Federal Court  Cour fédérale

Date: 20140724

Docket: T-518-13

Citation: 2014 FC 741

Ottawa, Ontario, July 24, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MURRAY WILKINSON, JERRY JESSO, CHRISTOPHER ARGUE, JAMES BASTARACHE, CATHERINE BLACK, CYNTHIA BURNS, LAURA CLARKE, RICHARD CUZZETTO, ANGELO DE RIGGI, JEFF DUNK, GEORGE DURSTON, JACQUES FRECHETTE, LILY-CLAUDE FORTIN, FRANK GONCLAVES, NELSON GUAY, CLAUDE HARVEY, MARK HASTIE, MARK HAYES, FANNY HO, ALANA HUNTLEY, MARK KAPICZOWSKI, KEVIN KELLY, ROSE-ANN JANG, ALAN JOHNS, ANGELIA JOHNSON, CAMERON JUNG, BOB LEDOUX, ROBERT LOHNES, INA MCRAE, DEBBIE MAIN, GREGORY MCKENNA, SHANE MCKINNON, KAREN MCMAHON, MICHAEL MCPHALEN, MAUREEN MILLER, MANJIT SINGH MOORE, RON NAULT, FIONA NORTHCOTE, HENRY PETERS, LINDA ROBERTSON, RALPH SCHOENIG, PATRICK SCOTT, DARLENE STAMP, RICHARD STEFANIUK, DOUG TISDALE, KEITH WATKINS, HARALD WUIGK

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicants seek the judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the decision by the President of the Canada Border Services Agency [the Deputy Head] made on February 25, 2013 rejecting the recommendation of the Classification Grievance Committee [the Committee] set up to look into the applicants' classification grievances. For the reasons that follow, the judicial review application is granted.

I. Facts

[2] The applicants are all Canada Border Services Agency [CBSA] employees who grieved their employment classification under paragraph 208(1)(b) of the *Public Service Labour Relations Act*, RSC 2003, c 22. They are all classified as FB-06 (Frontière-Border) and they are designated as "Manager, Regional Programs". They share the same work description and the classification examination was concluded on February 21, 2007.

[3] However, in 2010, the applicants challenged the classification. A Classification Grievance Committee was convened and the employer as well as the applicants had an opportunity to present multiple written and oral submissions before the Committee. The Committee met on at least three occasions from April to June 2012 in order to examine with obvious care the grievance.

[4] On July 18, 2012, the Committee determined that the factor designated as "Decision Making", which is one of the factors taken into account in making the classification decision, should be moved from degree 5 to degree 6. As such, that increased the number of points allocated bringing the number of points to a level such that a classification to the FB-07 level became appropriate.

[5] Following numerous delays and requests for extension sought by management, month after month, the Deputy Head concluded his deliberations and decided on February 25, 2013, in a two-page letter, against the recommendation made by the Committee. It is from that decision that judicial review is sought.

[6] A quick return on the history of FB-06 may be useful. The classification for that position created in 2006 in the wake of a government reorganization that resulted in the creation of the Canada Border Services Agency (*Canada Border Services Agency Act*, SC 2005, c 38), was set at FB-06, with an effective date of February 21, 2007. Both the job content and the classification were challenged shortly thereafter through the grievance process. Because the job classification grievance is obviously dependant on the job content, it was held in abeyance until the job content grievance had been disposed of; the job content grievance was successful in the fall of 2010. In spite of the changes to the job content, the position was still classified at the group and level FB-06 in December 2010. Thus, the classification grievance proceeded on the basis of the new job description, which had produced a classification at the same level as that originally identified in February 2007.

