

Federal Court



Cour fédérale

12528Date: 20161222

Docket: T-601-16

Citation: 2016 FC 1404

Ottawa, Ontario, December 22, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ISMAIL GULTEPE

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Dr. Ismail Gultepe, Ph.D. [the Applicant], pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made by the Deputy Minister of Environment Canada [Deputy Minister] on March 31, 2016 [the Decision], in which the Deputy Minister denied the Applicant's request for a promotion. In doing so, the Deputy Minister maintained a review conducted by the Independent Recourse Review Board

[Review Panel], dated March 18, 2016 [Review Panel Report], of a decision of the Departmental Career Progression Committee's [CPC] dated May 4, 2013 [CPC Decision], both of which recommended against the promotion. This application for judicial review focuses on the findings of the Review Panel because it was adopted by the Deputy Minister.

[2] This is the third application for judicial review in connection with this request for promotion. Having been turned down in his original request, the Applicant applied for judicial review which, on consent, resulted in a second consideration and decision. The second decision also rejected his application, and he sought judicial review which was granted by Locke J. in *Gultepe v Canada (Attorney General)*, 2015 FC 645 [*Gultepe No. 1*]. Locke J. ordered reconsideration by a differently constituted Review Panel. The Court-ordered Review Panel once again upheld the underlying CPC Decision denying the Applicant's promotion. The third Review Panel Report was upheld by the Deputy Minister in a Decision that denied the Applicant's request for promotion. This Decision is the subject of the current judicial review.

Facts

The Applicant

[3] The Applicant is a Cloud Physics Research Scientist with Environment Canada specializing in Arctic weather research. He received his Ph.D. in Meteorology from St. Louis University in 1989 and began working with Environment Canada in 1992 as a contractor. He became an employee at Environment Canada in 1998.

[4] The Applicant's work focusses on operational meteorology applications relevant to Environment Canada's mandate. The Applicant has an extensive history of research and project work within his field. As stated in his curriculum vitae, the Applicant has worked as an editor in the atmospheric science section of *J. of Pure and Applied Geophysics* since January 2004 and has collaboratively generated 3 books and 3 special issues. He has reviewed and edited over 50 journal papers and some proposals for the Natural Sciences and Engineering Research Council of Canada and is a member of several scientific and meteorological societies. He published 25 journal articles between 2007 and 2012, on which he was first author on 11. Close to half of these were published in a publication on which he, along with others, served as an editor. He has also worked as a leading scientist on several major fog, ice fog, and precipitation projects.

The SE-RES Group and Promotions under the 2006 Framework

[5] The Scientific Researcher group at Environment Canada (SE-RES) has 5 levels at which a Researcher Scientist such as the Applicant may be placed. The Applicant is currently at level 3 (SE-RES-3), to which he was promoted in 2007. He is currently seeking promotion to the SE-RES-4 level. To this end, the Applicant submitted an application for promotion, referred to as a 'dossier', in November 2012.

[6] Scientists covered by the SE-RES classification are promoted based on what is known as the "incumbent-based approach", meaning that the Researcher Scientist's achievements measured against certain criteria will determine his or her level in terms of promotion. To be appointed to the next level, Researchers must first demonstrate that they have met the expectations required by that level.

[7] The expectations concerning the promotion of Research Scientists are governed by the *Career Progression Management Framework for Federal Researchers [Framework]*. The *Framework* is an important cross-department document applicable to most departments of the Government of Canada. This document, released in February, 2006, was the culmination of five years of work across the Government after the creation of the new Research Group category of public servants in 1999.

[8] The *Framework* “provides a template for the improved management of Researchers' (RE) careers within the Federal public service and addresses new legislative and policy requirements.”

[9] The *Framework* changed the emphasis on publications in the promotion process, calling this a “culture change”. It emphasized this “culture change” in the manner in which Research Scientists are promoted: “[t]he culture change in the career progression assessment is in its focus. In the past, the basis for research scientists’ promotion was often summarized as “the number of publications. The focus now will be more on innovation and the impact of research.” It adds that, “[t]he number of publications, often perceived as the main focus in the current promotion process, is not to be viewed as only part of the evidence that demonstrates innovation, impact and recognition.”

[10] The *Framework* also identifies differences between the various SE-RES levels. The different qualifications between SE-RES-3, the level at which the Applicant is currently working, and SE-RES-4, to which the Applicant requests promotion, are described as follows:

SE-RES-3: A research scientist who is recognized by peers as a national expert in an area of specialty, and has led a team of

scientific and technical personnel or carried out in-depth inquiries to successfully deliver on the immediate, or contribute to intermediate and long-term, outcomes of the sector/department.

SE-RES-4: A research scientist who is recognized as an authority in broad areas of specialty and who has strategically conceptualized the course of research activity within the sector/department leading to the achievement of the intermediate, and contributing to the long-term, outcomes of the sector/department.

[11] The *Framework* says that only “valued outcomes” are to be used to assess a Research Scientist’s level when it comes to promotions. It identifies four valued outcomes: Innovation, Productivity, Recognition and Impact. Each of the four valued outcomes are to be assessed under three contexts of research work namely: (1) Research, Development and Analysis [RDA], (2) Managing of Research [MR] and (3) Representation and Client Services [RCS]. The *Framework* requires an emphasis on RDA when assessing a Research Scientist’s career progression.

The Departmental Balanced Evaluation Guide

[12] The *Framework* calls for departments to issue a *Balanced Evaluation Guide*. In this case, the *Balanced Evaluation Guide* repeats many of the relevant components of the *Framework*, including the four valued outcomes and the three contexts of research mentioned above. The *Balanced Evaluation Guide* states: “[t]he career advancement evaluations and related decisions focus entirely on the delivery of valued outcomes in the context of a given department’s mandate and targeted results. The promotion assessment considers all valued outcomes within the three contexts of RDA, managing of research and representation & client services. Within these contexts, a greater emphasis is placed on RDA at all five states of the career progression of

research scientists.” It also includes a copy of the *Evaluation Tool / Report* that is used in assessing promotion applications. Further, it outlines the relative importance of the valued outcomes (Innovation, Impact, Recognition and Productivity) within each context of research (RDA, MR and RCS). In this connection, Productivity is listed last. No consideration of Impact is required under MR or RCS, only within the RDA context of research.

[13] The *Framework* requires departments to produce guidance documents, one of which in this case is the *Guide for the Preparation of Researchers’ Career Advancement (Promotion) Documentation [Guide]* for use by candidates for promotion. The *Guide* requires a candidate’s manager to provide a “summary” of achievements and contributions, along with his or her opinion as to whether the candidate “has attained the valued outcomes that warrant his/her promotion” or, if not, to outline which areas require additional progress or evidence. It notes that the responsibility for the career advancement (promotion) documentation “should be undertaken as a joint effort between the research scientist and his/her manager”.

The Promotion Process Generally

[14] The following is a brief outline of the promotion process. First, a candidate for promotion (such as the Applicant) completes what is known as a ‘dossier’, which is his or her expanded CV, along with additional material relevant to the valued outcomes and contexts of research identified in the *Framework*. The dossier lists the applicant’s publications, conferences attended and other matters relevant to the four valued outcomes and qualifications related to the three contexts of research work, namely RDA, MR and RCS.

[15] After signature by an applicant's manager, the dossier is considered by a Sectoral Committee for Research Scientists [Sectoral Committee]. The Sectoral Committee has no power to approve an applicant's promotion; it may only make a recommendation to the final approving body. In this case, the CPC is Environment Canada's final approving body. The CPC is authorized to approve or deny a request for promotion.

