not demonstrate that executives were pressured to leave the CRA because of their age.

(v) Conclusion

[219] Looking at the evidence as a whole, I do not find that the Complainant has met her burden of proof to demonstrate that the CRA systemically discriminated against individuals over the age of 50. I find that the evidence filed with the Tribunal shows that the Respondent viewed the age, experience and expertise of executives, whether female or male, as something of value that should be retained for as long as possible. Quite the opposite of the Complainant's assertions, the evidence before me leads me to conclude that the organization was concerned about losing people as they got closer to retirement and encouraged executives, including female executives, to stay in the organization past the normal age of retirement, rather than pushing them out the door.

C. Has the Complainant met her burden establishing systemic discrimination on the compounded grounds of sex and age under section 10 of the Act?

[220] Ms. Emmett relies on statistical evidence to support her claim that the CRA discriminated against **older women** within the organization. As explained above, while the evidence demonstrates that statistically more women than men left the CRA after the age

of 54, this evidence is not enough to demonstrate that women over the age of 50 were passed over for promotional opportunities or “forced” into retirement, on a balance of probabilities. As explained above, there are a number of reasons why female executives were underrepresented in the 55-59 age group at the CRA. The Tribunal refuses to draw any negative inferences on the record before it based on Ms. Emmett’s interpretation of the data alone. Moreover, the evidence on record demonstrates that the CRA encouraged both female and male executives over the age of 50 to continue working within the organization and delay their retirement. This, coupled with the evidence of the CRA’s inclusive culture, attitude and successful increase in the representation of women in the executive group, supports my view that Ms. Emmett has not met her burden of demonstrating that the CRA practiced compound sex and age discrimination against women over 50 on a systemic level.

D. Was the Complainant discriminated by the Respondent on the basis of sex and/or age contrary to section 7 of the Act?

[221] From 1999 to 2006, Ms. Emmett alleges she was denied various acting opportunities at the Director level and was unsuccessful in several Director level job competitions because of her sex and/or age.

[222] At the hearing, Ms. Emmett argued that the CRA’s explanations for denying her the opportunity to advance were inconsistent, contradictory and unreasonable. She also claims that she did not benefit equally from acting opportunities because she was never subsequently promoted to a Director’s position compared to her male colleagues.

[223] At the hearing, the CRA argued Ms. Emmett’s strongly held beliefs that her inability to secure promotions was based on sex and age cannot be supported by the evidence. It argues that the most likely and reasonable explanation is that others were a “better fit” for acting assignments and that Ms. Emmett simply did not interview as well as other candidates in staffing processes. Furthermore, the Respondent argues that Ms. Emmett limited opportunities available to her by only applying to staffing opportunities in 4 TSO offices located in the GTA.

[224] I have read all of the parties' thorough submissions and only address the arguments that I believe are relevant for deciding the merits of the complaint.

(i) 1999 Acting Director Opportunity (TNTSO)

[225] In March 1999, Ms. Emmett's immediate superior, Mr. Troy, left for a 4 month acting assignment. Mr. Troy asked Mr. C to replace him for that 4 month period. Ms. Emmett argues that she was discriminated on the basis of sex when the acting assignment was given to Mr. C instead of herself. The Respondent claims that sex was not a factor, rather, the decision to appoint Mr. C was based on workload.

[226] I find that Ms. Emmett has not met her burden demonstrating that sex was a factor in Mr. Troy's decision to not provide her with this acting opportunity.

[227] Ms. Emmett argues that she ought to have been given the acting assignment per the CRA's widely accepted practice to give acting assignments to employees who are one level below the vacant job because she was the only executive in her office that met this standard. She also alleges that Mr. C was one level below her and no better qualified.

[228] I accept Mr. Troy's testimony that Mr. C and Ms. Emmett were his two most senior Assistant Directors at the TNTSO and both had similar program experiences as executives, both having attained their EX-01 level in 1992/93. He indicated that in 1999, both Assistant Directors' positions were reclassified from EX-01 to EX-02 and that Ms. Emmett's reclassification happened to come in earlier than Mr. C's. Moreover, several witnesses confirmed Mr. Troy's testimony that the next ranking executive did not automatically get acting Director assignments. As stated above, I accept that after administrative consolidation, the CRA emphasized the awarding of positions to candidates in accordance with operational requirements and the "best fit" principle. Contrary to Ms. Emmett's assertions, I accept that the acting assignment would not have been automatically awarded to her, even if she was the most senior executive in her office after Mr. Troy.

[229] Ms. Emmett argues that Mr. Troy should have awarded her the position because he ought to have known that she aspired to be an EX-03 and ought to have also known that

Mr. C did not aspire to such a position. However, as I found above, receiving acting appointments in higher levels was not necessarily seen as a “leg up” during promotional processes.

[230] Ms. Emmett also takes issue with the fact that the acting assignment was not advertised and there was no selection process held for it, claiming that the appointment was made arbitrarily. As I stated above under Part A of Section VIII when I assessed the CRA’s acting assignment process, the record demonstrates that the CRA did not award acting assignments arbitrarily. I accept that a number of factors were considered such as workload, if any specific skillsets were required, continuity of operations and developmental needs. Mr. Troy testified that he met with Ms. Emmett and Mr. C separately in order to assess their workloads. When he met with each of them, he did not inform them that an acting opportunity was forthcoming. At his meeting with Ms. Emmett, he recalled her telling him that she was swamped with work. He therefore decided to give the acting assignment to Mr. C rather than Ms. Emmett because Mr. C was in a better position “workload wise” to leave his position and take on the acting assignment.

[231] Ms. Emmett contends that she only told Mr. Troy that she was swamped with work after he announced that Mr. C would be given the acting assignment. Given the inconsistencies in Ms. Emmett’s evidence as outlined above, I give more weight to Mr. Troy’s testimony on this subject. At the very least, Mr. Troy’s testimony demonstrates that, at the time, he was aware of Ms. Emmett’s heavy workload because of her involvement in a particular file (the “X file”). I accept his testimony that Ms. Emmett’s involvement in the X file weighed heavily in his decision to not appoint Ms. Emmett to the acting position.