[7] The Classification Grievance Committee examined a number of factors that are considered in the classification of positions designated as "Manager, Regional Programs". The Committee concluded that all of the factors listed should remain at the same degree, but for the factor referred to as "Decision Making". The following chart summarizes what the situation was prior to the grievance. Obviously, it also summarizes the situation after the Deputy Head made his decision, as he rejected the Committee's recommendation:

Factors	**Degree**	**Points**
Knowledge	5	135
Analytical Skills	5	115
Communication Skills	4	070
Interaction	4	110
People and Operational Management	3	080
Decision Making	5	140
Physical Effort	C2	010
Sensory Effort	2	004
Risk to Health	3	020
Work Environment		
Psychological	A3	010
Physical	B2	010
	TOTAL	**704 (621-730)**

[8] The only difference between the recommendation and the Deputy Head's decision is in the difference in the degree that should be ascribed to Decision Making. The recommendation was to go to a degree 6 and the Deputy Head left it at a degree 5. According to the Classification Standard, the degree 6 for Decision Making would have added 35 points, thus bringing the total above 730. The other factors that were contested were: Knowledge, Communication Skills, and People and Operational Management. None of them found favour with the Committee following the same kind of evaluation that was done with respect to "Decision Making". The Committee's decision concerning these other factors has not been challenged.

[9] The examination of factors is done in the following fashion. Fundamentally, a classification exercise requires that a work description be evaluated against the appropriate Classification Standard. It is the value of jobs that is the focus of the exercise, not how the job is actually performed. The factor, or element, "Decision Making" is described in the Classification Standard; then, the Classification Standard defines degrees. It will be the task of the Committee, in considering a classification grievance, to evaluate the work description against those definitions. In order to assist, guidelines are provided in the form of examples of work activities for the different degrees.

[10] In this case, "Decision Making" and degrees 5, 6 and 7 are defined in the Classification Standard as:

- **Decision Making**:
  This element recognizes the increasing level of responsibility for decision making that stems from the level of judgement and latitude applied in making decisions, and the impact of the decisions made. Decisions can be policy, program development, program/service delivery or compliance in nature and can include human, financial or physical resources. For the purposes of this element, a decision should be interpreted in its broadest sense to include substantive expert recommendations or advice.

- **Degree 5**:
  Decisions impact the implementation and delivery of programs and services. Decisions require autonomy and independence and are typically related to the organization and coordination of program service objectives.

- **Degree 6**:
  Decisions impact the overall determination of approaches to program development or delivery within a variety of integrated operations or program/project areas. Decisions are based on significant managerial or subject matter expertise.

- **Degree 7**:
  Decisions impact the establishment and achievement of broad operational objectives. Decisions at this level typically affect how the component program/operational areas will achieve the Agency's overall objectives.

II. Decision under review

[11] The decision of the Deputy Head is to be found in a letter signed by the Vice President of Human Resources of CBSA. For all intents and purposes, the decision is captured in the following two paragraphs:

> In its report, the Committee states that "the subject positions are not required to make decisions which require in-depth consideration of the relationships between programs or national priorities; these considerations would be addressed at more senior levels of management". Rather, the Committee recognizes that "the subject positions must make decisions on the approaches to program delivery in relation to various projects and/or programs and that decisions are based on significant subject matter expertise". The Committee further goes on to say that decisions required of the subject positions are focused on the implementation of policy objectives and the delivery of their program and operations.
>
> The intention behind the Manager, Regional Programs position is that it makes decisions that affect the ability to implement and deliver the programs in the region, and makes decisions and recommendations on individual cases that require expertise in a specific program area. This is clearly articulated by the management representatives who provided the organizational context related to the work performed by the Manager, Regional Programs, in support of the fact that the position does not directly affect change to national policies or multi-disciplinary program development. There is no indication in the report that the Committee considered organizational context in making its recommendation, as is required by the application guidelines for classification standards.

[12] As can been seen, the Deputy Head takes issue with the assessment made by the Committee of the Decision Making factor. He seems to find an argument in two passages taken

from the Committee report. The Deputy Head then goes on to what he considers the intention behind the position. He does not explain how that can be relevant to a classification exercise. Actually, he faults the Committee for not having considered the organizational context, without further explanation. The letter simply concludes that the President (Deputy Head) cannot support the "conclusion that there is a correlation between the work performed and degree 6 of the Decision Making factor". As a result, the classification of the applicants remained at the FB-06 level.