[16] I will now turn to the promotion process in the current case.

The Applicant's Request for Promotion

[17] On September 18, 2012, an email call for RES submissions went out to various research scientists, including the Applicant. The email explained the application process, the deadlines and requested that scanned copies of the signature page, with signatures from both the candidate and their manager, be included. The Applicant decided he wished to apply for promotion to SE-RES-04.

Manager's Consideration of the Application

[18] The Applicant's line manager, Dr. Stewart Cober, did not support the Applicant's promotion. The Applicant's acting manager at the time also declined to sign the application for promotion. The Applicant eventually decided to submit his dossier for consideration without a managerial signature. I note that the Applicant subsequently alleged bias on the part of Dr. Cober; this allegation was not pursued on judicial review.

Sectoral Committee's Assessment of the Promotion

[19] The Applicant's dossier was reviewed by the Sectoral Committee. At the Sectoral Committee meeting, line directors are responsible for presenting their department's candidates' cases. Because Dr. Cober had taken an assignment in a different division before the Sectoral Committee meeting, Dr. Veronique Bouchet, who became Acting Director of the Meteorological Research Division in which the Applicant worked after the close of the application cycle, presented the Applicant's case.

[20] The Sectoral Committee (technically the Atmospheric Science and Technology Directorate for the department's Research Scientist Group) unanimously declined to recommend the Applicant's application for promotion. According to the Sectoral Committee's *Evaluation Tool/Report*, the Applicant only met 1 of the 4 valued objectives for promotion to for SE-RES-04 under Research, Development and Analysis [RDA]; the only one he met was Productivity reflecting the number of his publications (25) and the number of times they had been cited (600). On the other three valued outcomes considered under the important RDA factor, the Sectoral Committee concluded that the Applicant was still at only the SE-RES-03 level. The Sectoral Committee held that the Applicant met all 3 valued outcomes for promotion to SE-RES-04 under Managing of Research [MR]. However, he met none of the three valued outcomes for promotion to SE-RES-04 under Representation and Client Services [RCS]; he was still at only SE-RES-03.

[21] In its analysis under the Innovation heading, the Sectoral Committee had a positive review for his work on projects, but said it was "less clear whether his research has led to new

understanding of the scientific issues.” The Sectoral Committee called for more evidence that innovation had been “taken through to application into model improvements.” In its analysis of the Applicant’s Impact under RDA, the Sectoral Committee acknowledged that the Applicant’s work had contributed to forecasts of fog and low visibility weather conditions, but the wording he used “for the description of the technology transfer is ambiguous and the status of these transfers to operations is not made clear.” It noted his extensive publication record, but said that “more consideration should be given to high impact journals.” The Sectoral Committee’s draft report stated that the Applicant was an editor of a “fairly young journal where he published a large number of his papers,” having noted that the journals chosen by the Applicant for his work “are not the top journals for the field.”

[22] In its meeting Minutes, the Sectoral Committee reports that although the Applicant had been very productive from a publication standpoint, his work did not “contribute to ground breaking or innovative science”; some of his work had “not yet been taken through to publication and application”.

[23] Concern was also expressed about “inaccurate statements made in the documentation regarding accomplishments, technical transfer and application including those statements made in the unsigned ‘Accountable Manager’s Recommendation’”. The Sectoral Committee found his application was premature, noting that “there should be more papers published in high impact journals.”

[24] I pause here to note that “high impact journals” and the role they play are important considerations in this judicial review.

[25] In relevant part, the Sectoral Committee Minutes state:

The candidate has been very productive from a publication standpoint. The research papers, however, do not contribute to ground breaking or innovative science. The majority of the work described in the papers has yet to be manifested into model improvements or other operational applications. The candidate has invested in promising initiatives to collect data that could be used for parameterization and modelling improvements but most of the innovation articulated in the promotion application has not yet been taken through to publication and application. Concern was also expressed that there were inaccurate statements made in the documentation regarding accomplishments, technical transfer and application including those statements made in the unsigned “Accountable Manager's Recommendation”. This application to RES-04 is thus premature, at this point.

The committee noted that there should be more papers published in high impact journals.

Assessment of Application:

Committee members were not aware that this request for promotion was made without manager support when they received the application. The need for management statement on support or lack of support should be made clear to both candidates and management.

[emphasis added]

[26] The Sectoral Committee reported this outcome to the Applicant by letter dated January 9, 2013 [Sectoral Denial Letter]. While the letter noted good progress, it called for more achievements in representing or improving departmental operational models.

[27] The Sectoral Denial Letter did not say that that there should be, or that the Applicant was required to publish more papers in high impact journals, as did the Minutes. Instead, the Sectoral Denial Letter *recommended* “a preference be given to high-impact peer-review journals when publishing results and that quantified demonstrations of improvements derived from completed technological transfers be included in your next promotion application.” I note the addition of the words “peer-reviewed”. The letter encouraged the Applicant to continue discussing career progression with his manager, among other things. In relevant part, the letter states:

The consensus evaluation of the Committee is that you have made good progress since becoming a SE-RES-03 and that you are making significant progress towards improving the understanding of the formation of cloud, fog, low visibilities and precipitation and their representation in forecasting methods and numerical weather models. The committee understands that you have published extensively on the measurements collected through a number of field experiments and would like to see similar achievements in deriving the physical parameterizations to represent or improve these processes in our operational models. We recommend that a preference be given to high-impact peer-review journals when publishing results and that quantified demonstrations of improvements derived from completed technical transfers be included in your next promotion application. The committee values the projects that you have engaged in and recognizes the potential they represent to weather modelling and forecasting; we encourage you to continue developing these initiatives with the directions outlined above.

[emphasis added]

[28] The Sectoral Committee’s Denial Letter advised the Applicant that he could have his RES candidature reviewed by the CPC.

[29] The Applicant decided to exercise this option and sent his dossier to the CPC for consideration.

The CPC's Assessment of the Promotion

[30] Following receipt of the Applicant's dossier, the CPC noted that the required Manager's signature was missing from the Applicant's application. The Application was therefore returned to the Applicant for the required signature. Dr. Bouchet, as the Applicant's new Acting Director, worked with the Applicant to determine the wording for this section. The revised application that went to the CPC included the following summary of the Sectoral Committee's Decision:

The [Sectoral Committee] recommends that a preference be given to high-impact peer review journals when publishing results and that quantified demonstrations of improvements derived from completed technical transfers be included in the promotion application.

[emphasis added]

[31] Dr. Bouchet then signed the dossier but did not recommend the Applicant for promotion.

[32] After reviewing the Applicant's dossier, the CPC declined, on consensus, to approve the Applicant's promotion. According to its *Evaluation Tool/Report*, the CPC found that the Applicant achieved SE-RES-4 in only 1 of 4 valued outcomes under the RDA research contexts, namely Productivity (the same finding made by the Sectoral Committee). Recall that the *Framework* called for emphasis on RDA. He had, however, achieved SE-RES-4 in all three MR valued outcomes (the same finding made by the Sectoral Committee). The CPC found that the Applicant had failed to achieve SE-RES-4 in any of the 3 RCS considerations (the Sectoral Committee had allowed SE-RES-4 in one of the three). The CPC therefore concluded that there "needs to be more evidence that innovation has been taken through to application into model

improvements.” Further, in terms of Impact, it stated that there was “insufficient evidence of technology transfers to clients.”