[232] Accordingly, I find that there is no evidence that sex was a factor in Mr. Troy’s decision. Rather, Mr. Troy conducted an assessment of the workload of his two most senior Assistant Directors and made the decision based on their workload.

(ii) 2000 Acting Director Opportunity (TETSO)

[233] Ms. Emmett argues that sex discrimination was a factor when Ms. Howard decided to award an acting opportunity to Mr. S instead of Ms. Emmett. The CRA claims that the decision was based on operational requirements and “best fit”.

[234] I find that Ms. Emmett’s sex was not a factor in the decision.

[235] In September 2000, Ms. Emmett wrote to Mr. Troy expressing interest in an acting Director’s assignment in TETSO after hearing that the incumbent was assigned elsewhere. Mr. Troy testified that he had no responsibility for this assignment, but he did bring Ms. Emmett’s request to the attention of the Assistant Commissioner, Ms. Howard, who was responsible for recommending a candidate. Ms. Howard recommended Mr. S for the position over other interested candidates.

[236] According to Ms. Emmett, Mr. S was one executive level below her and had lesser qualifications. She claims she was not contacted about the assignment and, again, there was no formal process to assess the qualifications and competencies of interested candidates. Ms. Howard disagreed with Ms. Emmett’s portrayal of Mr. S being less qualified than her. Mr. S was a Program Director in the SOR and had previous experience acting as a Director of a TSO. Ms. Howard testified that Mr. S had experience in various parts of the organization as an executive; whereas Ms. Emmett’s program experience was largely as a non-executive and Ms. Emmett did not have experience acting in a TSO Director position. Ms. Howard also indicated that the CRA was going through administrative consolidation at the time, and was therefore seeking out managers who had skills in consensus building and team work. Her personal experience working with Mr. S indicated he “best fit” this criteria as he was a consensus-builder and very comfortable with change. In comparison, Ms. Howard testified that Ms. Emmett struggled with change.

[237] I find that the decision to appoint Mr. S was not arbitrary despite the fact that there was no formal process to vet interested candidates. I accept the evidence of Ms. Howard that candidates were assessed against the CRA’s operational requirements and that Ms. Emmett was not chosen because she did not satisfy the operational requirements for the position.

(iii) 2001 Acting Director Opportunity (TCTSO)

[238] Ms. Emmett alleges she was discriminated on the basis of sex when Ms. Howard awarded this acting opportunity to Mr. G instead of herself. The Respondent argues that only operational considerations were the basis for the CRA's decision to appoint Mr. G.

[239] In August 2001, Ms. Emmett emailed Mr. Troy to express interest in the acting Director assignment in the TCTSO. Again, Mr. Troy testified that he forwarded Ms. Emmett's email to Ms. Howard, who was responsible for recommending a candidate.

[240] According to Ms. Emmett, Mr. G was no better qualified than herself. Again, Ms. Emmett submits that this acting opportunity was not advertised and no formal staffing process was undertaken. She says she was never given an explanation as to why she was not chosen for this acting assignment. However, the Tribunal notes that Ms. Emmett provided no evidence that she ever requested an explanation.

[241] Both Ms. Emmett and Mr. G were at the EX-02 level at the time. Ms. Howard testified that operational considerations were the basis for the CRA's decision. Specifically, she said Headquarters wanted a "seasoned" Director to act in the TCTSO because the office was having issues with the union at that time, which required a manager with many years of experience. This evidence was confirmed by Mr. Troy. At the time of the appointment, Mr. G was the Director of TETSO and also had previously acted as a Director in the TCTSO. I therefore accept that Mr. G was a seasoned Director and that his appointment would help to build continuity and minimize change in the office.

[242] In contrast, Ms. Emmett had no recent Director level experience (her previous experience was pre-consolidation in 1994), other than occasionally acting in the short term absences of Mr. Troy.

[243] I find that gender was not a factor in deciding not to provide Ms. Emmett with the acting opportunity. The evidence demonstrates that nothing but the operational issues were top of mind with CRA senior management when they made the decision to appoint Mr. G. I accept that Mr. G possessed the skillsets required to deal with the operational issues occurring at the time in that office. Furthermore, I accept that Ms. Emmett did not

possess the experience and the skillsets immediately needed at the time to deal with those operational issues. Finally, I find that Ms. Emmett would not have been aware of all the concerns and issues in that office.

(iv) 2001 Acting Director Opportunity (TETSO)

[244] In September 2001, another acting Director assignment became available in the TETSO. Ms. Emmett claims she was discriminated against on the basis of sex when Ms. Howard appointed Mr. P to the position instead of herself. The Respondent submits that Ms. Howard was directed to give an assignment to Mr. P by Headquarters because of his participation in the EXDP.

[245] According to Ms. Emmett, Mr. P was one executive level below her and less qualified when he was given the assignment. She also takes issue with the fact that the acting opportunity was not advertised and no formal staffing process was held. She claims that, despite her stated interest in this type of assignment, she was never advised of the vacancy or why she was not considered. The Tribunal notes that Ms. Emmett provided no evidence that she ever sought such an explanation.

[246] First, while Mr. P was substantively at the EX-01 level, he was in an EX-02 pre-qualified pool as a result of successfully competing in two EX-02 level competitions. I therefore find that both Ms. Emmett and Mr. P were qualified for the acting position.

[247] Second, while the evidence is not clear on whether Mr. P was part of the EXDP at the time of this acting opportunity, the crux of Ms. Howard's evidence was that she was directed by Headquarters to provide an assignment to Mr. P. I accept the CRA's explanation, namely that Mr. P was the Assistant Director in that office and as such could provide continuity of operations for the office, as being truthful and not pretextual. Moreover, as in the previous and subsequent acting assignments, there was no obligation on the CRA to fill the temporary assignment by a formal staffing process or advertised assignment. Again, there is no evidence that sex played any role in the decision not to ask Ms. Emmett to act in this position.

(v) 2002 Lateral Move / Director Deployment Opportunity (TETSO)

[248] In July 2002, a staffing notice was issued to executives canvassing their interest in deploying to a Director's position. Ms. Emmett applied and was screened in for an interview. Following the interviews, Mr. P, who had been acting in the role since September 18, 2001, received the job. Ms. Emmett alleges she was not awarded the position on the basis of her sex. The CRA submits that Ms. Emmett was not found qualified for the role because she was unable to demonstrate that she possessed the competencies required for the position.

[249] Ms. Howard noted that while she could have appointed Mr. P directly into the role since he was already at the EX-02 level and acting in the position, a competition was held to ensure that everyone who had an interest in the position could apply. She was also on the selection board for the process and explained that the board was looking for someone able to build consensus and have constructive discussions with their peers and senior management. Ms. Howard described the assessment process as one where each of the selection panelists marked and discussed the performance of each candidate by considering which answers they felt were strong and which answers were lacking. Ms. Howard added that the selection board also considered the candidates' cognitive thought process; their analysis of the question or issue; whether the candidate consulted others in exercising their discretion; whether the candidate considered other options; whether they understood the consequences of each option; and, whether the decision made was based on organizational awareness. Discussion amongst the panelists was a key part of evaluating each candidate's performance.

[250] Ms. Howard recalled that Ms. Emmett's answers were brief, much briefer than Mr. P's responses and the board was unable to understand her thought process because she did not explain matters such as how the CRA contributed to the government's agenda, she did not incorporate the CRA's business plan and she only explained "what" she would do without expressing the "how". Ms. Howard remembered that Ms. Emmett was also very nervous during the interview process and did not make eye contact with anyone.

[251] I find that gender was not a factor in the decision not to staff this position with Ms. Emmett. Despite the fact that the staffing files for this process were destroyed, I accept Ms. Howard's recollection of the candidates' performance during interviews. I give considerable weight to the evidence of Ms. Howard because she was directly involved with the decision-making on this selection process. She gave detailed evidence about the types of questions asked and the answers provided by Ms. Emmett and the other candidates. Moreover, Ms. Howard's testimony was consistent with other witnesses who, throughout the hearing, testified that Ms. Emmett was brief in her answers compared to other candidates and had a tendency to be nervous during interviews.

[252] Moreover, contrary to Ms. Emmett's assertions, I find that the board's decision not to select Ms. Emmett was not based on a subjective evaluation of her personal characteristics. I find that the board evaluated Ms. Emmett's responses objectively against the job requirements in relation to the other candidates. Ms. Howard was quite clear in describing that it was the depth and breadth of the answers the selection panel was assessing. I accept that explaining how and why one would take particular steps in a given situation demonstrates the thinking process, analytical skills and competencies being assessed. I also accept that, in failing to provide more fulsome answers than others, Ms. Emmett was unable to demonstrate the analytical skills and competencies as well as the successful candidate did.

[253] Finally, I note that following the process, the Respondent encouraged Ms. Emmett to pursue individual feedback of her interview so that she could learn and understand how to perform better in future processes.

(vi) 2003 and 2004 Transfers of other Executives

[254] In her SOP, Ms. Emmett highlights three instances where the deployment requests of three male colleagues were accepted and where she alleges no staffing notice was issued and no formal selection process was held. She alleges that she was treated differently than her male counterparts because her deployment request was denied,

forcing her to compete for positions. Despite the fact that Ms. Emmett did not raise this issue in her closing submissions, I have decided to address it in these reasons.

[255] Following a review of the evidence, I do not find there to be any adverse impact or discrimination against Ms. Emmett with regards to the filling of these specific positions. Regarding two of the positions, the evidence is quite clear that there were indeed selection processes held and that the two individuals appointed were the successful candidates. Ms. Emmett's allegations with respect to these two positions are factually incorrect. Moreover, Ms. Emmett did not apply to either of these positions nor express an interest in any of the positions.

[256] Regarding the position in Barrie, the evidence presented was that the Barrie office was carved out from the TNTSO and the creation of a Director position at the EX-01 level had been approved. One of the Assistant Directors in that office was deployed to the Director position without a competition. The deployment was at level, i.e. the individual remained an EX-01 when taking on the Director role. No other evidence was provided by Ms. Emmett with regards to these deployments. Without any further evidence on the facts, considerations or issues that formed part of the decisions to deploy the individual to that role or why Ms. Emmett's previous requests were denied, I do not find that Ms. Emmett has met her burden of demonstrating that she was treated adversely based on her gender in the CRA's consideration of these deployment requests. Moreover, the evidence shows that Ms. Emmett was not interested in being deployed to an EX-01 level position.

(vii) 2003 Acting Director Opportunity (TNTSO)

[257] In September 2003, Ms. Emmett was given a 4 month acting Director assignment. This was the first long-term acting Director assignment she received at the Director level. She contends this assignment was not a sincere effort to help advance her career, but was given in bad faith to silence her from complaining of being treated in an adverse differential manner in relation to her male peers. Further, Ms. Emmett submits that she did not benefit equally from this acting opportunity because she was never subsequently promoted to a Director's position compared to her male colleagues.

[258] The CRA notes that Ms. Emmett's belief that this assignment was given to her in bad faith and to silence her is illogical because she had not commenced her human rights complaint at the time. The CRA further submits that there were male colleagues in similar circumstances who did not progress to the Director level, despite acting in various capacities.

[259] I accept Mr. Troy's testimony that he gave this assignment to Ms. Emmett because he had committed to doing so following the 1999 acting assignment she did not receive. Ms. Emmett's allegation seems nonsensical for I do not understand how giving her an acting assignment, which she requested, can be discriminatory on either the grounds of age or gender. I find that receiving an acting assignment did not create an adverse impact for Ms. Emmett. The evidence was clear that Mr. Troy had indeed promised Ms. Emmett that when he was next in need of someone for a longer term acting assignment, he would give the assignment to her. This assignment was the next one and Mr. Troy fulfilled his promise by giving the acting assignment to Ms. Emmett. Finally, as repeated above, I accept the Respondent's evidence that acting assignments were not necessarily seen as a leg up in staffing processes and that not all employees who received acting assignments, whether male or female, were subsequently promoted to a Director position.

(viii) 2004 Director Competition (TCTSO)

[260] Ms. Emmett claims she was not found qualified for this position because of her sex. The Respondent argues that Mr. A, who was 54 at the time, was best qualified because he possessed the degree of knowledge directly related to the position and the key competencies critical to the Director role. According to the CRA, Ms. Emmett failed to demonstrate her readiness and suitability for this position during the selection process.

[261] Ms. Emmett applied for the position, was screened into the competition and invited for an interview. There were seven candidates for the job: four male and three female. The selection committee was composed of both men and women. Following her interview, Ms. Emmett was found not qualified for the job. Mr. A was awarded the position and Mr. P was placed in the EX-03 pre-qualified pool. The other two women also did not qualify.

[262] Ms. Emmett claims she ought to have qualified because she had significantly more program experience, Director experience and had worked at a higher executive level for longer than both of the male candidates found qualified.

[263] Based on the evidence provided at the hearing, I find that gender was not a factor in not finding Ms. Emmett qualified for the position. The evidence does not demonstrate that Ms. Emmett was more qualified than the successful candidate. In any event, Ms. Emmett was not appointed because she lacked experience, but because other candidates performed better than her at the interview. Mr. Hillier, who was a member of the selection committee, testified that Mr. A and Mr. P both performed better than Ms. Emmett because they were able to demonstrate, with concrete examples the competencies necessary for the position. He articulated, with detail, how the selected candidate demonstrated the competencies for the position and where Ms. Emmett failed. I accept the testimony of Mr. Hillier, which was supported by the report on selection process and summary of interview for Ms. Emmett.

[264] The summary of interview document, which was prepared shortly after the interview and which contained the input of the members of the selection committee, states that Ms. Emmett did not demonstrate the breadth of experience required for the position. The document further notes that Ms. Emmett appeared to be very nervous throughout the interview, hesitant in her responses to the questions, was unable to organize her thought process logically and was unable to project the depth of leadership expected of someone aspiring to the EX-03 (Director) level. As a result, the selection committee concluded that the linkages that would have demonstrated a strategic and corporate approach in her thinking were not apparent.

[265] Ms. Emmett suggests that this document, and the report on selection process, should be given little weight because they are unsigned. She also alleges the summary of interview was prepared six months after the interview. I am not prepared to give either document little weight because Ms. Emmett did not call or ask any of the witnesses questions regarding the date the document was created. Moreover, the comments relating to Ms. Emmett's performance during the interview are consistent with how witnesses described her performance during interviews throughout the period of the complaint. I

therefore accept the testimony of Mr. Hillier that these documents reflect the discussions and findings of the selection committee and that they were prepared shortly after the interview occurred.

[266] Ms. Emmett asked for and received an individual feedback meeting to shed light on why she was found not qualified in the competition, but she claims the meeting was not helpful. Mr. Hillier recalled providing Ms. Emmett with the observations of the selection committee and suggesting that she consider executive coaching in preparing for and participating in selection interviews to assist her in future processes. While Ms. Emmett testified that she was not satisfied with the feedback she received, she did not express this concern to Mr. Hillier. In fact, the next day she wrote to him and thanked him for meeting with her.

(ix) 2004 Interim Director Opportunity (TETSO)

[267] Ms. Emmett claims she was discriminated against on the basis of her sex when Mr. Hillier appointed Mr. V, a 56 year old man, to the interim Director position (pending the running of a competition) at issue instead of herself. The Respondent argues that the decision to appoint Mr. V was not pretextual but based on operational requirements and the competencies and skills of the available candidates.

[268] Ms. Emmett claims that Mr. V was at a lower executive level and was less qualified than her at the time of being awarded the acting assignment.

[269] Mr. Hillier testified that Mr. V was the on-site Assistant Director and continuity of management was a key priority for Mr. Hillier. I accept Mr. Hillier's testimony that it made sense to have Mr. V act in that office because there were union and accommodation issues at the time that required attention, and which Mr. V had familiarity with by virtue of his substantive position as Assistant Director in TETSO. Furthermore, Mr. V had a good relationship with the union, which Mr. Hillier thought would assist with the resolution of the issues. Finally, Mr. Hillier also testified that Mr. V was not interested in seeking the position indeterminately. This was a part of Mr. Hillier's consideration because he felt assigning

Mr. V the acting assignment would not provide him with the “distinct inside advantage” of acting for a number of months in the position to then compete for it.

[270] According to Ms. Emmett, Mr. Hillier’s explanation about continuity of management being a priority to him contradicts the action he took in February 2006 when Mr. P was awarded the TNTSO Director position after having acted in it for several months. Ms. Emmett’s allegations in this regard will be examined in more detail later in these reasons.

[271] I find that there was no discrimination against Ms. Emmett based on gender in the appointment of Mr. V for this assignment. I do not see any contradiction in the explanation provided by Mr. Hillier as to why he selected the individual he did. Continuity of operations was only one of the factors considered when appointing employees to acting positions. Other factors included issues occurring in a position and office, who was best able to deal with those issues, and who would be able to provide continuity of operations without any disruption (i.e. could the candidate “jump in” immediately). In my view, there was no evidence to suggest that gender was a factor in considering who was the “best fit” for the acting assignment or in deciding not to appoint Ms. Emmett. Finally, it should be noted that when the competition was held to staff the position indeterminately, 3 women competed in the competition, one of whom was the successful candidate to staff the position substantively.

(x) 2004 Lateral Director Competition (TETSO)

[272] In this staffing process, Ms. Danis was awarded the EX-02 position and Ms. Emmett was found not qualified for the position. Ms. Emmett alleges that her age was a factor in the decision. The CRA argues that the age difference between Ms. Emmett and Ms. Danis was negligible and that Ms. Danis performed better at the interview than Ms. Emmett. The CRA also alleges that sex cannot be the basis for discrimination in the decision to appoint Ms. Danis because both Ms. Emmett and Ms. Danis are female.

[273] Three women, including Ms. Emmett, and one man, applied for the position. The three women were granted interviews. Substantive reference checks were also performed.

According to Ms. Emmett, Ms. Danis should not have been found qualified because she came from a lower executive level than her, her experience was “not recent” and she had significantly less depth and breadth of experience in managing the CRA’s tax programs. Ms. Emmett also claims the youngest candidate was selected. That is, Ms. Danis was 47, Ms. Emmett was 52 at the time, and the other candidate was older than Ms. Emmett. Therefore, Ms. Emmett contends a strong inference of age discrimination is raised.

[274] Ms. Wlotzki confirmed that Ms. Danis was screened in for an interview because she had significant experience in the management of a large complex program directed to the public by virtue of three former positions she held. I accept Ms. Wlotzki’s testimony and find that Ms. Danis was properly screened into the competition and properly qualified to compete. Moreover, Ms. Emmett’s interpretation of the definition of experience required of candidates is not supported by the selection profile. Furthermore, while Ms. Danis’ substantive position was classified at the EX-01 level, she was in an EX-02 pre-qualified pool (the same level as Ms. Emmett), which allowed her to compete in the selection process.

[275] As the hiring manager, Mr. Hillier determined that the chosen candidate would have to demonstrate high levels of the following key competencies: cognitive capacity, visioning, partnering, interpersonal relationships, communications, personality, and, self-confidence. These competencies were chosen as key because of the requirements of the position, namely to effectively interact with various stakeholders, including colleagues at Headquarters and the RMT, to have the ability to see the “big picture”, to understand the impact of issues within the federal public service and trends in CRA priorities, and have knowledge of the challenges facing the Director of TETSO.

[276] With respect to the performance of candidates at the interview, I accept the evidence presented at the hearing, including the interview summaries, that Ms. Emmett answered the interview questions in general terms and did not demonstrate the competencies required for the position. Mr. Hillier testified that Ms. Emmett was unable to show her strategic thinking because she was unable to draw links between complex issues the CRA was facing or show how she would address the issues in a coherent fashion. Mr. Hillier’s testimony is corroborated by Ms. Emmett’s interview summary, which

says that she is a solid executive and is an intelligent and hardworking individual who is technically knowledgeable. However, the document notes that during her interview, Ms. Emmett did not make eye contact, appeared somewhat nervous and hesitant, spoke primarily in generalities, did not speak to the broader context of the challenges of the position, and, did not command the attention of the committee or exude self-confidence.

[277] In contrast, the committee's interview summary for Ms. Danis says that she was "very articulate, and presents herself as a polished professional. She is intelligent, good-humoured and self-confident". It also says that she responded to questions logically and methodically, provided examples where appropriate and spoke about the challenges of the position with concrete illustrations. It also says that Ms. Danis demonstrated the capacity to interact and communicate effectively, strategically and persuasively. According to Mr. Hillier, in comparison to Ms. Emmett, Ms. Danis' illustrations better demonstrated the competencies of the job.

[278] Finally, Ms. Emmett asserts that Mr. Troy and Mr. Hillier gave her negative references in the competition, which were inconsistent with her performance reviews and which, in her view, demonstrate that the reasons she was not found qualified were pretextual. Regarding Mr. Troy's reference specifically, Ms. Emmett is upset that Mr. Troy did not give the selection committee an eight page reference letter she had drafted for Mr. Troy. Mr. Troy requested that Ms. Emmett prepare a bulleted document to assist him in completing the reference check. He testified that he edited the document to reflect his views as a referee and because he did not support all the comments in the document because of errors and inaccuracies. He further testified that the document provided by Ms. Emmett looked more like a performance review, which based on his personal experience, was not the information the selection committee was seeking. Questions in reference checks were instead targeted to elicit responses for assessing a candidate's readiness to move up to the next level. Thus, while Ms. Emmett's performance reviews were positive because she performed well in her substantive position, the references were not as positive because Mr. Troy was expressing his opinion that Ms. Emmett lacked some competencies to be a TSO Director.

[279] I agree with the Respondent that it is up to the individual referee to decide how to answer each question. While Ms. Emmett believes that Mr. Troy marginalized many of her accomplishments and added negative criticisms about her performance, I find that there was nothing improper about Mr. Troy responding to the reference check based on his own experiences, having worked with Ms. Emmett as her supervisor for a number of years. I find that the comments found within his reference check were consistent with the testimony provided by the Respondent's witnesses. Moreover, there is no indication Mr. Troy marginalized Ms. Emmett's accomplishments or added negative criticism about her performance because of her gender.

[280] Ms. Emmett submits that Mr. Hillier's criticisms of her performance are self-serving and fabricated, raising a strong inference that his explanation for why he denied her the employment opportunity at issue is pretextual. I accept the testimony of several witnesses that it was appropriate for Mr. Hillier to be a reference for Ms. Emmett since she had been a direct report to him for almost 4 months.

[281] Ms. Emmett claims that Mr. Hillier testified that he observed her not building relationships with colleagues. She says that his testimony is inconsistent with the answers in his reference check document which says that he was unable to assess her collaboration skills because of his short term limited exposure to her.

[282] I do not find that Mr. Hillier's testimony contradicted his reference check. Contrary to Ms. Emmett's claims, Mr. Hillier testified that Ms. Emmett could improve her networking and consensus building skills. I find that this comment is not related to the comments in the reference check about Ms. Emmett's ability to collaborate. Instead they were made in response to a question in the reference check relating to Ms. Emmett's ability to network. The Tribunal also notes Mr. Hillier's concluding remark found in the reference check that he "... feels that she could probably do the job". Viewing his evidence as a whole, I find that Mr. Hillier's explanations were not pretextual. His testimony was consistent and amplified the answers provided in the reference check.

[283] Again, there is nothing in the evidence to indicate that sex or age was a consideration in the CRA's decision not to select Ms. Emmett.

(xi) 2004 to 2006 Short-Term Acting Opportunities

[284] Ms. Emmett claims she was denied the opportunity to act for her Director, during his short term absences from 2004 to 2006. Instead, Mr. Troy often appointed the Program Support Manager, who was a female older than Ms. Emmett, to act in his place. Ms. Emmett contends in her SOP that she was treated adversely because in all other Toronto offices the male Assistant Directors were given the opportunity to act during short-term absences of their Directors. The Tribunal notes that Ms. Emmett seems to have abandoned this argument since she does not address it in her closing submissions. I have chosen to address this issue despite this.

[285] First, it should be noted that the individual requested to act on Mr. Troy's behalf was an Assistant Director, not simply a Program Support Manager. Second, I fail to see how choosing to provide acting assignments to another, older, female over Ms. Emmett is discriminatory on the grounds of gender or age. Third, Ms. Emmett failed to provide evidence that, as a general practice, short-term acting assignments were provided to assistant directors in other offices, whether male or female.

[286] It is glaringly apparent that Ms. Emmett is dissatisfied that she was not requested to act for Mr. Troy. However, I believe the evidence of Mr. Troy that he was frequently finding it disruptive to his Assistant Directors to have them act on his behalf for such short periods of time and further, that he would return to the office to find much of his work not having been acted on. Thus, he decided it was more efficient and more productive and less disruptive to all involved if he had his Assistant Director of Programs act on his behalf. Finally, I believe Mr. Troy when he described these short-term acting assignments as being administrative as opposed to developmental in nature. The individual was simply keeping matters moving and recording updates while Mr. Troy was away, which allowed Mr. Troy to jump back into his work with sufficient updates.

(xii) 2006 Acting Director Opportunity (TNTSO)

[287] In February 2006, Mr. Troy accepted an acting assignment resulting in his position becoming vacant. Mr. P was assigned to act in his place without advertisement, a formal

staffing process and without explanation to Ms. Emmett, despite her previously expressed desire in such opportunities. Ms. Emmett alleges that the CRA did not offer her the acting assignment on the basis of her gender. In response, the CRA argues that Mr. Hillier had operational reasons to appoint Mr. P, a seasoned Director, over Ms. Emmett, as the office was dealing with particularly turbulent times.

[288] Ms. Emmett submits that the assignment should not have been awarded to Mr. P because the objective of the AEXDP was to help participants advance their career to an EX-04 or EX-05 Assistant Deputy Minister position, not to an EX-03 Director position. Ms. Emmett asserts this was an illogical developmental assignment for Mr. P because he already had experience working at the EX-03 level. At the time, Mr. Hillier had an EX-04 Deputy Assistant Commissioner's (DAC) assignment vacant which Ms. Emmett feels was an ideal AEXDP assignment for Mr. P. Instead, Mr. Hillier gave the DAC assignment to Mr. Troy.

[289] The evidence shows that Mr. P was selected for this acting assignment as part of his participation in the AEXDP. At the time of the assignment, Mr. P was already substantively at the EX-03 level because of his participation in the AEXDP and had been the Director of TETSO for approximately 3 years. The written announcement at the time confirmed that Mr. P had accepted this "interim assignment" until the completion of his OR assignment as part of the AEXDP. Mr. Hillier testified that the impending absorption of 300 employees from the province created sensitivities between both the federal and provincial unions and numerous management challenges which he thought were best managed by Mr. P over Ms. Emmett. Because of these various challenges, this initiative was identified as an opportunity for the AEXDP. The evidence also shows that Mr. P had already gained knowledge and exposure to these issues and had already been involved in the plans to absorb the new employees in his role as Senior Advisor to the Assistant Commissioner.

[290] While Ms. Emmett argues that Mr. Hillier's testimony regarding his reasons for appointing persons to acting positions is contradictory, I find that Mr. Hillier's reasoning is consistent with the CRA's overall approach of placing great weight on operational requirements. Ms. Emmett contends that, if the CRA favoured continuity of management, then it would have made sense for it to appoint her to the assignment as she was the

Assistant Director of that office. However, throughout the hearing, a number of witnesses testified that the particular needs of the office were considered in selecting a candidate to fill an acting opportunity. I find that “continuity” does not mean that the Assistant Director would move into the acting role as Ms. Emmett argues. Rather it means the office will continue to function with continuity and stability. These goals are not contradictory and support the overarching goal of meeting the policy objective that all staffing decisions are to take business requirements into account (*Executive Policy Framework*, s. 5.0).

[291] In this case, I accept Mr. Hillier’s testimony that operational issues, namely the absorption of 300 new employees in the TNTSO required a seasoned manager. I also find that Ms. Emmett did not have the same level of experience as Mr. P in dealing with the absorption of the new employees or with the union issues faced by the office. I accept the Respondent’s evidence that Directors had lead responsibility for coordinating the transition of the new employees and that Assistant Directors, such as Ms. Emmett, would only have been indirectly involved. I find that Ms. Emmett played a role in absorbing 38 of the employees into her work area. But, hers was a much smaller and limited role than the Directors’ involvement in the overall work plan to absorb the new employees.

[292] I find that gender was not a factor in the decision not to select Ms. Emmett for this acting opportunity. While Ms. Emmett may have had her own personal opinions on what position was best for Mr. P, I give no weight to her opinions as she was not in a position to know all of the facts that went into making the decision including the needs of the organization, the skills required of the person acting in the role and the developmental needs of the individual in the AEXDP. There is also nothing to indicate that the hiring executives were aware that Mr. P wanted to be the Director for the TNTSO at the time he was given the acting assignment. In effect, Mr. Hillier testified that Mr. P was disappointed in being provided this acting opportunity as he had hoped to stay in his Senior Advisor role to the Assistant Commissioner. This further supports my finding that there was no evidence that Mr. P was selected to provide him with an advantage when the competition for the position was advertised.

(xiii) 2006 Competition Held for Two Director Positions (TNTSO and TWTSO)

[293] In April 2006 the CRA held one competition process to fill two Director positions, one in the TNTSO and the other in the TWTSO. Eight individuals, 4 of them women, including Ms. Emmett, were screened into the TNTSO competition and granted interviews. Eight individuals were also screened in for the TWTSO competition, with 3 women being interviewed, including Ms. Emmett. The same interview and reference check process were used to staff both positions. Three candidates were determined to possess the relevant experience, knowledge and executive competencies to be qualified for the jobs: one male and two females. Mr. P, who had been acting Director for TNTSO was selected for that position. Ms. Emmett claims that a factor in not finding her qualified in the TNTSO competition was her sex. For the TWTSO position, Ms. M, a 44 year old woman was selected (Ms. Emmett was 54 at the time). Ms. Emmett claims that she was found not qualified for that position because of her age.

[294] I find that neither age nor gender was a factor in the decisions involved in finding Ms. Emmett not qualified in these two selection processes.

[295] Ms. Emmett argues that Ms. M should not have been the successful candidate in the TWTSO competition because she did not have the requisite experience: Ms. M had only been with the CRA for one year and had 20 years' experience in positions unrelated to the field of taxation. According to Ms. Emmett, this appointment raises a strong inference of age discrimination because she was close to retirement age at the time.

[296] As previously stated, I accept Ms. Wlotzki's testimony, which was corroborated by other witnesses, that tax experience was not an essential qualification to be a TSO Director. I also accept that Ms. M had significant experience as an executive in another organization. I also note that both successful candidates were more senior to Ms. Emmett as they were already substantively classified as EX-03s at the time of the competition.

[297] Ms. Emmett requested feedback on her interview as well as a copy of the source documents pertaining to her assessment. The purpose of individual feedback is to assist executives in achieving their career goals moving forward and point out areas that can be improved. The assessment documents were denied because, as a general rule, the CRA

did not disclose standardized interview questions in order to protect the integrity of future selection processes. I accept this as a valid reason for not sharing the questions at the time, however it is unfortunate that the questions were not made available during the inquiry as they could have provided some assistance in my assessment of the evidence. Ms. Emmett was however provided with the summary of interview document.

[298] Ms. Wlotzki described the individual feedback discussions as difficult since employees are usually disappointed, as was the case here. Ms. Wlotzki assured Ms. Emmett that her competence at the current level was not in dispute. During the feedback session Ms. Wlotzki highlighted some of the deficiencies in Ms. Emmett's answers, she explained how references were taken into account, and provided advice on career development and opportunities to further develop herself for future staffing processes.

[299] Ms. Emmett claims she uncovered serious anomalies with the competition process as a result of the feedback session. She claims the main reason she was not the successful candidate was because a lot of weight was put on self-confidence when the competencies should have been weighed equally. She claims this anomaly, and others, support her position that the CRA attempted to hide the true motive for not selecting her.

[300] According to Ms. Emmett, the selection profiles for these processes did not identify self-confidence as a competency. However, her interview summary said the capacity to think strategically and demonstrate self-confidence were imperative for the Director positions. She claims self-confidence was introduced because it is a highly subjective criterion that can be used as an easy excuse to discriminate against a candidate. The interview summary also recommended that Ms. Emmett make increased efforts to network with colleagues. According to Ms. Emmett, this contradicts her performance reviews, which contain numerous examples of her networking with colleagues at all levels of the organization.

[301] Despite Ms. Emmett's concerns, I accept the evidence of the CRA's witnesses, which is supported by the documentary evidence, that Ms. Emmett did not demonstrate the competencies required to meet the level of competency required to be selected for

either position. Furthermore, I find that the selected candidates demonstrated their respective competencies and that they performed better than Ms. Emmett during the interview process. The summaries of interviews of the successful candidates indicate they were very articulate and professional; and, had the capacity to think strategically and demonstrate a high level of self-confidence. Their answers to questions were responsive with examples, methodical and logical; and, their performance at the interview was consistent with the selection committee members' personal knowledge of their behaviour on the job. In contrast, Ms. Emmett's summary of interview says she was unable to demonstrate the required executive competencies. Consistent with her performance in previous competitions, the selection committee found that Ms. Emmett's responses were too general; she did not provide concrete examples on how she would work with other partners; and, she did not speak to how she could contribute to the broader mandate of the organization at a strategic level. The selection committee recommended she pursue executive counseling services at the Public Service Commission in order to assist her in the future with interviews and other aspects of her career.

[302] Ms. Emmett also had concerns over the selection board's use of her 2004 reference check, as it did not reflect her current accomplishments. Moreover, the 2004 reference check spoke to different competencies than those tested in the 2006 competition. Ms. Wlotzki explained that the references in this process were obtained through personal knowledge of the candidates or written references on file because Mr. Hillier, who sat on the selection committee, was familiar with the candidates that were found to meet the competencies. Ms. Wlotzki testified that a reference of Ms. Emmett's supervisor at the time, Mr. P, was not sought because he was also competing for the positions and it would not have been appropriate to ask him to be a referee due to the conflict of interest. Instead, the committee referred to reference checks prepared for Ms. Emmett during the 2004 competition process.

[303] I find that the CRA's reasons for not seeking a reference from Mr. P were reasonable and considerate. I also find that the CRA's use of a reference check from a previous competition, while not ideal, did not discriminate or disadvantage Ms. Emmett on any prohibited ground.

[304] While there may have been anomalies in the competition process, such as the weighting of reference checks and interviews and how the competencies were linked to interview questions, I find that any anomalies in the process did not discriminate against Ms. Emmett on the grounds of gender or age. And, while there were some inconsistencies between the testimony of Ms. Wlotzki and Mr. Hillier, such inconsistencies were minor and certainly do not cause me to question the credibility of either witness. I accept that all of the candidates were assessed on the same competencies, in accordance with the same weighting criteria, and with the same interview questions, and thus, all candidates were treated equally in the process. Moreover, no evidence was tendered to show that the requirement to be self-confident had a discriminatory impact against Ms. Emmett on the prohibited grounds of sex and/or age. Accordingly, I find that none of the prohibited grounds were a factor in deciding not to find Ms. Emmett qualified for either position.

E. Conclusion

[305] The Tribunal has no doubt that Ms. Emmett was an experienced executive and was very good working in her position as ADVE. All her performance reviews were positive and not one witness questioned her abilities in her substantive role and the work she was responsible for. The Tribunal is also sympathetic to the frustration Ms. Emmett must have felt at being turned down in each contested opportunity. However, when all of the evidence is considered as a whole, I cannot conclude that gender and/or age was a factor in the CRA's decision not to staff these opportunities with Ms. Emmett.

[306] With respect to acting assignments, I find the evidence clear that the business needs of the organization were the foundation for the decisions the CRA made in selecting who would act. The purpose of equal opportunity in the facts of this case should not be interpreted as a guarantee of the right to a promotion as Ms. Emmett believes. I find that Ms. Emmett was provided with an opportunity equal with other individuals to act in various roles within the CRA without being hindered or prevented from doing so by discriminatory practices as set out in s. 2 of the *CHRA*. Moreover, as previously stated, not all men who received acting assignments were later promoted. Obtaining acting assignments did not automatically lead and/or entitle anyone to a promotion.

[307] The selection processes run by the CRA for the positions at issue were extremely competitive. Many experienced and highly qualified individuals across the public service applied. As recognized by the Federal Court of Appeal, “[o]ften in promotion decisions, only a few win, many more lose, and the difference between winning and losing can legitimately turn upon fine things, sometimes subjective or subtle things” (*Canada (Attorney General) v. Boogaard*, 2015 FCA 150, at para. 51).

[308] The record demonstrates that, in each selection process, the selection committee arrived at the decision to hire one candidate over others by weighing numerous factors, including the experience, skillset of each candidate, and the particular needs of each TSO office at the time. While there may have been a few anomalies in the selection process such as the use of previous references or the weight given to selection criteria, nothing on the record has convinced me that Ms. Emmett’s sex, age, or a combination of the two, was a factor in denying her any of the opportunities at issue. In comparison to other candidates, Ms. Emmett was simply out-performed during the interview process by both male and female candidates, whether younger or older. I find that younger female candidates were awarded promotions not because of their age but because they had the broader experience required to staff the positions Ms. Emmett competed in and because they performed better during interviews. The same can be said for the successful male candidates. Again, nothing on the record demonstrates that Ms. Emmett was being passed over for promotion because of her age/and or gender.

[309] Moreover, it must be recalled that a promotion is a privilege. No employee has the right to a promotion (*Gladman v. Canada (Attorney General)*, 2017 FCA 109 at para. 37). The record demonstrates that Ms. Emmett truly believed she had the “right” to be promoted to a TSO Director position merely because of the number of years of experience she accumulated as an executive in the CRA with audit experience. This may have been how promotions were awarded prior to administrative consolidation, but it was no longer the case after consolidation. According to Mr. Troy’s testimony, there were only 7 TSO Director positions across the country at the EX-03 level. Ms. Emmett aspired to one of the 4 TSO Director positions in the GTA. The odds were clearly against Ms. Emmett just based on the limited number of positions available. Ms. Emmett’s aspiration to be

promoted to a TSO Director position is simply not enough to be selected for promotion. It must also be acknowledged that because the number of positions was small and the pool of potential candidates significantly larger, achieving such an aspiration would have been very difficult and challenging for anyone. There were other EX-02 and EX-03 positions within the CRA and the federal public service which Ms. Emmett could have applied for but chose not to.

[310] The record demonstrates that Ms. Emmett, to her own detriment, was not following the advice of her peers and supervisors on what steps she should have taken to advance her career and perform better in selection processes. Almost every single witness who gave evidence testified that executive level experience in various functions within the organization coupled with the knowledge and skillsets gained were essential to winning higher level positions through competitions. Ms. Emmett was well aware of this and was offered opportunities to step into other executive roles on several occasions to gain some of the experience and skillsets required. Yet she declined such opportunities for the most part, erroneously maintaining that she already possessed such experience and skillsets. In fact, Ms. Emmett testified on cross-examination that she generally did not seek out regional or positions at Customs because her “personal preference” was to work in a TSO.

[311] Ms. Emmett had also been told both formally and informally that she was not performing well in interviews and was aware of what aspects needed improvement and which tools (i.e. training, mentorship, executive level support) she could take advantage of to do so, yet she declined to follow these recommendations for most of the time within the period of the complaint.

[312] Through the course of the hearing, it became apparent that Ms. Emmett strongly perceived that any possible barriers to promotion were external to herself and related to her sex and/or age. She felt entitled to a promotion and refused to believe that anyone at the CRA had provided support for her career advancement. However, as is well established, mere perceptions are not sufficient for a complainant to establish their case (*Chopra v. Health Canada*, 2008 CHRT 39 at para. 185). In fact, despite Ms. Emmett’s negative perceptions, the record demonstrates that her superiors took several actions to support her career advancement such as: (1) allowing her opportunities to act while her

director was absent, (2) asking her to attend senior management meetings to gain exposure of other senior colleagues within the organization, (3) supporting her on leading special projects and assignments, (4) advancing her name for consideration on assignments, and (5) providing advice and resources on how she could improve her performance on interviews.

[313] Accordingly, it is my view that Ms. Emmett has not met her burden under sections 3.1, 7 or 10 of the *Act*. In other words, I have not been persuaded, on a balance of probabilities, that the CRA practiced systemic sex and/or age discrimination in its staffing practices, nor have I been convinced that sex and/or age was a factor in not choosing Ms. Emmett in any of the employment opportunities at issue.

Signed by

Susheel Gupta
Tribunal Vice-Chairperson

Ottawa, Ontario
July 25, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1727/8211

Style of Cause: Diane Carolyn Emmett v. Canada Revenue Agency

Decision of the Tribunal Dated: July 25, 2018

Date and Place of Hearing: January 27 to 31, 2016
February 3 to 6, 2014
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July 22 to 25, 2014
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Toronto, Ontario

Appearances:

Diane Emmett, for herself

No one appearing, for the Canadian Human Rights Commission

Gillian Patterson and Andrew Law, for the Respondent