[13] The decision made by the Deputy Head was supported by a memorandum prepared by the Vice President of Human Resources at CBSA which was specifically approved by the Deputy Head. One can read in the paragraph entitled "Recommendation" that "[t]he Agency's position is that the FB standard has not been applied properly and therefore the Decision Making factor is inflated".

III. Points in Issue and Standard of Review

[14] The applicants make two arguments in their judicial review application. First, they claim that the Deputy Head was wrong to reject the recommendation of the Classification Grievance Committee. The rationale offered by the Deputy Head cannot be said to be reasonable. Second, they submit that the Deputy Head was in breach of the procedural fairness requirements in that he never asked nor received submissions prior to making his determination that the recommendation of the Classification Grievance Committee was not to be followed.

[15] The respondent argues that deference is the name of the game. The Deputy Head disagreed with the assessment made by the Committee. As put by the respondent, some of the factual findings made by the Committee actually support a degree 5, as opposed to its conclusion that a degree 6 is more appropriate. Furthermore, the respondent suggests that the reference to the intention behind the job description should be read in connection with the organizational context, such that there was nothing new being considered by the Deputy Head that would have required seeking the views of the applicants.

[16] The parties are in agreement that the first question calls for a standard of review of reasonableness whereas the second ground calls for a standard of correctness. I share their view.

[17] The Supreme Court of Canada's jurisprudence since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], all the way to *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895, favours a standard of reasonableness for decisions made by the administration. The case law of this Court also supports that deferential standard of review (*Beauchemin v Canadian Food Inspection Agency*, 2008 FC 186 [*Beauchemin*]; *McEvoy v Attorney General*, 2013 FC 685 [*McEvoy*]) when reviewing classification decisions. Conversely, breaches of procedural fairness are to be reviewed on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

IV. Analysis

[18] The starting point of the analysis must be paragraph 47 of the Supreme Court of Canada's decision in *Dunsmuir* which described what the standard of reasonableness entails:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. 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.

[19] Our search, therefore, centers on possible outcomes and the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. With great respect, I have found myself unable to conclude that the reasons given satisfy the criteria of "justification, transparency and intelligibility within the decision-making process". A standard of review of reasonableness carries a measure of deference towards the decision-maker. However, as the Court put it in *Dunsmuir*,"[i]t does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view".

[20] Classification Grievance Committees are highly specialized and their decisions will also be afforded a high degree of deference (see *Beauchemin* and *McEvoy*, *supra*). In the case at hand, the Deputy Head chose to disagree with the conclusion reached by the Committee. That is certainly his prerogative although it is not often the case as acknowledged by the respondent. Hence it is possible for the decision of the Deputy Head to fall within the range of outcomes which are possible and acceptable because they are defensible in respect of the facts and the law. However, one will expect that such departure will be justified in order to meet the standard of reasonableness. This decision under review did not reach the necessary standard.

[21] The Classification Grievance Committee Report [the Report], which runs for some 22 pages, examines rather carefully the generic job description. The Committee concludes that one factor, Decision Making, needs to be adjusted to a higher level. In conducting its examination, the Committee compares the work descriptions to three different degrees. Degree 5 is the degree at which the FB-06 position was classified; it also considers degrees 6 and 7 and concludes ultimately that the position should receive a degree 6, not a degree 7. Thus, the Report does not limit itself to a comparison between degrees 5 and 6, but rather compares degree 7 to the subject positions in order to reach a conclusion that the position does not have that degree of difficulty.

[22] In order to conduct that exercise, the Committee received the submissions of the grievers together with the observations made by management. Furthermore, managers in three regions were interviewed. It is against that backdrop that the Committee considered examples of work activities and reached its conclusion.

[23] It is not easy to understand how the Deputy Head reached the conclusion that he should depart from the findings of the Committee. As indicated earlier, the decision covers two paragraphs and is supported by a memorandum from the Vice President, Human Resources.

[24] There seems to have been some confusion with the terminology. Before reaching the two paragraphs of the decision letter which purport to justify the conclusion that the Deputy Head has to agree with degree 5, instead of degree 6 as found by the Committee, the letter states that

> The Border Services (FB) classification standard clearly indicates that positions evaluated at degree 6 for Decision Making "provide broad perspective, substantive recommendations on the development of multi-disciplinary programs and polices" and that these decisions directly affect how national policies and guidelines will be developed and implemented.

