

**NOTE: THE CASE IS NOT A TRUE CASE. IT IS A MODIFICATION OF  
*BRITISH COLUMBIA (WORKER'S COMPENSATION APPEAL TRIBUNAL) v.  
FRASER HEALTH AUTHORITY, 2016 SCC 25.***

**STATUTES, AND SOME REFERENCES HAVE BEEN EDITED TO  
REFLECT ONTARIO WORKPLACE SAFETY AND INSURANCE LAW FOR  
THE EDUCATIONAL PURPOSES OF THE PARALEGAL CUP MOOT.**

**CITATION:** Ontario (Workplace Safety and Insurance  
Appeals Tribunal) v. Fraser Health Authority, 2016  
SCC 99

**BETWEEN:**

**Workplace Safety and Insurance Appeals Tribunal**  
Appellant

and

**Fraser Health Authority, Katrina Hammer, Patricia Schmidt and Anne  
MacFarlane**  
Respondents

- and -

**Attorney General of Canada, Attorney General of Ontario, Ontario Network of  
Injured Workers' Groups, Industrial Accident Victims' Group of Ontario,  
Community Legal Assistance Society and British Columbia Federation of  
Labour**  
Intervenors

**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Côté and  
Brown JJ.

**REASONS FOR JUDGMENT:** Brown J. (McLachlin C.J. and Abella, Moldaver,  
(paras. 1 to 40) Karakatsanis and Wagner JJ. concurring)

**REASONS DISSENTING IN PART:** Côté J.  
(paras. 41 to 82)

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v.

**Fraser Health Authority,  
Katrina Hammer,  
Patricia Schmidt and  
Anne MacFarlane**

*Respondents*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Ontario Network of Injured Workers' Groups,  
Industrial Accident Victims' Group of Ontario,  
Community Legal Assistance Society and  
British Columbia Federation of Labour**

*Interveners*

**Indexed as: Ontario (Workplace Safety and Insurance Appeals Tribunal) v.  
Fraser Health Authority**

**2016 SCC 25**

File No.: 36300.

2016: January 14; 2016: June 24.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Workers' compensation — Occupational disease — Causation — Evidence — Standard of proof — Hospital laboratory technicians diagnosed with breast cancer applying for compensation on basis that their cancers are occupational diseases — Compensation payable if employment is of causative significance in development of disease — Medical experts unable to find sufficient scientific basis to establish causal link between workers' cancers and employment — Whether Tribunal erred in its approach to causation in deciding that workers' cancer was occupational disease arising due to nature of employment — Workplace Safety and Insurance Act, R.S.O. 1997, c. 16, ss, 15, 124(2).*

H, S and M (the “workers”) were among seven technicians at a single hospital laboratory who were diagnosed with breast cancer. Each of them applied for compensation under the *Workplace Safety and Insurance Act* on the basis that the cancer was an occupational disease. The *Act* provides that where a worker is disabled from an occupational disease that is due to the nature of his or her employment, compensation is payable as if the disease were a personal injury arising out of and in the course of that employment. In accordance with the applicable policy, the payment of benefits is conditional upon the employment having been of “causative significance” in the development of the worker’s illness.

The medical experts who provided evidence concluded that there was a lack of a sufficient scientific basis to causally link the incidence of breast cancer to the workers’ employment in the laboratory. A review officer of the Workers’ Compensation Board denied each of the workers’ claims. The workers each appealed the Board’s decision to the Workplace Safety and Insurance Appeals Tribunal. A majority of the Tribunal found that the workers’ breast cancers were indeed

occupational diseases. Upon application by the employer to the Tribunal for reconsideration, a reconsideration panel upheld the original decision. The employer's application for judicial review of the Tribunal's original and reconsideration decisions was allowed: both decisions were set aside and the matter was remitted back to the Tribunal. On appeal by the workers, the majority of the Court of Appeal dismissed the appeal, holding that the Tribunal's reconsideration decision was a nullity and that the Tribunal's original decision was unreasonable. The workers now appeal to this Court, raising the issue of whether the Tribunal erred in its approach to causation. *Held* (Côté J. dissenting in part): The appeal by the workers should be allowed.

*Per* McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and **Brown** JJ.: The standard of review applicable to the Tribunal's original decision requires curial deference, absent a finding of fact or law that is unreasonable. Because a court must defer where there is evidence capable of supporting a finding of fact, unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient.

The presence or absence of opinion evidence from an expert positing or refuting a causal link is not determinative of causation. Causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence. Subject to the applicable standard of review, the task of weighing evidence rests with the trier of fact. In the instant case, the Tribunal's original decision cannot be said to have been unreasonable. While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other evidence which, viewed reasonably, was

capable of supporting its finding of a causal link between the workers' breast cancers and workplace conditions.

In addition, according to the standard of proof set out in s. 124(2) of the *Act*, where the evidence is evenly weighed on causation, that issue must be resolved in the workers' favour. This standard of proof contrasts sharply with the scientific standards employed by the medical experts in the case at bar. The majority of the Tribunal was right to consider that the experts thus imposed a too stringent standard of proof. In relying upon the inconclusive quality of the experts' findings as determinative of whether a causal link was established between the workers' breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law.

*Per Côté J.* (dissenting in part): For the workers' appeal, it should be dismissed since the original decision of the Tribunal is unreasonable and ought to be set aside. There is no evidence — and certainly no positive evidence — capable of supporting a causal link between the workers' employment and the development of their respective diseases.

Experts are responsible for providing decision-makers with precisely those inferences that decision-makers — due to the technical nature of the issues — are unable to formulate themselves. The Tribunal is not presumed to possess medical expertise. As a result, while the Tribunal is not bound by the medical experts' findings, it cannot simply disregard their uncontradicted conclusions. In this case, the expert reports before the Tribunal were unequivocal: the available evidence could not establish any causal relationship between the workers' employment as laboratory technicians and the development of their breast cancer.

In the instant case, the medical experts did not seek to establish causation on a level of scientific certainty. Having undertaken a more limited investigation, the medical experts simply found no workplace exposure that could plausibly have increased the risk of developing breast cancer. As a result, even on the relaxed standard of proof applicable under s. 124(2) of the *Act*, there is still no positive evidence capable of establishing causative significance.