[33] The *CPC Evaluation Tool/Report* said nothing about “high impact journals”. The CPC did, however, observe that “more consideration should be given to journals demonstrating greater independence from historical relationships”.

[34] The CPC meeting Minutes note sufficient level of productivity in publications and research of value to the Department. However, they conclude there was insufficient evidence to support “clear demonstration of operationalization of technology transfer to clients”, such that the Applicant therefore “did not meet the criteria for advancement within the RES occupational classification.” The CPC Minutes encouraged the Applicant “to focus on documenting the operationalization and technology transfer of his scientific contributions, and publishing in a greater diversity of journals demonstrating greater independence from historical relationships.” The CPC also concluded that promotion was premature.

[35] Of significance, the CPC Minutes, as with its *Evaluation Tool / Report*, does not mention “high impact journals”. In relevant part, the CPC Minutes state:

The Committee noted a sufficient level of productivity in publications and research, which is of value to the Department. However in regards to Representation and Client Services, there was insufficient evidence in the application to support clear demonstration of operationalization of technology transfer to clients (MSC), and he therefore did not meet the criteria for advancement within the RES occupational classification. To support future career growth, Dr. Gultepe was encouraged to focus on documenting the operationalization and technology transfer of his scientific contributions, and publishing in a greater diversity of

journals demonstrating greater independence from historical relationships. It was felt that Dr. Gultepe will have the opportunity to provide impact, in particular in technology transfer to Meteorological Service of Canada, and that his application for promotion this year was premature.

[emphasis added]

[36] The Applicant was informed of the CPC's decision [CPC Denial Letter], signed by the CPC's Chair, Dr. Karen Dodds. The letter reiterates, in large part, the CPC meeting Minutes. It also encourages the Applicant to initiate informal discussion with Dr. Charles Lin, Chair of the Sectoral Committee, to continue discussing career progression with Dr. Bouchet, and provided direction regarding the submission of a recourse request.

[37] The CPC Denial Letter, like the *CPC Evaluation Tool / Report* and the CPC meeting Minutes, said nothing about "high impact journals". It did, however, encourage the Applicant to "focus on documenting the operationalization and technology transfer of your scientific contributions, and publishing in a greater diversity of journals demonstrating greater independence from historical relationships".

The Independent Recourse Mechanism and Overview of Decision

[38] As a Research Scientist whose application for promotion had been refused by the CPC, the Applicant had the right to apply for recourse. An incumbent-based process such as this, pursuant to section 2 of the *Public Service Employment Regulations*, SOR/2005-334 [*Regulations*], requires a deputy minister to establish an independent recourse mechanism to

resolve disputes, and that the deputy head consult with the bargaining agent (in this case, the Professional Institute of the Public Service of Canada) before creating this recourse mechanism.

[39] The Applicant exercised his right to independent recourse mechanism by request to the Deputy Minister. A three-person Review Panel was duly constituted to review the Applicant's recourse request. The Review Panel is authorized by the *Framework* to recommend that a newly constituted CPC re-examine the case, or to identify issues that need to be resolved. However, the Review Panel may not recommend that a promotion be granted.

[40] The mandate for the Review Panel is established in the *Framework*. The *Framework* says that the Review Panel is not to replicate the role of the CPC. Its relevant part states that "[T]he reviewer/panel shall not replicate the role of a CPC. The reviewer's/panel's purpose is to review the recourse case, with regard to the process used by the CPC to assess the candidate's readiness for promotion and the alleged ground(s) of the complaint."

[41] The Review Panel rejected the Applicant's request for review.

[42] The Deputy Minister, to whom the Review Panel report is submitted, makes the final decision to approve or decline a promotion. In this case, after providing the Applicant with a copy of the Review Panel's Report and hearing from the Applicant, the Deputy Minister did not approve the Applicant's promotion. This denial was communicated by letter dated March 31, 2016.

[43] The Deputy Minister's letter stated that he had reviewed the Review Panel's Report, which had "carefully considered all of the material brought before it." He found that "the CPC process used to determine your eligibility for promotion was correctly applied," concluding that he had "reviewed the report and agree[d] with the Panel's findings and recommendations. Therefore, the original decision of the CPC is maintained."

[44] The Deputy Minister's Decision does not refer to "high impact journals".

The Three Review Panel reports

[45] As noted above, this application for judicial review concerns the third of three Review Panel reports. The following is a brief outline of each.

The First Review Panel Report

[46] The first Review Panel was convened on May 10, 2013 and supported the March 2013 decision of the CPC. The Deputy Minister agreed and declined to promote the Applicant. The Applicant filed an application for judicial review in this Court, which was ultimately withdrawn when the parties came to an agreement to remit the matter to a differently constituted Review Panel [Second Review Panel].

The Second Review Panel Report

[47] The Second Review Panel Report also supported the CPC's decision. The Deputy Minister again agreed with the Review Panel's report, and declined to promote the Applicant. The Applicant again applied for judicial review and, on May 19, 2015, Justice Locke quashed the Deputy Head's decision and remitted the matter to a new Review Panel for reconsideration:

Gultepe No. 1.

[48] The Report of the third Review Panel and the Decision resulting therefrom are at issue in this judicial review.

The Current (Third) Review Panel Report - the Decision under Review

[49] The third Review Panel Report was submitted to the Deputy Minister on January 25, 2016. On February 19, 2016, the Deputy Minister directed the Review Panel to "make the appropriate disclosures and give Dr. Gultepe an opportunity for rebuttal". The Review Panel provided the Applicant and his union representative with disclosure and an opportunity to respond, which he did. The Review Panel submitted a revised report to the Deputy Minister on March 18, 2016.

[50] The Report began by identifying the role of the Review Board:

It is the responsibility of the Board to examine the process used by the committee to assess the candidate's readiness for promotion and the grounds of the complaint submitted by the candidate. The review board is expected to provide a report to the Deputy Minister's delegate within 75 days of appointment. This report

either confirms the appropriateness of the process used by the CPC or, *alternatively*, identifies any issues that may have negatively affected their decision. In the latter case, the review board can recommend to the deputy Minister that the CPC reconsider the application for promotion.

[emphasis added]

[51] The Review Panel identified the grounds for recourse under the *Framework*. In this case, the Review Panel conducted many interviews; its Report include the names of interviewees the Panel spoke with. The Report also sets out the substance of each interview. It listed the documents and information considered in making its recommendations. It identified the Applicant's grounds for recourse (which it refers to as “claims”) in the following order:

- i. The Applicant is of the view that the CPC, in making its decision, took into consideration additional information not originally included in the Applicant's submission to the CPC, and this additional information proved inaccurate;
- ii. The Applicant is of the view that the decision of the CPC was based on grounds other than the career progression criteria; and
- iii. The Applicant is of the view that there was an abuse of authority by the CPC in the exercise of its authority.

[52] The Review Panel rejected each of the Applicant’s three claims. It found there was no basis for the Applicant’s statement that Dr. Bouchet's comments regarding high impact journals constituted additional information or was inaccurate. It found the Applicant had not identified substantive grounds other than the career progression criteria that were used to assess his dossier. It found there was no evidence that an abuse of authority occurred during the assessment of his dossier.

[53] The Review Panel found that Dr. Bouchet as manager performed her duties properly and in good faith and that the expectation for publication in high impact journals could not reasonably be described as an irrelevant consideration.

[54] The Review Panel found:

There is no evidence that the Sector or Departmental committees acted on inadequate or irrelevant material. The documents provided to the review board and the interviews show clearly that correct procedure was followed at all times with regard to Dr. Gultepe's application for promotion.