[25] Actually, the letter is not quoting from the Classification Standard. It is quoting from paragraph 6.6.3 of the Application Guidelines (the Court notes that the parties provided two slightly different texts of the Application Guidelines, August 2005; for the purposes of these reasons, nothing rides on the discrepancies). Furthermore, the quoted words are coming from paragraph 6.6.3, under Degree 6, of examples of work activities, while the clause "and that these decisions directly affect how national polices and guidelines will be developed and implemented" is borrowed from paragraph 6.6.2. which reads:

> 6.6.2 Provides substantive recommendations to CBSA management and external stakeholders concerning the development or modifications to legislation, regulations and policies. These decisions directly affect how national policies and guidelines will be developed and implemented.

It is less than clear what message was being conveyed by collapsing awkwardly examples of work activities and stating, mistakenly, that the Classification Standard indicates clearly that positions evaluated at degree 6 must satisfy what would appear to be presented as a standard, when in fact these are merely examples of work activities. It seems to suggest that the examples of work activities have become essential requirements. That puts the cart before the horses. The examples of work activities serve to illuminate features that would be associated with a standard at a particular degree. The paragraph seems to flip the proposition on its head by suggesting that degree 6 for Decision Making requires that these examples of work activities be present. Indeed, this begs the question: what about the other examples of work activities listed for degree 6? It is unclear how examples of work activities can be elevated to standards against which positions are evaluated at degree 6 for Decision Making. Would have been much more appropriate a reference to the specific guidelines corresponding to degree 6:

> At degree 6, decisions involve more complexity given the integrated nature of operations, i.e. more constraints, more variables, more sets of program objectives that may not be aligned. Decisions are based on significant managerial or subject matter expertise. Decisions impact how to implement programs in this more complex environment.

Suffice it to say that the decision letter does not state how the examples of work activities associated with degree 6 would be such that "the President cannot support the Committee's conclusion that there is a correlation between the work performed and degree 6 of the Decision Making factor", without a comparison of the work content of the job, something that was done by the Committee but not by the Deputy Head. Thus the paragraph is more declaratory than an articulation of reasons for parting company with the Committee.

[26] That takes us to the two paragraphs already reproduced and which purport to be the articulation of the decision to refuse to follow the recommendation. The Deputy Head seems to take issue in the first of the two paragraphs with two sentences extracted from the Committee Report when analyzing degrees 5, 6 and 7. There is no context provided; just two extracts are taken from the Report. The first of the two sentences comes from page 15 of the Report. Read in context, the sentence carries the conclusion that the work done by the applicants does not reach a degree 7. No more.

[27] This conclusion is drawn after the Committee compared the "subject positions" to degree 7 and example of work activities 6.7.1 taken from the Application Guidelines. Hence the Report simply makes the point that the analysis does not allow a jump from degree 5 to degree 7. It does not state that degree 6 has not been met.

[28] That first sentence is connected to the second sentence by the word "rather", suggesting "on the contrary", "instead" or perhaps "more precisely" (*The Canadian Oxford Dictionary,* 2001, *sub verbo,* "rather"). Whatever the meaning one wanted to convey by connecting the two sentences with the word "rather", the intent must have been at least to show that the second sentence is the more precise, the more accurate. At its worst, the use of the word suggests an opposition, certainly much more than a simple contradiction.