While drawing inferences is important in fact finding, the evidence in the record must still be capable of supporting the inferences drawn. Otherwise, the fact-finder is at risk of straying outside the realm of inference and reasonable deductions and into the wilderness of mere speculation or conjecture. Common sense or inferential reasoning cannot bridge insuperable gaps in the evidence, in either a standard civil action or in an administrative claim under the *Act*. In the case at bar, the only support for the Tribunal's original decision is the existence of a cluster of diagnosed cases of breast cancer. The Tribunal's findings of fact simply do not rise above the level of mere speculation. The Tribunal disregarded the consensus view of the medical experts, in spite of its own lack of expertise in medical matters. The Tribunal also ignored the applicable policy, which states that there must be sufficient positive evidence capable of supporting a finding of causative significance, failing which the only possible option is to deny the claim.

### **Cases Cited**

By Brown J.

**Referred to:** *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Toronto (City) Board of Education*

*v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Sam v. Wilson*, 2007 BCCA 622, 78 B.C.L.R. (4th) 199; *Moore v. Castlegar & District Hospital* (1998), 49 B.C.L.R. (3d) 100; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98; *Speckling v. Workers' Compensation Board (B.C.)*, 2005 BCCA 80, 209 B.C.A.C. 86; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Kovach, Re* (1998), 52 B.C.L.R. (3d) 98, rev'd 2000 SCC 3, [2000] 1 S.C.R. 55; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181; *Rodrigues v. Ontario (Workplace Safety & Insurance Appeals Tribunal)* (2008) 92 O.R. (3d) 757.

By Côté J. (dissenting in part)

*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; *Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 A.C. 32; *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; *Kozak v. Funk* (1997), 158 Sask. R. 283, aff'g in part (1995), 135 Sask. R. 81; *Meringolo v. Oshawa General Hospital* (1991), 46 O.A.C. 260, leave to appeal refused, [1991] 3 S.C.R. vii; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

## Statutes and Regulations Cited

*Workplace Safety and Insurance Act*, R.S.O. 1997, c. 16, ss. 15, 31(2), 31(3), 118, 120, 121, 131(3), 123(4), 124 (2), 129, Sch. A.

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*Timothy J. Martiniuk* and *Jeremy Thomas Lovell*, for the appellant/respondent the Workplace Safety and Insurance Appeals Tribunal.

*Tonie Beharrell*, *Randall J. Noonan* and *Kaity Cooper*, for the appellants/respondents Katrina Hammer, Patricia Schmidt and Anne MacFarlane.

*Nazeer T. Mitha*, *Dianne D. Rideout* and *Erin Cutler*, for the respondent Fraser Health Authority.

*Christine Mohr* and *Alexander Pless*, for the intervener the Attorney General of Canada.

*Sara Blake* and *Sandra Nishikawa*, for the intervener the Attorney General of Ontario.

*Ivana Petricone*, for the interveners the Ontario Network of Injured Workers' Groups and the Industrial Accident Victims' Group of Ontario.

*Monique Pongracic-Speier*, for the interveners the Community Legal Assistance Society and the British Columbia Federation of Labour.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Brown JJ. was delivered by

BROWN J. —

## I. Introduction

[1] These appeals call upon the Court to consider (1) whether the Ontario Workplace Safety and Insurance Appeals Tribunal can, by way of a “reconsideration” decision, reopen an earlier decision to consider whether, in the circumstances of this case, the Tribunal erred in its approach to causation<sup>1</sup> in deciding that each of three workers’ cases of breast cancer was an “occupational disease” arising “due to the nature of [their] employment” (the “Workers’ Appeal”). A majority of the Ontario Court of Appeal held that the Tribunal’s reconsideration decision (which simply affirmed its original decision) was a nullity, and that the Tribunal erred in its original decision in finding a causal link between the workers’ breast cancers and their employment.

[2] I would allow the Workers’ Appeal. For the reasons that follow I am of the view that, in light of the applicable standard of review, the Tribunal’s finding of a causal link between the workers’ breast cancers and their employment should not have been upset.

## II. Overview of Facts and Proceedings

### A. *Background and Statutory Provisions*

[3] Katrina Hammer, Patricia Schmidt and Anne MacFarlane were among seven technicians at a single hospital laboratory who were diagnosed with breast cancer. Each of them applied for compensation under the *Workplace Safety and Insurance Act*, 1997 R.S.O., c. 16, on the basis that the cancer was an “occupational disease”.

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<sup>1</sup> Tort law recognizes two dimensions of causation: factual (cause-in-fact) and legal (cause-in-law/remoteness) (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3). In these reasons, where I refer to “causation” I mean *factual* causation.

[4] The *Act* establishes a comprehensive no-fault insurance scheme for workers who sustain workplace injuries or suffer from occupational diseases. More specifically, s. 15 of the *Act* provides that where a worker is disabled from an occupational disease that is due to the nature of his or her employment, compensation is payable “as if the disease were a personal injury arising out of and in the course of that employment”.

[5] Upon receiving a claim, the Workplace Safety and Insurance Board inquires into, hears and determines all matters and questions of fact and law (s. 118). Decisions of the Board can be objected to by individuals and the Board has the power to reconsider a decision (ss. 120 and 121), and, further, can be appealed to the Tribunal. Section 31(2) confers upon the Tribunal “exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined [on appeals under the *Act*]”. Further, the Tribunal may amend its own decisions to cure a clerical or typographical error, an “accidental or inadvertent error, omission or other similar mistake” or an arithmetical error (s. 129 *WSIA*, # 2.5 *WSIAT Practice Directions*), or it may reconsider a decision to cure a jurisdictional defect or if new evidence has become available or has been discovered (ss. 123 (4) and 129).

[6] As to whether a worker suffers from an occupational disease due to the nature of his or her employment, the Board’s *Workplace Safety and Insurance Board Adjudication Principles*, the relevant policy which must be applied by the Tribunal to decide these appeals (s. 131(3) of the *Act*), conditions payment of benefits upon the employment having been of material or significant causation<sup>2</sup> in the development of

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<sup>2</sup> The *WSIB Final Report* indicates that the Appeals Tribunal uses “significant causation” and the Board makes no distinction between “material causation” and “significant causation”, at p. 9.

the worker's illness. This means "work-related factor(s) contributed significantly to the development of the disease"<sup>3</sup>, and entails consideration of whether:

- there is a physiological association between the injury or death and the employment activity, including whether the activity was of sufficient degree and/or duration to be of causative significance in the injury or death;
- there is a temporal relationship between the work activity and the injury or death; and
- any non-work related medical conditions were a factor in the resulting injury or death.

[7] Section 124(2) of the *Act* provides that, where the Tribunal is hearing an appeal respecting the compensation of a worker and the evidence is "evenly weighted" on an issue, the Tribunal must resolve that issue "in favour of the person claiming benefits". In other words, the applicable burden of proof is not the civil burden of "balance of probabilities". Where the evidence leads to a draw, the finding must favour the worker. This extends to deciding whether the occupational disease is "due to" the nature of employment — that is, to the issue of causation: ". . . if the weight of the evidence suggesting the disease was caused by the employment is roughly equally balanced with evidence suggesting non-employment causes, the issue of causation will be resolved in favour of the worker" (*Rehabilitation Services and Claims Manual, vol. II, Chapter 4, policy item #26.22*).

[8] By operation of s. 123 of the *Workplace Safety and Insurance Act*, a reviewing court may not interfere with a finding of fact or law made by the Tribunal in respect of a matter over which it has exclusive jurisdiction unless it is unreasonable.

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<sup>3</sup> WSIB, *Final Report of the Chair of the Occupational Disease Advisory Panel*, February 2005, online (<http://www.wsib.on.ca>)

B. *Evidence on Causation*

[9] The causal issue before the Board, the Tribunal and the courts below was the etiology of the workers' breast cancers.<sup>4</sup> The evidence on that question comprised three expert reports:

- (a) the final report of the Occupational Health and Safety Agency for Healthcare in Ontario ("OHSAH") regarding the incidence of cancer in the laboratory where the workers were employed (*Cancer Cluster Investigation within the Mission Memorial Hospital Laboratory*, Final Report, March 31, 2006 (online)) and two earlier draft reports, each produced by various OHSAH staff, consultants and trainees (collectively the "OHSAH reports");
- (b) the report of Dr. Jeremy R. Beach, a specialist in occupational medicine; and
- (c) the report of Dr. M. W. Yamanaka, a medical advisor to the Board specializing in occupational medicine.

[10] The OHSAH reports contained a review of the scientific literature on factors associated with the risk of breast cancer, an epidemiological analysis of the cancer cluster among workers in the laboratory, and a field investigation into possible exposure among laboratory technicians to potentially carcinogenic substances. They confirmed that the number of diagnoses of breast cancer (7 of the 63 workers studied were so diagnosed) represented a statistically significant cluster, with a "standardized

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<sup>4</sup> Although the parties to the judicial review agreed to proceed solely in respect of Ms. Hammer, they did so on the basis that the outcome of her case will govern the outcome of the other two workers' cases (as the Tribunal decisions in respect of each of the three workers were substantially identical): 2013 BCSC 524, at para. 8 (CanLII).

incidence ratio” for breast cancer approximately eight times the rate that would have been expected in the general population. As to potential causes, the authors of these reports observed no current occupational chemical exposures, but noted that past exposures were “likely much higher”, and included one known human carcinogen (Final Report, at p. 35).

[11] Ultimately, the authors of the OHSAH reports did not reach “scientific conclusions to support the association between work-related exposures and breast cancer in this cluster” (Final Report, at p. iii). More particularly, they explained that “[o]ur review of the literature was unable to establish the basis for [an etiological hypothesis based on scientific evidence of causal mechanisms for breast cancer], as we did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer” (p. iv). The authors speculated that the increased incidence of breast cancer among laboratory employees may have been due to “(1) a cluster of reproductive and other known, non-occupational, risk factors, (2) past exposures to chemical carcinogens and less likely to ionizing radiation, and (3) a statistical anomaly” (p. 39 (emphasis added)).

[12] Dr. Beach’s report and Dr. Yamanaka’s report were each in substantial agreement with the OHSAH reports. In particular, Dr. Beach and Dr. Yamanaka shared the OHSAH reports’ conclusion regarding the lack of a sufficient scientific basis to causally link the incidence of breast cancer to the workers’ employment in the laboratory. Dr. Yamanaka went somewhat further than Dr. Beach, saying (without elaboration) that he “would prefer to refute than support” that posited link, and that he “would favour the opinion that non-occupational factors were the cause of [the] breast cancer” (J.R., vol. 4, at p. 230).

C. *The Decisions Below*

(1) The Workplace Safety and Insurance Board

[13] The Board denied each of the claims, finding that “there is insufficient evidence . . . to conclude that [each worker’s] years of employment as a medical lab technician has played a significant role in causing breast cancer”, and pointing to various non-occupational risk factors for breast cancer (J.R., vol. 3, at p. 21).

(2) The Tribunal’s Original Decisions

[14] The workers each appealed the Board’s decision to the Tribunal. At the Tribunal, a majority of two members found that the workers’ breast cancers were indeed occupational diseases. In doing so, the majority acknowledged the need for “positive evidence linking the disease to employment” (J.R., vol. 1, at p. 16) and cited the decision of this Court in *Snell v. Farrell*, [1990] 2 S.C.R. 311, as authority for a fact-finder’s ability to draw a “common sense” inference of causation in the absence of scientific proof of causation — scientific standards being more rigorous than the “lesser standard . . . demanded by the law” (J.R., vol. 1, at p. 17). The authors of the OHSAH reports, in seeking “to reach scientific conclusions to support the association between work-related exposures and breast cancer in this cluster” (Final Report, at p. iii), therefore applied a too stringent standard of proof. The applicable standard was not that which is necessary to support a scientific conclusion, but rather the standard set out in s. 124(2) of the *Act*.

[15] The majority then analysed the evidence with reference to the indicia described by A. Bradford Hill (“The Environment and Disease: Association or

Causation?” (1965), 58 *Proc. R. Soc. Med.* 295) for weighing epidemiological evidence of causation. In this case, the criteria of “strength of association” (the ratio of the incidence of disease among exposed workers when compared to the incidence within the general population) and “temporal relationship” (the proximity in time between exposure and the onset of the disease) were clearly satisfied, although other criteria were not. The majority concluded, however, that it was not necessary to identify a specific causal agent, it being sufficient for the evidence merely to point to a causal link between a disease and an occupation. Here, the evidence of past carcinogenic exposure, coupled with the statistically significant cluster of breast cancer cases among laboratory workers, comprised “positive evidence” supporting a conclusion that it was as likely as not that the workers’ breast cancers were caused by workplace exposure.

[16] The dissenting member explained that, while she agreed that scientific certainty was not required, the expert reports provided no “positive evidence” of a causal link. Without more, they were therefore insufficient to support a conclusion that workplace exposures were of causal significance.

### (3) The Tribunal’s Reconsideration Decisions

[17] Fraser Health applied under s. 129 of the *Workplace Safety and Insurance Act* for reconsideration<sup>5</sup> of the Tribunal’s original decisions. Section 129 permits the Tribunal to “reconsider its decision and may confirm, amend or revoke it. The tribunal may do so at any time if it considers it advisable to do so”. According to *WSIAT Practice Directions*, the Tribunal may consider it advisable to reconsider if the decision

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<sup>5</sup> The *Practice Directions* interprets s. 129 as permitting the Tribunal to review its own decisions for unreasonableness. Although it is more accurate to say that the Tribunal is “reopening” a decision, for clarity I adopt the language (“reconsideration”) used by the Tribunal.

contains jurisdictional error. Fraser Health’s argument was that a “jurisdictional defect” arose here, since the Tribunal’s finding in the original decisions of a causal link between the workers’ breast cancers and their employment lacked supporting evidence and was, as such, unreasonable.

[18] The reconsideration panel (comprising a single member) reviewed the original decisions for unreasonableness and determined that, given the elevated standard incidence ratio and the past exposure to carcinogens, the original panel had sufficient evidence to support its conclusions regarding causation.

(4) Ontario Superior Court of Justice, Divisional Court, 2013 ON SCDC 524

[19] Fraser Health sought judicial review of the Tribunal decisions — the original decisions and the reconsideration decisions. Savage J. (as he then was) explained that he would review the original decision for unreasonableness and the reconsideration decision for correctness. He observed that the Tribunal’s decisions are entitled to the highest level of curial deference and, in particular, that “the [Tribunal] has a right to be wrong provided that there is some evidence capable of supporting its conclusion” (para. 11 (CanLII), citing *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 44).

[20] That said, the chambers judge observed, the Tribunal “was not entitled to ignore the expert evidence in favour of its own expertise or common sense, and it was unreasonable [for it] to do so” (para. 34). Here, he relied on British Columbia Court of Appeal authority — specifically, *Sam v. Wilson*, 2007 BCCA 622, 78 B.C.L.R. (4th) 199, at para. 41, citing *Moore v. Castlegar & District Hospital* (1998), 49 B.C.L.R. (3d) 100 (C.A.), at para. 11 — which holds that, “where there is affirmative medical

evidence leading to a medical conclusion it is not open to the court to apply ‘the common sense reasoning urged in *Snell v. Farrell*’. This precluded “the purported application of common sense on matters of causation where there is contrary expert opinion” (chambers judge’s reasons, at para. 40). Here, the experts clearly and unambiguously concluded that there was no evidence that workplace factors caused the workers’ breast cancers. Given “the absence of any evidence and in the face of expert opinion to the contrary” (para. 49), the Tribunal’s original decision was unreasonable and the reconsideration decision was incorrect. He set aside both decisions and remitted the matter back to the Tribunal.

(5) Ontario Court of Appeal, 2014 ONCA 499, 67 O.R (5th) 213

[21] The workers appealed Savage J.’s decision, and the Court of Appeal invited the parties to make submissions as to, *inter alia*, the jurisdiction of the Tribunal to reconsider its original decision in this matter. Chiasson J.A., joined by Frankel and Goepel JJ.A., held that s. 129 of the *Workplace Safety and Insurance Act* merely preserves the Tribunal’s common law power to reopen a proceeding to complete its statutory task, and therefore does not permit it to correct errors made within its jurisdiction. The Tribunal’s interpretation of s. 129 as permitting it to review its own decisions to identify and correct unreasonable errors is supported neither by that common law power to reopen nor by the *Act*’s legislative history. Since no true jurisdictional error had been alleged, the Tribunal’s reconsideration decision was a nullity. Chiasson J.A. therefore dismissed the appeal of the chambers judge’s order setting aside the reconsideration decision.

[22] Newbury J.A., joined by Bennett J.A., disagreed. The meaning of “jurisdictional error” in s. 129, having been drafted prior to the decision of this Court

in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, should not be confined to permitting the Tribunal to review for errors of “true” jurisdiction as that term was described in *Dunsmuir*. Rather, it should be understood in light of the common law power to reopen which, in her view, included the power of a tribunal to determine whether an original decision was unreasonable. As a practical matter, limiting the Tribunal’s scope to reconsider its own decisions for unreasonableness would mean more court proceedings, contrary to the purpose of the *Act* and to the principles of administrative law generally.

[23] On the issue of causation, Chiasson J.A., joined by Frankel J.A., held that, while there was “some evidence” to support the Tribunal’s finding of causation (specifically, the “statistical anomaly” of elevated breast cancer rates among laboratory workers), “something more” was required (paras. 198-99). The Tribunal’s finding of causation was, therefore, unreasonable.

[24] Goepel J.A., writing separately, agreed that the chambers judge did not err in setting aside the original decision as unreasonable. Resolving issues of causation in this case required expert “medical” and “scientific” evidence (para. 209). Lacking such expertise, the Tribunal cannot disregard uncontradicted expert evidence in order to substitute its own opinion. In the absence of “positive evidence linking the disease to employment” (para. 211), and in the face of expert evidence to the contrary, the Tribunal’s decision was unreasonable.

[25] Newbury J.A., again joined by Bennett J.A., observed that the standard of review of “unreasonableness” denotes the highest level of deference, permitting curial interference only where there is “no evidence” to support the Tribunal’s findings or where its decision was “openly, clearly, or evidently unreasonable” (para. 70). Here,

the experts did not rule out a causal connection between laboratory conditions and the workers' cancers. While the experts acknowledged that present chemical exposures were minimal, past exposures had likely been much higher and included at least one known human carcinogen. The Tribunal's conclusion that the likelihood of a statistical anomaly did not exceed the likelihood that breast cancers in these cases were occupational diseases was reached appropriately, after a careful review of all the evidence. Viewed through the scheme and underlying objectives of the workers' compensation system, which requires the Tribunal to resolve issues in favour of a worker where the evidence supporting different findings on an issue is evenly weighted, the Tribunal's original decision was not unreasonable and should not have been upset by the chambers judge.

### III. Analysis

#### *Causation*

##### (1) Standard of Review

[26] As already noted, and as the parties agree, the applicable standard of review requires curial deference, and that "reviewing courts can interfere only where in the case of patent unreasonableness where the Tribunal's decision is "clearly irrational", and in the case of unreasonableness where the decision does not fall within a range of possible, acceptable outcomes": *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008) 92 O.R. (3d) 757, at para.16.

[27] The Tribunal's conclusion that the workers' breast cancers were occupational diseases caused by the nature of their employment was a finding on a

question of fact (*Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 29). That finding is therefore entitled to deference unless Fraser Health demonstrates that it is unreasonable — that is, that “the evidence, viewed reasonably, is incapable of supporting a tribunal’s findings of fact” (*Toronto (City) Board of Education*, at para. 45). Because a court must defer where there is evidence *capable of supporting* (as opposed to *conclusively demonstrating*) a finding of fact, unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient; the reviewing court “must find that there are no lines of reasoning supporting the decision that could have reasonably led the tribunal to reach the decision that it did. (*Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008), at para. 16). Simply put, this standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court’s preferred inferences for those drawn by the fact-finder.

(2) The Tribunal’s Finding on Causation

[28] Understandably, the workers stress s. 124(2) of the *Workplace Safety and Insurance Act*, which signifies that, where the evidence is evenly weighted on causation, that issue must be resolved in their favour. We agree that this represents an important distinction from civil tort claims, where causation must always be established on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 49; *Ediger*, at para. 28; *Kovach, Re* (1998), 52 B.C.L.R. (3d) 98 (C.A.), at para. 30 (per Donald J.A., dissenting), rev’d 2000 SCC 3, [2000] 1 S.C.R. 55). This less stringent burden of proof, like the *WSIB Final Report* direction that the workplace need only be of “significant causation” or “more than a trivial or insignificant aspect” in the development of a worker’s illness, furthers at least one of the core policy goals of workers’ compensation schemes identified by the Court in *Pasiechnyk v. Saskatchewan*

(*Workers' Compensation Board*), [1997] 2 S.C.R. 890, at para. 27, citing *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.), at p. 279, being to have “compensation to injured workers provided quickly without court proceedings”. Section 124(2) therefore reflects the legislature’s intention that workers should obtain compensation for occupational diseases without having to satisfy the requirements of a civil tort claim.

[29] Section 124(2)’s standard of proof contrasts sharply with the “scientific” standards employed by the authors of the OHSAH reports. Their inability “to reach scientific conclusions” (Final Report, at p. iii) to support the causal association between workplace conditions and the workers’ breast cancers, or to “find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer” (p. iv), spoke *not* to the burden imposed upon the workers by s. 124(2), nor even to the burden imposed upon plaintiffs in a civil tort claim (*Ediger*, at para. 36; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 9; *Snell*, at pp. 328-30), but to a standard of scientific certainty. The majority of the Tribunal considered that the OHSAH reports thus imposed a too stringent standard of proof. I agree. This standard is wholly inapplicable to determining causation in the workers’ claims (R. W. Wright, “Proving Causation: Probability versus Belief”, in R. Goldberg, ed., *Perspectives On Causation* (2011), 195; S. Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (2014), at p. 22). In my respectful view, therefore, in relying upon the inconclusive quality of the OHSAH reports’ findings as determinative of whether a causal link was established between the workers’ breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law.

[30] All that said, the central problem in the handling of causation in the courts below arose not in their failure to have appropriate regard to the less stringent standard of proof required by s. 124(2), but from their fundamental misapprehension of how causation — irrespective of the standard of proof — may be inferred from evidence.

[31] As I have recounted, the evidence before the Tribunal on causation comprised, principally, the OHSAH reports (supported by the reports of Dr. Beach and Dr. Yamanaka), which (1) confirmed a “statistically significant cluster” of breast cancer, with a standard incidence ratio approximately eight times the rate of breast cancer in the general population; and (2) noted that past occupational chemical exposures were likely “much higher” than current exposures, and included one known carcinogen; but also (3) reported that they were unable “to reach scientific conclusions to support the association between work-related exposures and breast cancer in this cluster” (Final Report, at p. iii). Consequently, the OHSAH reports would only speculate that the increased incidence of breast cancer among the laboratory workers may have been due to non-occupational risk factors, to occupational risk factors such as chemical carcinogens or ionizing radiation, or to a statistical anomaly.

[32] The Tribunal, in lengthy and comprehensive reasons explaining why it found “causative significance” in the evidence of past carcinogenic exposure and in the statistically significant cluster of breast cancer cases, gave careful consideration to the OHSAH reports. It correctly noted that the OHSAH reports “did not exclude the possibility of occupational causation”, and that the Tribunal did not have before it “much detailed evidence as to historical exposures” (J.R., vol. 1, at p. 47). And, it acknowledged that “it is possible that the breast cancer cluster is a statistical anomaly”, and that “this matter is not without some uncertainty” (p. 48). The Tribunal chose,

however, to “attach weight” to the reports’ observations that past exposures were “likely much higher” (p. 47), leading it to find that the likelihood of a statistical anomaly did not exceed the likelihood that the workers’ breast cancers were an occupational disease caused by the nature of their employment. As it explained:

Perhaps the most compelling evidence for us involves the fact that the workers with breast cancer were exposed to carcinogens and there is a very elevated statistically significant [standardized incidence ratio] for breast cancer. Our decision does not simply rest on the occurrence of a very elevated statistically significant [standardized incidence ratio] for breast cancer.

That [standardized incidence ratio] occurs against the backdrop of the particular standard of proof employed by us, the workers’ exposure to carcinogens, and the comments of [the Final Report] to the effect that all cancer causing agents have the potential to initiate and promote cancer, little is known about the possible synergistic, additive or antagonistic effects of multiple chemical exposures, and past exposures were likely much higher. [J.R., vol. 1, at p. 48]

[33] The chambers judge, seeing “no evidence that workplace factors caused [the workers’] cancers” (para. 44), viewed the Tribunal as having impermissibly “ignore[d] the expert evidence in favour of its own expertise or common sense” (para. 34). Similarly, at the Court of Appeal, having found there to be no “positive evidence linking the disease to employment” (para. 211), Goepel J.A. (for the majority on this point) agreed that “[t]he issue for determination is one that required expert scientific evidence” (para. 209), which expertise the Tribunal could not be presumed to have.

[34] With respect, the issue that the Tribunal decided was precisely the sort of issue that the legislature intended that it should decide. Section 31(2) of the *Act* provides that, on appeals from decisions of the Board, the *Tribunal* has *exclusive* jurisdiction to determine *all* questions of fact. While, in doing so, the Tribunal may

choose to draw from the expert evidence put before it (as it drew here from expert evidence of historical exposures and of a statistically significant cluster of breast cancer cases among laboratory workers), the decision remains the Tribunal's to make.

[35] The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation (e.g. *Snell*, at pp. 330 and 335). It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment. This goes to the chambers judge's reliance upon the Court of Appeal's decisions in *Sam* and *Moore* and to Goepel J.A.'s statement that there must be "positive evidence" linking their breast cancers to workplace conditions. Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact that causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence. This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact — in this case, with the Tribunal.

[36] In light of the foregoing, the Tribunal's original decision cannot be said to have been "unreasonable". While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other

evidence which, viewed reasonably, was capable of supporting its finding of a causal link between the workers' breast cancers and workplace conditions.

#### IV. Conclusion

[37] I would allow the Workers' Appeal, with costs to Katrina Hammer, Patricia Schmidt and Anne MacFarlane in this Court and in the courts below as against Fraser Health Authority. The Tribunal's original decisions are restored.

The following are the reasons delivered by

CÔTÉ J. —

[38] I part ways with my colleague Brown J. with respect to the appeal by Katrina Hammer, Patricia Schmidt and Anne MacFarlane (the "Workers' Appeal") because, in my view, the original decision of the Workers' Compensation Appeal Tribunal is unreasonable. On my reading, there is no evidence — and certainly no positive evidence — capable of supporting a causal link between the workers' employment and the development of their respective disease. The three expert reports before the Tribunal only established the existence of a cluster of diagnosed cases of breast cancer, and nothing more. In my view, the Tribunal relied on what it called "ordinary common sense" to speculate about a possible causal link, while openly disregarding the medical experts' consensus view. As such, the Tribunal's decision is "openly, evidently, clearly" wrong and ought to be set aside: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 57.

##### A. *Background*

[39] The issue before the Tribunal was whether each of the three workers' breast cancer was "due to" her employment as a laboratory technician at the Mission Memorial Hospital, a causal link required by s. 15(3) of the *Workplace Safety and Insurance Act*, R.S.O. 1997, c. 16 (the *WSIA*).

[40] While Schedule 3 of the *WSIA* lists a number of occupational diseases which are deemed to be "due to the nature of [the] employment" in the context of specific processes or industries, breast cancer is not listed among them. As a result, a causal link must be established on the basis of the evidence before the Tribunal.

[41] A policy of the Workplace Safety and Insurance Board, the *WSIB Final Report* specifies that in order for the disease to be "due to" the nature of the employment, the employment "has to be of significant causation, which means more than a trivial or insignificant aspect of the injury or death": p. 8.

[42] The Board's policy goes further, however, and requires that there be sufficient *positive* evidence to ground a finding of causative significance. The *RSCM II* states that "[i]f the Board has no or insufficient positive evidence before it that tends to establish that the disease is due to the nature of the worker's employment, the Board's only possible decision is to deny the claim": c. 4, policy item #26.22 (emphasis added).<sup>6</sup> As my colleague Brown J. has observed, policies of the Board must be applied by the

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<sup>6</sup> Justice Côté is making a reference to the British Columbia Worker's Compensation Appeal Tribunal (WCAT) operation policy *Rehabilitation Services and Claims Manual*. As Ontario's WSIAT has recently adopted (Decision No. 1173/16, 2016 ONWSIAT 1783 (CanLII)) the Supreme Court's *BC (Worker's Compensation Board) v. Fraser Health*, 2016, the reference has been kept because it is important to illustrate that there is conflict between the policy and the Act. In this instance, it has not been possible, nor would it be adequate, to change to an Ontario WSIAT policy reference.

Tribunal in making its decisions: s. 131 (3) of the *WSIA*. The Tribunal also recognized this requirement: WCAT-2010-03503 (the “Original Decision”), at paras. 46-47.

[43] In this case, the workers’ claims were initially denied by the Board. A review officer with the Board’s Review Division confirmed these decisions, finding that there was insufficient evidence to conclude that each worker’s years of employment as a laboratory technician had played a significant role in causing breast cancer. On appeal, a two-member majority of the Tribunal concluded that there was sufficient positive evidence to establish that the workers’ breast cancer was due to their employment, but a dissenting member disagreed, finding that the expert reports had provided insufficient positive evidence of a causal link. That dissenting member’s conclusion was later vindicated, as the British Columbia Supreme Court set the Tribunal’s decision aside, an order which was upheld by a majority of the British Columbia Court of Appeal.

[44] It is common ground that a reviewing court can only interfere with the Tribunal’s decision if it is unreasonable: *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008) 92 O.R. (3d) 757. On the authority of jurisprudence pre-dating *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, a decision is unreasonable if it is “openly, evidently, clearly” wrong: *Southam*, at para. 57. More specifically, findings of fact will be “unreasonable” where they are either based on “no evidence” or where “the evidence, viewed reasonably, is incapable of supporting” the finding of fact in question: *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at paras. 44-45; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669.

[45] Neither the Ontario Superior Court of Justice, Divisional Court nor the majority of the Court of Appeal sought to reweigh the evidence before the Tribunal. The lower courts did not, in other words, depart from this highly deferential standard of review. Rather, Chiasson, Frankel and Goepel JJ.A. of the Court of Appeal and Savage J. of the Supreme Court were of the view that there was no evidence before the Tribunal capable of supporting an inference of causative significance. I agree. Even on this highly deferential standard of review, the Tribunal's decision should be set aside.

B. *The Expert Reports Before the Tribunal*

[46] All three of the expert reports before the Tribunal were unequivocal. In the experts' collective view, expressed in clear, unambiguous language, the available evidence could not establish any causal relationship between the workers' employment as laboratory technicians and the development of their breast cancer.

[47] Speaking of one of the workers, Ms. Katrina Hammer, the Board's medical advisor Dr. Yamanaka concluded that "there is insufficient medical evidence to support that the work environment caused or significantly contributed to the development of Ms. Hammer's breast carcinoma left side": J.R., vol. 4, at p. 226. That conclusion was stated more forcefully in the final version of a report titled *Cancer Cluster Investigation within the Mission Memorial Hospital Laboratory*, prepared by seven authors for the Occupational Health and Safety Agency for Healthcare in Ontario (the "OHSAH Final Report") (online). The authors noted that they "did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer": p. iv (emphasis added). Finally, Dr. Beach, an expert in occupational medicine who was tasked with reviewing the OHSAH Final Report, largely supported its findings.

[48] The importance of these unanimous expert opinions cannot be overstated. Experts are responsible for providing decision-makers with precisely those inferences that decision-makers — due to the technical nature of the issues — are unable to formulate themselves: *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 71, leave to appeal refused, [2010] 2 S.C.R. v; see also G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 625.

[49] I would note here that the Tribunal is not presumed to possess medical expertise: *Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493, at paras. 62-66. As a result, while the Tribunal is not bound by the medical experts' findings, it cannot simply disregard their uncontradicted conclusions. In the absence of any other evidence to the contrary, one may wonder how the Tribunal could find a causal link where the experts, together, could see none.

[50] In the case at bar, the Tribunal's two-member majority was of the view that the experts had sought to establish a causal link on a level of scientific certainty, rather than on the ostensibly lower standard of proof prescribed by s. 124 (2) of the *WSIA*: Original Decision, at paras. 180-82. If this were true, it would certainly justify the Tribunal's rejection of the experts' common findings. Indeed, the Tribunal's analysis echoes the principle established in *Snell v. Farrell*, [1990] 2 S.C.R. 311, to the effect that causation need not be determined by scientific precision. This principle applies with even greater force in the context of claims made under the *WSIA*.

[51] However, the instant case differs from *Snell*. The authors of the three expert reports did not seek to establish causation on a level of scientific certainty. Rather, they question repeatedly whether certain workplace exposures “could” or “may” have been

related to an “increase in risk”, “contribute measurably”, or have been of “causative significance”.

[52] Having undertaken this more limited investigation, the medical experts could not even make out a *plausible* basis for establishing a causal link between the workers’ employment and their respective disease.

[53] The OHSAH Final Report, which constituted the main piece of medical evidence before the Tribunal, is a good illustration. That report was simply a “preliminary epidemiological study”. Its authors were tasked with identifying *any* “exposures that may be associated with excess cases in a workplace”: p. 32 (emphasis added). In the event such exposures were identified, the authors would then recommend proceeding to a “full-scale epidemiological study” which could “determine the association between the exposure and [the] increased risk” of developing breast cancer: p. 32. Thus, in their executive summary, the authors of the OHSAH Final Report spoke not of whether certain workplace exposures *caused* the workers’ breast cancer *on a level of scientific certainty*, but rather whether exposure to certain chemicals “could be related to the increase in risk”: p. iii (emphasis added).

[54] Ultimately, the authors of the OHSAH Final Report did not recommend proceeding to a full-scale epidemiological study, on the basis that they “did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer”: p. iv (emphasis added). The authors went on to state in their conclusion that “no current occupational chemical exposures, or records of past occupational exposures were found that might relate working in the [Mission Memorial Hospital] laboratory environment to elevated breast cancer risk, or cancer in general”: p. 38 (emphasis added).

[55] In short, these are not the words of medical experts seeking “but for” causation on a standard of scientific certainty. Rather, the authors simply found no workplace exposure that could plausibly have increased the risk of developing breast cancer. On my reading of the OHSAH Final Report, even on the relaxed standard of proof applicable to the workers’ compensation regime under s. 124(2) of the *WSIA*, there is still no evidence capable of establishing “causative significance”.

C. *The Bases on Which the Tribunal Inferred Causative Significance*

[56] In spite of overwhelming expert evidence to the contrary, a two-member majority of the Tribunal nevertheless saw in the expert reports sufficient evidence of a causal link.

[57] The key passages of the Tribunal’s majority decision read as follows:

As noted above, we have considered the factors in the Protocol. Perhaps the most compelling evidence for us involves the fact that the workers with breast cancer were exposed to carcinogens and there is a very elevated statistically significant [standardized incidence ratio] for breast cancer. Our decision does not simply rest on the occurrence of a very elevated statistically significant [standardized incidence ratio] for breast cancer.

That [standardized incidence ratio] occurs against the backdrop of the particular standard of proof employed by us, the workers’ exposure to carcinogens, and the comments of [the authors of the OHSAH Report] to the effect that all cancer causing agents have the potential to initiate and promote cancer, little is known about the possible synergistic, additive or antagonistic effects of multiple chemical exposures, and past exposures were likely much higher.

(Original Decision, at paras. 192-93)

[58] It does not take much probing to see that there is little to no support for these statements in the evidence before the Tribunal.

(1) The Cluster of Diagnosed Cases of Breast Cancer

[59] First, the presence of a cluster of diagnosed cases of breast cancer does not, on its own, constitute evidence of causative significance.

[60] As the OHSAH Final Report explains, clusters can occur naturally as a result of an uneven distribution of non-occupational risk factors amongst the general population. For breast cancer, these factors can include age, weight, family history, age of first menstruation, age at pregnancy and first birth, and certain lifestyle factors. As the authors of the OHSAH Final Report explained:

Cluster research has shown that elevated rates occur by chance at some geographic locations and times. In fact, clusters always occur and it is a statistical phenomenon — even when there is no causal factor that is responsible for the increased incidence (this is why so few cluster investigations uncover any new risk factors). So, if we look around at many geographic areas and times we will find some clusters; if a specific cluster is related to statistics and not an etiologic agent, it is most likely that in the next time period at this location the rate will not be significantly elevated. Thus, it would be very prudent to continue to evaluate the incidence of breast cancer in [Mission Memorial Hospital] Laboratory employees to see if the rate comes closer to what is expected. [Emphasis added; p. 39.]

[61] A cluster might also represent a statistical anomaly. Indeed, since only a total of seven diagnosed cases of breast cancer were identified at the Mission Memorial Hospital laboratory over a period of 34 years, the possibility that this cluster represents such an anomaly is significant.

[62] It is clear that, on its own, correlation is no proof of causation. On that same logic, I am of the view that, without more, the mere presence of a cluster of diagnosed cases within a workplace is not sufficient evidence of any causal link between the disease and the nature of the employment.

(2) Exposure to Chemical Substances

[63] Second, on the question of exposure to chemical substances, Dr. Yamanaka and the authors of the OHSAH Final Report were unwavering. In their view, the available evidence regarding the workers' exposure to chemical substances like formaldehyde, xylene, *o*-toluidine or ethylene oxide could not be related to an increase in the workers' risk of developing breast cancer.

[64] Among these chemical substances, ethylene oxide is the only one that has a recognized association with the development of breast cancer in human beings and, according to the evidence, this association is weak. Dr. Yamanaka's report, drawing on research from the U.S. National Institute for Occupational Safety and Health, stated that only women exposed to "very high levels" of ethylene oxide would be at an increased risk of developing breast cancer. There is no evidence in the record capable of supporting a conclusion that any of the workers were exposed to such "high levels" at Mission Memorial Hospital.

[65] Indeed, the OHSAH Final Report concluded that current exposure to chemical substances was minimal "because liquid volumes are small and handling is often minimized through the use of 'lock and load' systems": p. 36. Dr. Yamanaka noted in a May 31, 2007 log entry that, even in the past, high levels of exposure to ethylene oxide were "highly unlikely".

[66] The OHSAH Final Report did note that past exposures to certain chemicals were "likely much higher", but this statement must be read in context. For one, the mention of "past exposures" does not seem to refer to ethylene oxide, the only

carcinogenic substance with a recognized association with the development of breast cancer in humans.

[67] More importantly, a passing reference to “likely much higher” past exposures says nothing about whether these past exposures are “as likely as not” to have increased the workers’ risk of developing breast cancer. Rather, in their executive summary, the authors of the OHSAH Final Report observed that a “chemical assessment of carcinogens in the workplace also did not show any obvious and extreme exposures in the past (based on current scientific literature), which could be related to the increase in risk”: p. iii (emphasis added). This point was restated in their conclusion, where the authors explained that “no current occupational chemical exposures, or records of past occupational exposures were found that might relate working in the [Mission Memorial Hospital] laboratory environment to elevated breast cancer risk, or cancer in general”: p. 39 (emphasis added). Ultimately, as I have said, in spite of this “likely much higher” exposure to certain chemicals in the past, the authors of the OHSAH Final Report nevertheless concluded that they “did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer”: p. iv (emphasis added).

[68] Finally, rather than suggest that multiple exposures can have a “synergistic” or “additive” effect, as the Tribunal seems to imply, the OHSAH Final Report indicated that no synergistic or additive effect has been identified in the literature.

[69] Respectfully, there is simply no basis for inferring “causative significance” from these passages of the Final Report.

[70] It is true, as my colleague Brown J. notes, that the OHSAH Final Report did not *exclude* the possibility that past exposures to certain chemicals could have contributed to the development of the workers' breast cancer. At the conclusion of their report, the authors stated that:

In summary, this study confirmed that the perceived cluster was an observed cluster and that [Mission Memorial Hospital] Laboratory employees were experiencing an elevated rate of breast cancer. The factors associated with this increased incidence could not be determined but may have been due to: (1) a cluster of reproductive and other known, non-occupational, risk factors, (2) past exposures to chemical carcinogens and less likely to ionizing radiation, and (3) a statistical anomaly. [p. 39]

[71] This statement, however, should not be mistaken for evidence, and certainly not *positive* evidence. The authors of the OHSAH Final Report only meant to set out an exhaustive list of what could *possibly* explain the higher incidence of breast cancer in laboratory technicians at Mission Memorial Hospital. The inability to rule out a possible explanation simply does not transform that explanation into positive evidence of a causal link. Moreover, a list of three exhaustive possibilities says nothing about the likelihood of "causative significance". Put simply, this passage provides no basis for inferring such a causal link, especially when the OHSAH Final Report otherwise goes to great lengths to refute the proposition that exposure to workplace chemicals could have increased the workers' risk of developing breast cancer.

D. *The Tribunal's Findings of Fact Amount to Mere Speculation*

[72] I am left with the view that the only support for the Tribunal's original decision is the existence of a cluster of diagnosed cases of breast cancer. The Tribunal's findings of fact simply do not rise above the level of mere speculation. The Tribunal is

even candid about the speculative nature of its own conclusion. For instance, the two-member majority stated as follows:

. . . we acknowledge that the amount of exposure is not known and the specific carcinogens which contributed to their development of breast cancer are not known. As part of that exercise of “ordinary common sense”, we reiterate we are weighing the evidence using a standard of proof as set out by subsection 124 (2) of the [*WSIA*].

(Original Decision, at para. 179)

[73] In speculating in this way, the Tribunal disregarded the consensus view of the medical experts, in spite of the Tribunal’s own lack of expertise in medical matters. The Tribunal also ignored the Board’s policy, set out in the *RSCM II*, which states that there must be sufficient *positive* evidence capable of supporting a finding of causative significance, failing which the only possible option is to deny the claim. I would add that, in giving effect to so low a standard of proof, the Tribunal failed to respect the legislature’s wish not to include breast cancer among the list of occupational diseases which are deemed to have been caused by the nature of certain types of employment in Schedule 3 of the *WSIA*.

[74] Furthermore, while s. 124 (2) of the *WSIA* relaxes the burden of proof to a limited extent, it is of no assistance to the workers here. Section 124 (2) provides that where “it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits”. On a literal reading of these words, before s. 124 (2) can apply, there must be evidence capable of supporting two different findings, with each being equally plausible. In the present case, there is simply *no* evidence capable of supporting a finding of “causative significance”. Section 124 (2) simply cannot serve to bridge such a major gap in the evidence.

[75] My colleague Brown J. has emphasized the importance of drawing inferences in fact finding. While this may be so, I must insist that the evidence in the record must still be capable of supporting the inferences drawn. Otherwise, the fact-finder is at risk of straying outside the realm of inference and reasonable deductions, and into the “wilderness of ‘mere speculation or conjecture’”: *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 A.C. 32, per Lord Rodger, at para. 150, citing *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, per Lord Wright, at pp. 169-70; see also D. Cheifetz, “The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark” (2005), 30 *Adv. Q.* 1, at pp. 46-47.

[76] This kind of “common sense” or inferential reasoning simply cannot bridge insuperable gaps in the evidence — in either a standard civil action or in an administrative claim under the *WSIA*: see e.g. *Kozak v. Funk* (1997), 158 Sask. R. 283 (C.A.), at para. 22, aff’g in part (1995), 135 Sask. R. 81 (Q.B.); *Meringolo v. Oshawa General Hospital* (1991), 46 O.A.C. 260, at para. 89, leave to appeal refused, [1991] 3 S.C.R. vii.

[77] In this case, as I have said, there is simply no evidence — and certainly no positive evidence — capable of supporting a finding of causative significance. Having allowed mere speculation to suffice, the Tribunal’s decision is “openly, evidently, clearly” wrong and therefore ought to be set aside: *Southam*, at para. 57; *Toronto (City) Board of Education*, at para. 44; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

E. *Disposition*

[78] For these reasons, I would dismiss the Workers' Appeal

*Appeal by Katrina Hammer, Patricia Schmidt and Anne MacFarlane allowed with costs, CÔTÉ J. dissenting.*

*Solicitor for the appellant/respondent the Workers' Compensation Appeal Tribunal: Workers' Compensation Appeal Tribunal, Richmond.*

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*Solicitors for the respondent Fraser Health Authority: Harris & Company, Vancouver; Health Employers Association of British Columbia, Vancouver.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.*

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