[55] In conclusion, the Review Panel recommended that the CPC's decision should remain in effect. It also made additional recommendations concerning departmental information, and the Applicant's career advancement:

1. The process used by the Environment Canada Sector Career Progression Committee and Departmental Career Progression Committee with respect to the 2012 dossier of Dr. Ismail Gultepe appear to be fully satisfactory. Consequently, the decision of the Departmental Committee regarding denial of promotion from RES 3 to RES 4 for Dr. Gultepe should remain in effect.

...
2. Environment Canada should organize information sessions for Research Scientists each year early in the promotion cycle. These sessions should review the principal steps in the promotion process, identify appropriate departmental resources, and provide the relevant deadlines for submission and review of dossiers.

...
3. Management should work together with Dr. Gultepe to develop and implement a plan for his career advancement.

...

II. Decision

[56] The Deputy Minister's decision, dated March 31, 2016, is only a page long. The Deputy Minister states that he reviewed the Review Panel Report and agreed with its findings and recommendations:

This is further to the Federal Court decision dated May 19, 2015, requiring that a newly constituted independent review panel be convened to reconsider the Departmental SE-RES career Progression Committee's (CPC) decision of March 4, 2013, which denied your application for promotion to the SE-RES-04 level.

The Independent Review Panel was convened and carefully considered all of the material brought before it. In its final report dated March 18, 2016, the Panel concluded that the CPC process used to determine your eligibility for promotion was correctly applied. Enclosed please find enclosed a copy of the Panel's final report.

I have reviewed the report and agree with the Panel's findings and recommendations. Therefore, the original decision of the CPC is maintained. As you may be aware, my decision is final and binding. Should you choose to further challenge this issue, you may wish to seek input from your union representative.

Although it did not impact the decision of the CPC as it pertained to your denial of promotion, you will note that the Panel has also made recommendations to enhance understanding of the career progression process at Environment and Climate Change Canada. I have asked that the Science and Technology Branch and the Human Resources Branch work together to implement these recommendations.

I would like to take this opportunity to thank you for your contribution to science and to the work of the Department. I encourage you to continue discussing your career progression goals with your manager and wish you the best in your future endeavours.

[57] A copy of the revised Review Panel Report was attached to the Deputy Minister's Decision. The Applicant seeks judicial review.

III. Issues

[58] The issues are:

1. Did the Review Panel make a reviewable error in limiting the scope of its “mandate” under the *Framework*, i.e., was the Review Panel obliged to assess the Applicant's dossier to determine the reasonableness of the CPC Decision?
2. Did the Review Panel make a reviewable error by unreasonably requiring the Applicant to publish in high impact journals, i.e., did it permit the CPC to apply a new criterion, in the form of “high impact” journals, to assess the Applicant's request for promotion?
3. What is the appropriate standard of review: reasonableness or correctness?

IV. Standard of Review

[59] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.” This Court in *Gultepe No. 1* did not decide the standard of review; it set aside the decision on the basis that it was both unreasonable and incorrect at para 15.

[60] The parties disagree on the applicable the standard of review.

[61] The Applicant says that the first issue is a true question of jurisdiction and therefore must be determined on the correctness standard. The second issue the Applicant says “is a question of mixed fact and law, and therefore reviewable on the reasonableness standard.”

[62] The Respondent says both issues should be determined on the reasonableness standard. I agree with the Respondent.

[63] I begin by noting that in cases where the application of policies and procedures are within the specialized experience and expertise of the decision maker, deference is owed and the standard of reasonableness is applied: *Rabbath v Canada (Attorney General)*, 2014 FC 999 at para 31 [*Rabbath*]; *Hagel v Canada (Attorney General)*, 2009 FC 329 at paras 19-27, aff'd in 2009 FCA 364; *Backx v CFIA*, 2013 FC 139 at para 15; *Spencer v Canada (Attorney General)*, 2010 FC 33 at paras 18-32; *Peck v Canada (Parks Canada)*, 2009 FC 686 at paras 17-26; and *Vaughan v Canada*, 2005 SCC 11 at paras 38-39.

[64] Moreover, if there is not a presumption of reasonableness as the default standard of review in administrative law, a presumption of reasonableness is in my view the starting point: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], [2011] 3 SCR 654 at para 34; *Dunsmuir* at para 146 per Binnie, J.

[65] More recently the Supreme Court of Canada provided additional guidance in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton East*], a decision released after the hearing of this application, which states at para 22:

Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

[emphasis added]

[66] The Applicant says that correctness applies to the first issue because it involves the merit principle. He says that the scope of the mandate of the CPC is in issue. I agree that the merit principle is engaged in an incumbent-based promotion, as it is in all promotions in the Federal public service. I also agree that the merit principle is important in the public service. However I am not persuaded that a decision of the Review Panel is reviewable on the correctness standard.

[67] In my respectful view, the Applicant takes too expansive a view of ‘true jurisdictional questions’, a view that is contrary to settled principles. One of the many reasons the Supreme Court of Canada rejected giving so-called “jurisdictional” issues a broad interpretation is that most, if not all, matters considered by tribunals may be said to involve their jurisdiction in one way or another. It is well established that only “true questions of jurisdiction” attract review on a correctness standard. This is not such a case.

[68] The Applicant points to *Appleby-Ostroff v Attorney General of Canada*, 2011 FCA 84, in which the Federal Court of Appeal per Mainville JA, adopted the correctness standard in a matter turning on which of two guiding documents – a directive or a policy – applied to an individual’s termination. No such dispute arises here. Also in that case there was no analysis or discussion of the standard of review; the parties (and Court) simply agreed the standard was correctness. I do not see this decision as applicable to this case, which involves the interpretation and application of a single, agreed-upon policy.

[69] Therefore, both aspects of the Decision raised by the Applicant should be reviewed on the standard of reasonableness.

[70] In *Dunsmuir* at para 47, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[71] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole:

Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron*

Inc, 2012 SCC 65 [*Construction Labour*]; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*].

V. Relevant Provisions

The Framework

[72] This case turns on the application of the *Framework*, which states in part:

In the Framework, the government's research expectations are defined in terms of four types of valued outcomes of research work. The valued outcomes describe the expectations in terms of innovation, productivity, impact and recognition, which are the driving forces in a researcher's career progression.

For each of these valued outcomes, the Framework recognizes three contexts of research work: (1) research, development and analysis (RDA); (2) managing of research; and (3) representation & client services. Researchers' primary area of work remains RDA.

Even though four types of valued outcomes have been identified as distinct, they remain very much linked. For example, the evidence of a scientific researcher's innovation, impact and recognition is in her/his productivity; the recognition may result from the impact and/or the innovation. The number of publications, often perceived as the main focus in the current promotion process, is now to be viewed as only part of the evidence that demonstrates innovation, impact and recognition.

For progression within a research career, the development of competencies, the assumption of responsibilities and the delivery of valued outcomes are all required. A career progression assessment focusses on the delivery of valued outcomes. For a promotion, the evidence of the valued outcomes demonstrates the existence of a certain level of competencies and responsibilities. This assessment does consider all three contexts of work but emphasis is placed on valued outcomes within the RDA. This complete work assessment, with emphasis on RDA, is therefore referred to as a balanced evaluation guide.

...In the past, the basis for research scientists' promotions could often be summarized as “the number of publications.” The focus now will be more on innovation and the impact of research. It is also recognized that promotion takes into consideration all the research scientist's accomplishments, i.e., individual one as well as those achieved through team and integration work. For further specification of this focus, departments will each be developing guidance documents.