[29] This second extract actually is found earlier in the same paragraph in the Report, at page 14. Again, when read in context, the authors of the Report state that the positions under review are evaluated at degree 6 for Decision Making because "the subject positions must make

decisions on the approaches to program delivery in relation to various projects and/or programs and that decisions are based on significant subject matter expertise". In other words, the complexity level is higher and decisions require subject matter expertise. This second extract quoted from the Report is not in opposition to, or contradicting, anything. In fact, it does not constitute a more precise expression of the idea found in the first extract. They are in fact separate and apart. It is worth quoting *in extenso* the passage where the Committee concludes that degree 6 is the one that is appropriate:

> The Committee concurred with the proposal of the grievors that the subject positions should be evaluated at degree 6 for Decision Making given that the subject positions must make decisions on the approaches to program delivery in relation to various projects and/or programs and that decisions are based on significant subject matter expertise. This is further supported by comparison to Example of Work Activities 6.6.6. of the Application Guidelines which, like the subject positions, determines the strategic program delivery direction and priorities within an Agency area, establishes business directions of the area, and makes recommendations on the operational and fiscal impacts of proposals affecting service delivery and program effectiveness… [I have underlined the passage quoted in the decision letter.]

[30] Read as a whole, that paragraph in the Report conveys that an evaluation at degree 6 is appropriate because, by comparison, the decision-making aspects of the position are less than a degree 7 and fit the specific guidelines and examples of work activities associated with degree 6. Once one realizes that extract one presented in the decision in fact relates to degree 7, and that extract two relates to degree 6, it is very difficult to understand how these extracts might support the decision taken by the Deputy Head. There is no opposition between these two extracts. They drive to the same conclusion, that is that degree 6 is appropriate to this job description and content. But they do so from two different angles. First, the Committee establishes that degree 6

is appropriate and finds support in example of activities 6.6.6 associated with degree 6. The Committee then goes on to find that the job never reaches a degree 7.

[31] The paragraph of the decision does not even attempt to explain how the two extracts, taken out of context, help to establish how degree 5 is more appropriate. At its highest, it is true that "the subject positions are not required to make decisions which require in-depth consideration of the relationships between programs or national priorities…" That is because this is associated with degree 7. If the Deputy Head signals in the second sentence that the quoted words are a more appropriate expression of the standard, he would appear to agree that a degree 6 is appropriate because that is what the report concludes with those very words.

[32] By juxtaposing the two sentences in reverse order, and connecting the two with the adverb "rather", the decision letter seems to mistakenly assume that the Committee declined to reach a conclusion that degree 6 is appropriate and that, rather, the Committee recognized that degree 5 ought to be granted. This is at least one reading, one argued by the applicants. This reading of the decision could be confirmed by this paragraph taken from the memorandum in support of the decision:

> The Grievance Committee, however, states in its report that "…the subject positions are not required to make decisions which require in-depth consideration of the relationships between programs or national priorities; these considerations would be addressed at more senior levels of management". This statement is essentially in contradiction of the definition of Degree 6 for Decision Making and recognizes the fact that, within the agency, this responsibility rests with more senior management.

The trouble with this is that the Committee was not referring to degree 6, as the writer seems to wrongly assume, but rather the Committee was referring to degree 7. The only thing the Committee was acknowledging is that the subject positions are not at a degree 7. As seen when reading the extract in context, the Committee was not comparing the job work to degree 6, but rather to degree 7. And it concluded that these kinds of responsibilities are for more senior levels of management: degree 7. What was in play was example of work activities 6.7.1. In its briefing note, the CBSA seems to equate the example of work activities 6.7.1 with degree 6. It would appear that degrees 6 and 7 are unfortunately conflated.

[33] The respondent has not offered his own interpretation of that paragraph of the decision letter. The only other reading of that paragraph is that it does not lead to a conclusion that degree 5 is more appropriate. In a sense, it is in the nature of a *non sequitur*. If the first extract relates to degree 7 and extract 2 is concerned with degree 6, what does that say about degree 5? There is no explanation for why degree 5 should be preferred on the basis of two extracts that are concerned with degrees 6 and 7.Either way, this cannot meet the standard of reasonableness where justification, transparency and intelligibility are key.

[34] Furthermore, the Deputy Head finds fault with the Committee for not having considered "organizational context" in making its recommendation. Other than being a term the contours of which are rather uncertain, I fail to see how it can be asserted that it was not considered. The Committee obviously took pains to receive from management its point of view. Not only was the manager identified by CBSA as the right person to supply further information interviewed, but

when the person indicated that she had not been in the position for very long the Committee interviewed two more managers. Indeed in one case, that manager was interviewed twice.

[35] From these interviews and the material supplied, the Committee commented "that the organization structures in which the subject positions are located vary significantly from region to region and that, in some regions, the subject positions manage two or more programs simultaneously while in other regions they only manage one program" (page 12 of the Report). That would help explain the further comment "that the subject positions exist in different organizational contexts from region to region" (page 13 of the Report). Clearly, in my view, the Committee considered what it took to be the organizational context.

[36] A better way to express the concern of the Deputy Head might have been to declare that he disagreed with the consideration given to "organizational context". However, if that were the case, it would have been incumbent on the Deputy Head to explain his view in order to make the decision reasonable as justified, transparent and intelligible.

[37] But the Committee was confronted to a generic job description, approved in November 2010 by the employer after a grievance about job content. It is on that basis that the grievance was heard. The fact that job descriptions could have differentiated between positions does not change the reality with which the Committee had to contend: there was one job description to evaluate.

[38] These extracts cannot support a reasonable finding that degree 5 is more appropriate. In that sense, the only conclusion that can be drawn is that the decision was made in a capricious manner. Gleason J, of this court, reviewed some authorities on the notion of "capriciousness" and one can read at paragraph 37 of *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319:

> [37] The notion of "capriciousness" is somewhat less exacting. In *Khakh v Canada (Minister of Citizenship and Immigration)* (1996), 116 FTR 310, [1996] FCJ No 980 at para 6, Justice Campbell defined capricious, with reference to a dictionary definition, as meaning "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment, intent or purpose". To somewhat similar effect, Justice Harrington in *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at para 1, [2005] FCJ No 509, defined "capricious" as being "so irregular as to appear to be ungoverned by law". Many decisions hold that inferences based on conjecture are capricious. In *Canada (Minister of Employment and Immigration) v Satiacum* (1989), 99 NR 171, [1989] FCJ No 505 (FCA) at para 33, Justice MacGuigan, writing for the Court, stated as follows regarding conjecture:
>
> > The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in Jones v. Great Western Railway Co. [citation omitted]:
> >
> > > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. …

In the case at hand, the absence of justification makes the decision capricious and invites the intervention of this Court (para 18.1(4)(d), *Federal Courts Act*).

[39] The judicial review is not a contest between the Deputy Head and the Committee. The Committee is merely making a recommendation and the Deputy Head may disagree. As stated earlier, it is the Deputy Head's prerogative to disagree. The memorandum in support of the decision suggests that rejecting a recommendation has been seldom seen. It remains that it is the Deputy Head who decides and he may disagree.

[40] However, in so doing, the Deputy Head cannot act arbitrarily and his decision must be reasonable, as the notion is described at paragraph 47 of *Dunsmuir, supra*. Given the expertise generally shown by Classification Grievance Committees, that may not be an easy task. In this case, as I have tried to demonstrate, the decision fails the test of the "existence of justification, transparency and intelligibility within the decision-making process". It also fails because the Court is left without an understanding of how the decision made can fall within the range of possible and acceptable outcomes. The decision tries to rely on passages taken from the Committee Report, but it seems to misapprehend the sentences used.

[41] I do not dispute that perfection in the decision made and the reasons given is not required. Similarly, not every argument must be addressed. There may very well be more than one possible, acceptable outcome which would be defensible in respect of the facts and the law. The Court is very much alert to the admonition of the Supreme Court in *Dunsmuir* that reviewing courts should not "be content to pay lip service to the concept of reasonableness review while in fact imposing their own view." (para 48) But, at least, the reviewing judge has to understand the basis on which the decision was made in order to conclude whether or not it falls within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*]). This decision letter under review and its supporting memorandum are unfortunately cruelly lacking an articulation that could satisfy that minimal standard.

[42] I should add that the Court was also concerned about the general reliance by the Deputy Head on the "intention behind the Manager, Regional Programs position". How important a consideration the intention behind the position has been is left hanging. Surely, the position is what it is, and no more. If the content of the position brings with it a high degree in the Decision Making factor, it is a bit late to assert that such was not management's intention.