[emphasis added]

[73] Annex A to the *Framework* amplifies on the four valued research outcome to be assessed in a promotion:

1. Innovation

Innovation is the development of modified or novel approaches, theories, concepts, ideas or solutions, in line with departmental mandate.

2. Productivity

Productivity is the generation of departmental relevant outputs (also called contributions) being produced by the researcher, in accordance with the rate consistent with the specialty or type of work.

In this context, outputs may include: peer-reviewed publications, scientific products, science advice, research proposals, internal scientific reports, datasets, patents, technology transfers, reviews, books and chapters, expert panels; involvement in advisory committees, policy development, collaborative research and development projects, public outreach, peer-reviewed journals. These outputs may be individual or team contributions.

3. Recognition

Recognition is a measure of credibility and stature of the researcher within the scientific community, the department and the government, and with its clients and stakeholders, in accordance with the speciality or type of work.

4. Impact

Impact is the consequence of the research and new knowledge on departmental target results and on the advancement of the specialty. Science-based policies,

regulations, services and technology transfers are some examples of ways target results can be achieved and impact demonstrated.

[emphasis added]

[74] Annex B to the *Framework* contains the *Guide for Establishing an Independent Recourse Mechanism for Researchers* relied upon by the Applicant, and which underlies the Decision under review now:

Incumbent based process

2. For the purposes of subsection 34(1) of the Act, the internal appointment process within the Research and University Teaching Groups, if there is a career progression framework established by the deputy head in consultation with the authorized bargaining agents that includes an independent recourse mechanism, is an incumbent-based process.

Processus de nomination fondé sur les qualités du titulaire

2. Pour l'application du paragraphe 34(1) de la Loi, le processus de nomination interne au sein du groupe Recherche et du groupe Enseignement universitaire constitue un processus de nomination fondé sur les qualités du titulaire s'il existe un programme d'avancement professionnel pour ces groupes comportant un mécanisme de recours indépendant, lequel programme est établi par l'administrateur général en consultation avec les agents négociateurs concernés.

The Merit Principle

[75] The relevant sections of the *Public Service Employment Act*, SC 2003, c 22, state:

Basis of Appointment

Appointment on basis of merit

30 (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

Meaning of merit

(2) An appointment is made on the basis of

Modalités de nomination

Principes

30 (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.

Définition du mérite

(2) Une nomination est fondée sur le mérite

merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

...

Interpretation

(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

Area of selection

34 (1) For purposes of eligibility in any appointment process, other than an incumbent-based process, the Commission may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of section 3 of the *Employment Equity Act*.

lorsque les conditions suivantes sont réunies :

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;

b) la Commission prend en compte :

(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,

(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

...

Précision

(4) La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.

Zone de selection

34 (1) En vue de l'admissibilité à tout processus de nomination sauf un processus de nomination fondé sur les qualités du titulaire, la Commission peut définir une zone de sélection en fixant des critères géographiques, organisationnels ou professionnels, ou en fixant comme critère l'appartenance à un groupe désigné au sens de l'article 3 de la *Loi sur l'équité en matière d'emploi*.

Role of Review Panel in Independent Recourse Mechanism provided in Framework

[76] The *Framework* creates an entitlement to a Review Panel to review promotion decisions.

Article 3.4 addresses the role of the Review Panel:

The reviewer/panel shall not replicate the role of a CPC. The reviewer's/panel's purpose is to review the recourse case, with regard to the process used by the CPC to assess the candidate's readiness for promotion and the alleged ground(s) of the complaint.

[77] Pursuant to article 3.5, the Review Panel is to confirm “the appropriateness of the process used by the original career progression committee” or identify “issue(s) that may have negatively affected” the CPCs decision. Of particular importance, article 3.5 specifically states: “The Reviewer(s) may not recommend that career progression be granted”. However, the Review Panel may suggest a new CPC be convened to re-examine the case.

Grounds for Complaint to a Review Panel

[78] The Framework provides several grounds for recourse, which I will refer to as complaints. The Applicant mainly relies on one ground namely abuse of authority. In relevant parts the *Framework's* independent recourse mechanism provisions set out the ground of abuse of authority, and comments on abuse of authority in more detail :

2.2 *Grounds for Recourse*

The Career Progression process has not been applied correctly if one or more of the following apply:

...

e. Abuse of Authority

Applicants have the burden of proof “with respect to issues of abuse of authority put before the Reviewer/Review Committee.

The Federal Court of Appeal Decision of *Robert Kane v. Canada* states that “The PSEA does not provide a comprehensive definition of “abuse of authority”. However, it does contain the following provision for “for greater certainty”:

2.(4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.” [italics in original]

A further broad definition of abuse of authority, that may be used when considering such cases, is: *misuse or improper use of discretionary power in staffing processes.* [italics in original]

As such, abuse of authority may occur under one or more of five categories, namely, when:

- a delegate exercises discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith or on irrelevant considerations);
- a delegate acts on inadequate material (including where there is no evidence or without considering relevant matters);
- there is an improper result (including unreasonable, discriminatory or retroactive administrative actions);
- a delegate exercises discretion on an erroneous view of the law;
- a delegate refuses to exercise discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

Abuse of authority is more than simply errors or omissions; however, when a delegate acts on inadequate material and/or takes action [sic] which are, for example, unreasonable or discriminatory, these actions may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

[emphasis added]

VI. Analysis

General and Preliminary considerations

[79] I start by noting that while the final decision subject to this application for judicial review is technically the decision of the Deputy Minister, not the Review Panel. However, because the Deputy Minister accepted the findings of the Review Panel, I take the Review Panel decision to be the reasons for the Deputy Minister's decision; *Baker v Canada (MCI)*, [1999] 2 SCR 817 at para 44.

[80] The Applicant argues that the Review Panel incorrectly restricted its mandate by refusing to assess his dossier to determine whether the decision of the CPC was reasonable: *Rabbath* at para 36 ("... if the Reviewer had felt that the substance of the Committee's decision was problematic, he could have said so. Though the Reviewer was constrained from recommending that a promotion be given, he was free to note problems with the Committee's decision. In fact, that was his mandate").

[81] The Applicant does not suggest that the Review Panel should conduct a *de novo* review (which it could not do in any event because its role is "not to replicate the role" of the CPC, as the *Framework* states), but rather, that the Review Panel should have assessed the Applicant's complaint to determine the reasonableness of the CPC's decision. He says this because abuse of authority is defined by the *Framework* in the extract just quoted, to include "an improper result (including unreasonable, discriminatory or retroactive administrative actions)"[emphasis added].

[82] The Applicant says *Gultepe No. 1* supports his argument that the Review Panel must do a 'reasonableness' assessment of the promotion decision by the CPC. In particular he relies on the following paragraph:

[15] In my view, the Review Panel fell into error when it declined to consider some of the applicant's arguments on the basis that it is "expressly charged to review only process". Though the parties disagree as to the standard of review of the Review Panel's determination of the scope of its mandate, I need not decide the point because, in my view, the Review Panel's conclusion on the limits of its mandate was both incorrect and unreasonable. Several aspects of the IRM indicate that the Review Panel must consider substantive aspects of the CPC's analysis. One of these arises where the Review Panel must decide whether an aspect of that analysis has been unreasonable, resulting in an improper result, thus constituting abuse of authority.

[emphasis added]

[83] The Respondent did not challenge this finding by Justice Locke. Nor was the decision appealed. Therefore it stands.

[84] The Respondent argues that the Review Panel did consider the reasonableness of the CPC decision and came to the conclusion that it was not unreasonable, which argument I will now consider.

Issue 1: Did the Review Panel make a reviewable error in limiting the scope of its "mandate" under the Framework, i.e., was the Review Panel obliged to assess the Applicant's dossier to determine the reasonableness of the CPC's Decision?

[85] The Applicant says that the Review Panel only assessed process and, in that respect, made the same error as the Second Review Panel such that it should be set aside and re-determined for the same reasons as given by Justice Locke in *Gultepe No. 1*. I disagree.

[86] The Review Panel operated under terms of reference determined by the *Framework*. The *Framework* states, as the Review Panel found when assessing its mandate, that “[t]he board is not expected to replicate the role of the Career Progression Committee [CPC]. It is the responsibility of the board to examine the process used by the committee to assess the candidate’s readiness for promotion and the grounds of the complaint submitted by the Applicant.” This statement accords with the Review Panel’s mandate as set out in the *Framework*. Accordingly, I am unable to find fault with it.

[87] In my respectful view the Review Panel did not limit itself to examining the process in this case. It is trite to observe the presumption that the decision-maker considered the record before it. In this connection several facts are material. First, the Review Panel Report begins by noting that it had before it the Applicant’s dossiers that he submitted to the Sectoral Committee and to the CPC. In addition, the Review Panel stated that it had for its review both the Sectoral Committee’s and the CPC’s respective *Evaluation Tools / Reports*, in addition to the meeting minutes of both Committees were noted as being before the Review Panel (as outlined above at paragraphs 20 to 38 of these reasons). These indicate that the substance of the Applicant’s case was considered.

[88] Notably, in my view, the Review Panel concluded that there was no “indication that the CPC reached an ‘unreasonable result’”. The use of the phraseology “‘unreasonable result’” mirrors what the Applicant is asking for. This statement indicates the Review Panel considered the reasonableness of the CPC decision: it states this in so many words.

[89] It is important to remember in the context of the record being reviewed by the Review Panel, and by this Court, that the Review Panel also conducted many interviews. Its first interview was with the Applicant and his representative. The Applicant set out his complaint as he chose to do, which also suggests that to the extent his submissions were based on substantive concerns or the reasonableness of the CPC decision, the Review Panel considered his dossier.

[90] The Review Panel interviewed the Chair of the Sectoral Committee. Its Report details what the Sectoral Committee considered regarding the merits and substance of the Applicant's request for a promotion. Many of the other 8 interviews conducted by the Review Panel also speak to the reasons, i.e. substantive merits of why the Applicant's request for promotion was denied. These interviews confirm the reasoning set out in the Minutes and *Evaluation Tool / Reports* of both the CPC and the Sectoral Committee. These interviews indicate the concerns held by the Applicant's managers and other committee members, and report their concerns with his dossier, and provide reasons and insight into the reasons for their lack of support. This further confirms that the Review Panel was engaging on the substance of the CPC's decision as well as the processes involved, as the Applicant sought.

[91] Unlike the situation in *Gultepe No. 1*, there is no indication that the Review Panel Report was "*expressly charged to review only process*". There is nothing to suggest advice to that effect was given to the Panel in this case, as was the case in *Gultepe No. 1*. I conclude on this basis as well, that the situation Justice Locke reviewed in *Gultepe No. 1* is not the situation before the Court on the current judicial review.

[92] In addition, the Review Panel specifically raised and rejected the Applicant's contention that his dossier was not considered in sufficient detail. It states: "Dr. Gultepe's claim that his dossier was not considered in sufficient detail, and that his work is of equal value to other scientists who were successfully promoted to the SE-RES 4 level, is not supported by the review board." This statement is further confirmation that the Review Panel did indeed consider the Applicant's dossier.

[93] In my view, this record shows that the Applicant's dossier was considered by the Review Panel. Although the Review Panel did not conduct a line-by-line assessment of the Applicant's dossier to determine the reasonableness of the CPC's determination, it did not have to. It is well-established that such panels need not discuss every issue raised by an applicant in any particular detail. Additionally, judicial review is not based on the reasons alone, it is based on the record and the reasons.

[94] I am satisfied that the Review Panel did review the substance of the Applicant's concern regarding the decision not to promote him.

[95] On judicial review the core issue is the reasonableness of the decision. On balance, I am also satisfied that the Review Panel Report, when viewed as a whole and in the context of the record, is reasonable in that it falls within the range of decisions that are defensible on the facts. I therefore reject the Applicant's first ground of judicial review.

Issue 2: Did the Review Panel make a reviewable error by unreasonably requiring the Applicant to publish in "high impact journals," i.e., did it permit the CPC to apply a new criterion in assessing the Applicant's application for a promotion?

[96] The Applicant alleges that the CPC made a decision not to promote on the basis that the Applicant had not published sufficiently in “high impact” journals, which he says was unreasonable. He alleges that Review Panel erred by allowing the CPC to make this finding. He notes that while selection boards may reasonably elaborate on qualifications, they may not adjust or amend them: *Canada (Attorney General) v Blashford*, [1991] 2 FC 44 at paras 5, 27 (FCA) [*Blashford*]; *Barbeau v Canada (Attorney General)*, 2002 FCT 454 at paras 43-45 [*Barbeau*]. Furthermore, he argues that this Court has determined that “a selection board may not refuse to promote candidates on the basis of an absence of external peer-reviewed publications” if such requirement does not appear in the *Framework*: *Ollevier v Canada (Attorney General)*, 2008 FC 199 at paras 32-41 [*Ollevier*]; *Gladman v Canada (Attorney General)*, 2016 FC 917 at para 51 (Notice of Appeal filed 8 November 2016) [*Gladman*].

[97] The Applicant correctly notes that there is no mention of publication in “high impact journals” in the RES-4 level promotion requirements as set out in the *Framework*. But that is not the end of the matter.

[98] The Respondent submits the Applicant is really seeking to have this Court reweigh the evidence in a light more favourable to him. The Respondent correctly notes that there are numerous references throughout the *Framework* to “impact” as a basis for assessment. In any case, the Respondent submits that the reliance on “high-impact journals” did not factor in to the actual decision to not promote the Applicant, because it was only considered in the Sectoral Committee’s decision. The Sectoral Committee could not and did not disapprove the Applicant’s promotion; it could only make recommendations.

[99] It was the CPC that actually denied the promotion and, of importance, the CPC made no reference to “high impact journals”. Rather, the CPC provided multiple factors upon which the Applicant’s application was denied; specifically, the Applicant only achieved SE-RES-4 in the Managing of Research context, but failed to achieve SE-RES-04 in either Research, Development and Analysis, which is the most important area in which to score highly, or in Representation and Client Services. Further, he was not supported by his manager. Therefore, the Respondent says, the Deputy Minister's decision is reasonable and should be upheld. With respect, I agree with the Respondent.

[100] In my respectful view, the Applicant has not shown that the CPC acted unreasonably in “creating” a requirement that the Applicant publish publications in “high impact journals”, or that the Review Panel failed in any way by not stepping in to address this alleged but non-fact based unreasonableness.

[101] To begin with, under the heading “Productivity”, the *Framework* sets out the relevance and legitimacy of publishing in peer-reviewed publications:

In this context, outputs may include: peer-reviewed publications, scientific products, science advice, research proposals, internal scientific reports, datasets, patents, technology transfers, reviews, books and chapters, expert panels; involvement in advisory committees, policy development, collaborative research and development projects, public outreach, peer-reviewed journals. These outputs may be individual or team contributions.

[102] Peer-review is of obvious importance to the assessment; peer-review is an important part of the promotion process laid out by the *Framework* itself.

[103] In addition, the Applicant's assertion that he is required to publish in high impact journals cannot be maintained on this record. The only reference to "high impact journals" as such is found in the Sectoral Committee's *Evaluation Tool / Report* and in its Minutes; each of which state that "there should be more papers published in high impact journals." The Sectoral Denial Letter does not mandate high impact journals, it uses the word 'recommends'. More importantly, while it does speak of high impact journals, the letter specifically speaks of the need to publish in *peer-review* publications: it recommended "a preference be given to high-impact peer-review journals when publishing results and that quantified demonstrations of improvements derived from completed technical transfers be included in your next promotion application."

[104] I consider that the changes in language in the Sectoral Denial Letter from the working documents of the Sectoral Committee are significant. The letter made two changes. First, it phrased the reference as a recommendation, and did not use mandatory terms. Secondly, it added the words "peer-review" such that the recommendation was that "a preference be given to high-impact peer-review journals when publishing results".

[105] Both changes weaken the Applicant's case. I see a difference between making something mandatory and making a recommendation. Secondly, the letter recommended that the journals the Applicant published in be "peer-review" journals, which in my view is an obvious reference to the fact many of his articles were published in a junior journal, which was not top of the field, and of which he and others were in fact editors. The Sectoral Committee Letter was asking for more from the Applicant in terms of where he chose to publish his writings, which I find to be a

reasonable recommendation given the shortcomings identified that the recommendation was intended to address.

[106] In any event, what the Sectoral Committee said in this respect is of less relevance to the final result because the Sectoral Committee did not have the authority to approve the Applicant's promotion. That authority was vested exclusively in the more senior CPC.

[107] The CPC had the authority to approve or deny the Applicant's promotion, and I find its considerations carry significantly more weight than those of the Sectoral Committee. What the Applicant has overlooked, or perhaps downplayed, is that the CPC does not use the term "high impact journals" anywhere in its proceedings. Nowhere in the *CPC Evaluation Tool / Report*, or its Minutes or in its Letter, is there a reference to "high impact journals". In my view, the Applicant's complaint in this regard is simply not based on the record. I should add that the Deputy Minister's letter does not refer to high impact journals either.

[108] The record shows that there were two different concerns concerning the Applicant's publications. The first, raised in the Sectoral Committee deliberations relates to "high impact journals". This concern was based on the view that the journals in which the Applicant published were junior journals, not top of the field publications, and not peer reviewed. In my view this concern turned on the quality of the journals the Applicant published in.

[109] A different concern arose with respect to the Applicant's *relationship* to the publisher. The Applicant published many of his articles in a journal which he himself edited as one of

several editors. This concern did not speak to the *quality* of the journal but as I understand it, relates to a problematic “relationship” between the Applicant and the journal of which he was a senior editor. It “raised flags”, as one interviewee stated.

[110] The *CPC Evaluation Tool / Report*, along with the CPC’s minutes, address only the relationship issue. What the senior departmental CPC had issues with was the Applicant’s relationship with the journal in question: he was an editor. Thus, the *CPC Evaluation Tool / Report* included the following notation: “[t]he Committee noted that more consideration should be given to journals demonstrating greater independence from historical relationships” [emphasis added]. In my view, this concern was based on the record and was reasonable in the circumstances.

[111] The CPC minutes state: “[t]o support future career growth, Dr. Gultepe was encouraged to focus on documenting the operationalization and technology transfer of his scientific contributions, and publishing in a greater diversity of journals demonstrating greater independence from historical relationships” [emphasis added]. Here again, the Applicant is being encouraged to move away from journals with which he is involved as an editor. These comments do not relate to high impact journals. The CPC’s Letter to the Applicant uses the same words; it makes no reference to “high impact journals”.

[112] The Deputy Minister’s Decision is to the same effect. The Deputy Minister says nothing about “high impact journals”. Instead, he addressed the relationship issue, saying: “[t]o support future career growth, you are encouraged to focus on documenting the operationalization and

technology transfer of your scientific contributions, and publishing in a greater diversity of journals demonstrating greater independence from historical relationships.” The reference to “greater degree of diversity of journals” is likewise a clear reference to the problematic issue of the Applicant publishing so many articles in a journal that he himself edited, with others. I do not see this as creating a new job requirement, or that it requires him to publish in “high impact journals”.

[113] The issue then becomes: what of the Review Panel Report’s reference to “high impact journals”? The Review Panel Report does indeed refer to “high impact journals”. But I am not persuaded the Review Panel made that any kind of a promotion requirement. In my view, the Review Panel discusses high impact journals because that was at the core of the Applicant’s complaints. The Applicant asked the Review Panel to find alleged reliance on “high impact journals” to be inappropriate. The Applicant could not reasonably expect the Review Panel to consider his complaint regarding “high impact journals” without actually discussing and assessing the merits of his case in that respect.

[114] Indeed, the purpose of the Review Panel, as set out in Annex B to the *Framework* itself (3.4 *Conducting the Review*), was to “review the recourse case, with regard to the process used by the CPC to assess the candidate’s readiness for promotion and the alleged ground(s) of complaint” [emphasis added]. The Review Panel acted reasonably in discussing high impact journals and I find no merit in the suggestion otherwise.

[115] The question is not whether the Review Panel discussed his complaint concerning “high impact journals” (it did), but what reliance it placed on this issue. Its interviews and investigation into the Applicant’s complaints led it to conclude that “the requirement to publish high quality papers in leading journals is common among departments and, based on the interviews we conducted, a regular consideration in EC.” In my view, this finding is reasonable and supported by the evidence of Dr. Lin (Director General of the Atmospheric Science and Technology Directorate, Environment Canada and Chair of the Sectoral Committee), Dr. Brook (a RES-5 researcher at Environment Canada) and Dr. Karen Dodds (Assistant Deputy Minister, Science and Technology Branch, Environment Canada and Chair of the Departmental CPC). The Review Panel’s conclusion that publication of high quality papers in leading journals is a common requirement across departments and a regular consideration in the Applicant’s department, was simply one of its conclusion on the validity of the Sectoral Committee’s concerns regarding the quality of the publications chosen by the Applicant.

[116] The Applicant says that, in not disapproving reliance on “high impact journals”, the Review Panel has sanctioned impermissible tampering with promotion criteria. The Respondent, on the other hand, says this is simply an elaboration of existing promotion criteria. I prefer the Respondent’s position.

[117] The approach taken by the Applicant is too literal. It is true the words “high impact journal” do not appear in the *Framework*, but in my respectful view that is not determinative. The Sectoral Committee and CPC were legitimately weighing and assessing the Applicant’s

promotion request and the matter of whether the Applicant met the valued outcomes identified in the RDA context of research work established pursuant to the *Framework*.

[118] Applicants for promotion under the *Framework* are required to identify their publications in their dossiers. The “culture shift” announced by the *Framework* makes it clear that the number of publications is not enough to warrant promotion. Instead, the focus is clearly stated to be on “valued outcomes” in specified contexts of research work with emphasis on Research, Development and Analysis [RDA]. Publications may evidence that an applicant has achieved valued outcomes such as to warrant promotion, but the *Framework*’s new regime was no longer “publish or perish”.

[119] The issue for the decision-makers acting under the *Framework* is to assess, if any, the publications that are offered by candidates for promotion. This inevitably comes down to weighing not only the articles themselves, but the journals in which the candidate’s material is published; it appears uncontested that some journals have better reputations for vetting articles submitted for publication than others. I conclude it reasonable for a journal’s reputation and other such issues to be assessed in the promotion review process when a candidate offers published articles in support of a request for promotion. That assessment of evidence including articles and the journals in which they are publishes, is what both the Sectoral Committee and CPC are expected to do. Thus I conclude the Review Panel did not act unreasonably in assessing this aspect of the Applicant’s complaint.

[120] In addition, although the Applicant submits that there is no requirement for publication in scientific journals or “high impact journals” in the *Framework* for promotion to the RES-4 level, it is important to note that the *Framework* also states that “[t]he number of publications, often perceived as the main focus in the current promotion process, is now to be viewed as only part of the evidence that demonstrates innovation, impact and recognition” [emphasis added]. The SE-RES-04 requirements uses terms and phrases such as: “demonstrated in-depth understanding...,” “Guided and coordinated multi-disciplinary research teams in conducting several research projects or a research program...,” “has developed novel theories and/or techniques...or has applied existing theories ...to new areas where such application had not been obvious before,” “has proposed novel research...,” and “...evidence of contributions...”.

[121] Furthermore, the RDA context for SE-RES-04 contains phrases like “Novel theories and/or techniques”, “novel research”, “influences change”, “led changes within area of specialty at the national or international level” and “increasing depth.”

[122] In my respectful view, the use of these phrases and terms make it clear that the *Framework* requires more sophisticated, impactful, and specific research to support promotion such as moving from RES-3 to RES-04. The use of these terms confirms there will be an assessment of the articles submitted. In this respect, given their far greater relative scientific expertise to that of this reviewing Court, the Sectoral Committee and CPC are both entitled to considerable deference.

[123] I am also asked to determine whether consideration of high impact journals is either forbidden ‘tampering’ with selection criteria, or permitted ‘elaboration’ of criteria: *Blashford*, above at paras 5, 27; *Ollivier*, above at para 32; *Barbeau*, above at para 43.

[124] Before addressing this point, I wish to review what the CPC and Deputy Minister actually stated: “[t]o support future career growth, you are encouraged to focus on documenting the operationalization and technology transfer of your scientific contributions, and publishing in a greater diversity of journals demonstrating greater independence from historical relationships.”

[125] I am not persuaded that encouraging a candidate to publish in a greater diversity of journals demonstrating greater independence from the candidate himself unreasonably adjusts or amends the *Framework* selection criteria. Rather, to my view this is individual-specific assessment of the evidence offered by this candidate for promotion, and career management advice. That advice and encouragement was reasonable in the circumstances; it provided guidance to the Applicant in connection with any future promotion requests he might make. Far from being irrelevant, this is a reasonable means by which to encourage the Applicant in his career progression.

[126] I also wish to reiterate that on the record in this case, “high impact journals” were not, in fact, a consideration found either in the assessment by the CPC or by the Deputy Minister.

[127] That said, even if “high impact journals” had been considered by the CPC and Deputy Minister, such consideration would not taint the decisions under review with unreasonableness. I

say this because the consideration of “high impact journals” is a proper elaboration of the *Framework*, and fits in with the other descriptive terms employed in connection with articles written by those in the RES category and relied upon for their promotions. In reality, the weighing and assessment of the *quality* of journals in which a candidate’s articles are published should be expected as a routine part of the promotion process; in my view it is reasonable and permitted as part of the weighing and assessment of evidence filed in support of a promotion.

[128] The Applicant alleges that assessing the quality of the journals in which a candidate publishes entails changing or amending the promotion requirement and is therefore not permitted, per *Ollevier*. I disagree. In my view the Deputy Minister in adopting the Review Panel Report was elaborating and assessing in a fact-specific manner on the evidence before it. This Court allowed the Review Panel’s predecessor, the Appeal Board in *Ollevier* to conduct such an assessment and I see no reason to withhold that ability from the Review Panel. In *Ollevier*, the Appeal Board reviewed the denial of an application for promotion by a Defence Scientist at Defence Research and Development Canada. At para 41, the Court states:

In my view, by requiring that Mr. Ollevier establish a consistent multi-year history of externally-reviewed scientific publications, the Selection board changed the requirements of creativity by limiting the factors that could evidence creativity. Read properly, the DS SAS Guidelines provide that externally-reviewed publications are evidence of creativity, not determinative of creativity. The Appeal Board erred in finding that the Selection Board was entitled to interpret the performance indicator for creativity as it did.

[emphasis added]

[129] I note again that the *Framework* itself identifies the publication of articles in peer-reviewed as a relevant consideration in assessing a request for promotion:

2. Productivity

Productivity is the generation of departmental relevant outputs (also called contributions) being produced by the researcher, in accordance with the rate consistent with the specialty or type of work.

In this context, outputs may include: peer-reviewed publications, scientific products, science advice, research proposals, internal scientific reports, datasets, patents, technology transfers, reviews, books and chapters, expert panels; involvement in advisory committees, policy development, collaborative research and development projects, public outreach, peer-reviewed journals.

These outputs may be individual or team contributions.

[emphasis added]

[130] Therefore, I reject the submission that either the Deputy Minister or Review Panel tampered with selection criteria.

[131] I also note that the CPC provided multiple factors upon which the Applicant was refused the requested promotion. Neither of his managers supported his request. He only achieved SE-RES-4 in the MR, and did not achieve promotion status in the important RDA category.

According to its *Evaluation Tool/Report*, the CPC found that the Applicant achieved SE-RES-4 in only 1 of 4 valued outcomes under the RDA research contexts, namely Productivity (the same finding made by the Sectoral Committee) which I have discussed in detail already. The CPC found that the Applicant had failed to achieve SE-RES-4 in any of the 3 RCS considerations. The CPC concluded that there “needs to be more evidence that innovation has been taken through to application into model improvements.” Further, in terms of Impact, it stated that there was “insufficient evidence of technology transfers to clients.” The Applicant did not contest that these concerns could be considered in assessing his request: they were, and his request was found

wanting. These findings also point to the reasonableness of the Review Panel's and Deputy Minister's decisions.

[132] In summary and on balance, I am unable to find that either that the CPC's *Evaluation Tool / Report* or minutes reveal an impermissible consideration of the quality of journals in which the Applicant's publications are published. I am unable to conclude that the Review Panel's conclusion respecting "high impact journals" creates any new threshold for promotion.

VII. Conclusion

[133] Standing back and viewing the decision as an organic whole, and doing so in the context of the record, I find that both the Review Panel Report and the Deputy Minister's Decision fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law applicable to this case, per *Dunsmuir*. Therefore, both are reasonable and this application for judicial review must be dismissed.

VIII. Costs

[134] The parties agreed that the successful party should have all-inclusive costs fixed at \$3,250.00, which in my view is reasonable. Therefore, the Applicant shall pay the Respondent costs fixed in the all-inclusive amount of \$3,250.00.

JUDGMENT**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. The Applicant shall pay the Respondent costs, fixed in the all-inclusive amount of \$3,250.00.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-601-16

STYLE OF CAUSE: ISMAIL GULTEPE v CANADA (ATTORNEY GENERAL)

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 31, 2016

JUDGMENT AND REASONS: BROWN J.

DATED: DECEMBER 22, 2016

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