[43] The new assertion in the decision that the Committee lacked in its appreciation of the intention behind the position does not either satisfy the reasonableness standard. Indeed, it is less than clear at this stage how that can be a relevant consideration. Be that as it may, it is not necessary to expand on the possibility that it may have been an irrelevant consideration in view of the conclusion that the mention of "the intention behind the position" is not articulated as a concern, making it impossible for the "reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes…" (*Newfoundland and Labrador Nurses' Union*, para 16).

V. Conclusion

[44] In a case like this one, the reasons given to depart from a well-articulated recommendation must be intelligible, in the sense that they "are able to be understood" (*The Canadian Oxford Dictionary*, 2001, *sub verbo*, "intelligible"). With great respect, the decision

does not have that measure of intelligibility. It seems to contemplate statements made with respect to degrees 7 and 6 as if they related to degrees 6 and 5. If that is not what the decision actually meant, the respondent has been incapable of enlightening the Court either by providing an alternate meaning. The respondent also seems to rely on "the intention behind … the position" in order to take the analysis outside of the job description that is at the heart of the grievance adjudication. Finally it faults the Committee for not having considered the organizational context, where it would appear that the Committee considered that context. If the Deputy Head disagreed with the findings on that account, he did not express where his disagreement lies. At the end of the day, this reviewing court is left without understanding "why the tribunal made its decision" (*Newfoundland and Labrador Nurses' Union*, *supra*, para 16).

[45] My conclusion on the reasonableness of the decision suffices to dispose of the matter. The application for judicial review is granted, with costs.

[46] As a result, it will not be necessary to address the alternate argument of the applicants about an alleged breach of procedural fairness. I would nevertheless offer the observation that, as this matter is sent back for redetermination, and given the expertise of the Committee and what appears to have been a misapprehension of the rationale for the recommendation of the Committee, it might well be advisable to receive the comments and the observations of the applicants for the purpose of having the most complete and accurate picture. I have in mind in particular the use that was made by the Deputy Head of the "intention behind the Manager, Regional Programs position", assuming of course that it is relevant to a classification decision. Similarly, as I have indicated, the organizational context was considered by the Committee, yet

the Deputy Head either disagreed with its findings or meant something else where he indicated that the Committee failed to do what "is required by the application guidelines for classification standards". A clear record would be advisable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review of the decision made by the President of the Canada Border Services Agency on February 25, 2013 is allowed, with costs. The matter is sent back for redetermination in a manner consistent with these reasons for judgment.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MURRAY WILKINSON, JERRY JESSO, CHRISTOPHER ARGUE, JAMES BASTARACHE, CATHERINE BLACK, CYNTHIA BURNS, LAURA CLARKE, RICHARD CUZZETTO, ANGELO DE RIGGI, JEFF DUNK, GEORGE DURSTON, JACQUES FRECHETTE, LILY-CLAUDE FORTIN, FRANK GONCLAVES, NELSON GUAY, CLAUDE HARVEY, MARK HASTIE, MARK HAYES, FANNY HO, ALANA HUNTLEY, MARK KAPICZOWSKI, KEVIN KELLY, ROSE-ANN JANG, ALAN JOHNS, ANGELIA JOHNSON, CAMERON JUNG, BOB LEDOUX, ROBERT LOHNES, INA MCRAE, DEBBIE MAIN, GREGORY MCKENNA, SHANE MCKINNON, KAREN MCMAHON, MICHAEL MCPHALEN, MAUREEN MILLER, MANJIT SINGH MOORE, RON NAULT, FIONA NORTHCOTE, HENRY PETERS, LINDA ROBERTSON, RALPH SCHOENIG, PATRICK SCOTT, DARLENE STAMP, RICHARD STEFANIUK, DOUG TISDALE, KEITH WATKINS, HARALD WUIGK v ATTORNEY GENERAL OF CANADA
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APPEARANCES:

Mr. Andrew Raven Ms. Morgan Rowe	FOR THE APPLICANTS
Mr. Sean Kelly	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT