

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201222

Docket: A-79-19

Citation: 2020 FCA 223

**CORAM: PELLETIER J.A.
DE MONTIGNY J.A.
RIVOALEN J.A.**

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 GONCALVES, NELSON GUAY,
CLAUDE HARVEY, MARK HASTIE, MARK HAYES, FANNY HO,
ALANA HUNTLEY, MARK KAPICZOWSKI, KEVIN KELLY,
ROSE-ANN JANG, ALAN JOHNS, CAMERON JUNG, BOB LEDOUX,
ROBERT LOHNES, INA MACRAE, GREGORY MCKENNA,
SHANE MCKINNON, 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**

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on November 2, 2020.

Judgment delivered at Ottawa, Ontario, on December 22, 2020.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

DE MONTIGNY J.A.

RIVOALEN J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an appeal from a judicial review of a classification grievance, reported as 2019 FC 83 (Reasons), in which the Federal Court found that the Canada Border Services Agency (CBSA or Agency) President's decision to reject the unanimous recommendation of the Classification Grievance Committee (the Committee) was reasonable. Since all three decisions below refer to the President as the Deputy Head, I will do so as well for the sake of consistency.

[2] This is the third time the Deputy Head has considered the Committee's recommendation as well as the third application for judicial review of the Deputy Head's decision. In the first application (2014 FC 741 – *Wilkinson 1*), the Deputy Head's decision was found to be unreasonable due to the insufficiency of the reasons he gave for rejecting the Committee's recommendation. In the second application (2016 FC 1062 – *Wilkinson 2*), the Federal Court again found the Deputy Head's decision unreasonable due to his reliance on a table which inaccurately represented the work description. This appeal concerns the third judicial review (2019 FC 83 – *Wilkinson 3*) from the Deputy Head's decision in which he, once again, rejected the Committee's recommendation.

[3] In this case, the Federal Court found that the Deputy Head's decision was reasonable. Unfortunately, I am unable to agree. I would therefore allow the appeal.

II. The Facts

[4] The Classification Standard for the Border Services Group (the Classification Standard) uses a point-rating system that defines elements of the jobs being classified, defines degrees of the extent to which the element is present in the position being classified and allocates point values to each degree. The person or group assigning or reviewing the classification for any given position determines the degree to which each element is present in the work description of the position(s) being classified and then classifies (or recommends a classification for) the position(s) in question based on the sum of the points attributed to each element. In the case of disagreement with the classification, the matter can be referred to a classification grievance committee which repeats the process and makes a recommendation to the Deputy Head, who may reject the Committee's recommendation, or accept it, with or without modification. In the case of rejection, the Deputy Head must justify his decision with "reasons for non-acceptance, tied directly to the justification used by the committee in arriving at its recommendation": Directive on Classification Grievances (effective July 1, 2015, modified May 6, 2020) (the Directive).

[5] In this case, the 43 appellants, who were all previously employed in various supervisory positions across the country in the Canada Customs and Revenue Agency or the Department of Citizenship and Immigration, were all grouped in "positions ... collectively designated as 'FBC003, Manager, Regional Programs' (MRP) under a generic work description and classified at the FB-06 level" when various border-related programs were merged: *Wilkinson 3* at para. 2.

[6] Dissatisfied with this classification, the appellants submitted job content and classification grievances under paragraph 208(1)(b) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22. In November 2010, the work description grievance was allowed and the employer, the CBSA, signed off on a revised generic work description for the positions (the Work Description), which remained classified at the FB-06 level. The appellants then proceeded with their classification grievances based on the Work Description. The grievance was heard in 2012.

[7] In the course of its process, the Committee met with both employer representatives and with the appellants who provided both written and oral submissions. The Committee members met at least three times and conducted a comparative analysis for each element of the Work Description. The Committee noted that the Work Description did not accurately describe all positions covered by it, but because it had been authorized and signed off on by the Vice President of the Operations Branch, it continued its analysis. The Committee ultimately determined that the element designated as “Decision Making” should be assessed as degree 6 rather than degree 5. This increased the number of points allocated to the position so that it fell within the range for classification at the level of FB-07. The Committee unanimously recommended that the MRP positions be classified at that level.

[8] As noted earlier, the Deputy Head rejected this recommendation, and his decision was judicially reviewed. This appeal arises from the Federal Court’s finding that the Deputy Head’s decision was reasonable.

III. The Federal Court's Decision

[9] The appellants (applicants in the Federal Court) argued that the Deputy Head's decision should be set aside because it was unreasonable and was reached in breach of their right to procedural fairness. The Federal Court examined both issues. It found that the appropriate standard of review for classification grievances is reasonableness and that, in reviewing issues of procedural fairness, the Court should consider "whether the decision maker followed a fair and just process in light of the substantive rights and consequences involved": Reasons at para. 31.

[10] The Federal Court found that the appellants' rights to procedural fairness "fall in the lower spectrum". The duty of procedural fairness was satisfied when they were provided with an opportunity to respond to the package prepared for the Deputy Head by a consultant. The Court found it was open to the Deputy Head to rely on the consultant's analysis of the Committee's decision and the Work Description: Reasons at para. 42.

[11] The Court then went on to analyze whether the Deputy Head's decision to reject the recommendation was reasonable. While finding that in a classification grievance the Deputy Head must accept the Work Description as is, the Court also found that it was reasonable for the Deputy Head to diminish parts of the Work Description that do not accord with the Work Description as a whole, relying on this Court's decision in *Allard v. Canada (Canadian Food Inspection Agency)*, 2018 FCA 85, [2018] F.C.J. No. 473 [*Allard*]. The Court ultimately found that the Deputy Head's conclusion was reasonable because the Work Description was considered in its entirety, the Committee's reasoning was taken into account, and the reasons for rejection

were set out. The Court concluded that the decision was justified, transparent and intelligible and fell within the range of reasonable outcomes.

[12] In order to avoid repeating portions of the relevant documents and the Committee's recommendation at this stage and again later, I will reproduce this material and provide my comments in my analysis.

IV. Statement of Issues

[13] The appellants argue that the Deputy Head's decision should be set aside because it is unreasonable and that the process followed in reaching it, breached their right to procedural fairness. The respondent argues that the Deputy Head's decision is entitled to deference, given the latter's intimate familiarity with the workings of the CBSA.

[14] In light of my conclusion on the reasonableness of the Deputy Head's decision, it will not be necessary to deal with the procedural fairness issue. As a result, I will only examine the reasonableness of the Deputy Head's decision.

V. Analysis

[15] The Federal Court found that the Deputy Head's decision was to be reviewed on the standard of reasonableness. While the decision of the Federal Court was released before the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65 [*Vavilov*], it is consistent with that decision which determined that

the appropriate standard of review for judicial review of decisions of administrative decision makers is presumptively reasonableness, except in certain defined circumstances, none of which are present in this case.

[16] *Vavilov* also stipulated that reasonableness is determined in light of “constraints imposed by the legal and factual context of the particular decision under review”. This means that “each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context”: *Vavilov* at para. 90.

[17] The factual/legal context in this case includes the rules, guidelines, and standards, which the Treasury Board has issued pursuant to its authority over classification of public service positions: see *Financial Administration Act*, R.S.C. 1985, c. F-11. Those standards include the Classification Standard, which includes the MRP positions, as well as the Application Guidelines (the Guidelines), and the Directive in force at the relevant time.

[18] The Directive incorporates an appendix entitled Mandatory Procedures for Classification Grievance (the Procedures) which stipulates, among other things, the composition of a grievance committee. A classification grievance committee must include:

A chairperson who is accredited in classification;

A grievance officer for the Office of the Chief Human Resources Officer; and

An individual from within or without the organization, preferably a manager who has knowledge of the job evaluation standards being used and the work being evaluated.

[19] One would expect a committee with this composition to bring a certain expertise to the exercise for which the committee was struck. The drafters of the Procedures appear to have thought so as well since they specified that, in the event the Deputy Head disagreed with the Committee's recommendation, he must provide reasons which were "tied directly to the justification used by the committee in arriving at its recommendation". Thus, a failure to implement the Committee's recommendation must be justified by reference to the reasons given by the Committee. In other words, the Deputy Head must show why he thinks the Committee's recommendation is wrong.

[20] In terms of a judicial review of the Deputy Head's decision, the make up of the Committee and the onus placed on the Deputy Head to justify non-acceptance of the Committee's recommendation suggest that the Deputy Head is not altogether free to substitute his decision for the Committee's. He must show how he disagrees with the Committee's fact-finding or its reasoning. A reviewing court, such as the Federal Court or this Court on appeal from the Federal Court, should review the Deputy Head's rationale for rejecting the Committee's reasons with these constraints in mind. Thus, if the Deputy Head's reasons for not accepting the Committee's recommendations are not tied to the reasons given by the Committee, his decision will be unreasonable. Similarly, if the Deputy Head misapprehends the Committee's recommendation and rejects it on the basis of something the Committee did not say or decide, his decision will be unreasonable.

[21] The respondent argues that the Deputy Head's decision is reasonable if there are portions of the Work Description which support his decision. I disagree. It is not enough that the Deputy

Head be able to point to some element of the Work Description which might support his decision. The Deputy Head must be able to tie those elements to the Committee's decision and show why the Committee should have preferred the elements which he relied upon.

[22] The respondent invokes this Court's decision in *Allard* in support of his position. *Allard* was a judicial review of the employer's adoption of the grievance committee's decision with respect to a position. The grievors argued that the classification committee (whose reasons were taken to be the employer's since its recommendation had been adopted) erred in not giving effect to elements of the work description which referred to national and international work.

[23] This Court found no reason to interfere with the employer's decision and concluded that the comparison with the benchmark position chosen by the committee was appropriate. It distinguished the grievors' work description from that of the higher rated position to which the grievors were comparing themselves. Nothing in that case suggests that it was sufficient for the employer to find any element in the work description which supported its decision to reject the committee's recommendation, which is not surprising since *Allard* was a case in which the employer accepted the committee's recommendation.

[24] In this case, the basis for the Deputy Head's refusal to accept the Committee's recommendation can be found in the letter dated November 30, 2017, over the signature of Jacqueline Rigg, Vice President, Human Resources Branch, CBSA to one of the grievors: see Appeal Book at p. 868. Since the letter recites that it is "the President's rationale for his decision to reject the recommendation of the classification grievance committee with respect to your

classification grievance ...”, Ms. Rigg can be taken as the President’s [Deputy Head’s] delegate and the rationale set out in the letter can be taken as the Deputy Head’s reasons.

[25] In the course of argument, a good deal was made of a report prepared by a consultant to assist the Deputy Head to comply with the direction given by the Court in *Wilkinson 2* when it returned the matter to the Deputy Head “for a redetermination in which the entire work description of the MRP position is considered”: *Wilkinson 2* at para. 17. In that case, the Deputy Head had before him a chart prepared by human resource officials relating to the decision making element of the MRP position. The Court found that the chart was “significantly deficient in that it ignored or omitted relevant aspects of the MRP work description that arguably correspond to the degree 6 [Examples of Work Activity] and which could reasonably have led to a finding by the Deputy Head to accept the Committee’s recommendation”: *Wilkinson 2* at para. 12.

[26] The consultant apparently considered that her mandate included verifying the accuracy of the Work Description if one is to judge by the references to absence of substantiation, absence of examples, “difficult to support as a core and direct accountability of the MRP”, “no purpose, no link to core work, no scope or direct impact – not rateable” etc. No useful purpose is served by multiplying the examples. The Work Description is what it is and must be taken as such. The consultant’s report missed the point of the Court’s direction which was that the Deputy Head’s decision must be more inclusive of the elements of the Work Description, not less so.

[27] As a result, I place no weight on the consultant's report. Significant portions of the consultant's report were incorporated into the letter signed by Ms. Rigg. Since that letter constitutes the Deputy Head's reasons for his decision, the rationale for his conclusions must be found in his letter and not elsewhere.

[28] The appellants emphasized the consultant's report in making their argument that the Deputy Head had, once again, impermissibly rewritten the Work Description but this argument is compelling only to the extent that the consultant's editing of the Work Description found its way into the Deputy Head's decision. Most of the elements identified in the table at paragraph 50 of the appellants' memorandum did not appear as such in the Deputy Head's rationale for rejecting the Committee's recommendation. However, as will be seen, the Deputy Head did "rewrite" the Work Description "by elevating an EWA [Example of Work Activity] to an essential requirement" : see appellants' memorandum of fact and law at para. 59.

[29] I now turn to the Deputy Head's decision. After describing the work of the positions, the Deputy Head reasoned as follows:

However, in the analysis, the committee failed to consider the operational context in which the MRP position operates as it relates to decision making.

The MRP role as it relates to decisions of national policy and program development and implementation is contributory and does not reach the threshold of being substantive recommendations.

Substantive recommendations generally become the decision without further layers/levels of analysis and scrutiny which is not the case for the MRP contributions. While the MRP contribution may be input to effective national program and policy development and implementation, it is but one perspective in many, including, but not limited to, the Regional Directors to whom the MRP job reports, as well as [a] variety of roles within [the] Operations Branch. Further, the accountability for national programs and policy development lies with the headquarters Programs Branch. It therefore does not meet the threshold of

constituting a substantive recommendation as required for degree 6 of the Decision Making element to apply.

Appeal Book at pp. 869-870

[30] This can be summarized as follows: the MRP's recommendations on questions of national policy and program development and implementation are not substantive recommendations and since substantive recommendations are a criterion for degree 6 Decision Making, the MRP job does not satisfy the criteria for that degree.

[31] This needs to be compared to the Committee's conclusions on Decision Making with particular attention to the making of recommendations. At pages 19-20 (Appeal Book at pp. 604-605) of its Report, the Committee says this about the MRP's recommendations:

There is a need to develop program delivery strategies, define and implement and guide the work that supports the Agency vision and establish/align the business direction of regional multidisciplinary work units or teams. There is also the need to use judgment when making recommendations on operational and fiscal impacts of proposals that will affect service delivery and program effectiveness. The subject positions decide on the appropriate resource allocation, and provide recommendations on programs to senior management. ... The subject positions provide broad perspective, substantive recommendations on the delivery of multidisciplinary programs and policies to districts and divisions within a region, and provide expertise and recommendations to senior Agency management on the drafting, development and implementation of national programs and policies. These recommendations directly affect how national policies and guidelines will be developed and implemented.

[32] The first point to be made is that the Committee did not find that the MRP made substantive recommendations with respect to national policy and program development and implementation. The Committee found that the MRP made substantive recommendations to districts and divisions within a region on the delivery of multidisciplinary programs and policies.

Insofar as senior Agency management is concerned, the Committee found that the MRP provided expertise and recommendations on the drafting, development and implementation of national programs and policies.

[33] If the Deputy Head thought that the Committee said that the MRP made substantive recommendations to senior management, he misapprehended the Committee's report. The Committee was careful to distinguish between substantive recommendations and recommendations *simpliciter*. The Deputy Head did not disagree that the MRP's recommendations affected national policies and guidelines since he found that they were contributory to the development of those policies and guidelines.

[34] The question which remains is whether the making of substantive recommendations is a required element of Decision Making at degree 6. The introductory heading to the discussion of Decision Making in the Classification Standard reads as follows:

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. (emphasis added)

Appeal Book at p. 72

[35] The description of degrees 5 and 6 of Decision Making that follow the heading illustrate the difference in scope between the two degrees:

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.

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.

Appeal Book at p. 72

[36] The Guidelines, which are intended to provide guidance in the application of the Classification Standard, contain these comments on the subject of degrees 5 and 6 of Decision Making:

At degree 5, decisions are taken within the parameters of program objectives and operational constraints. Significant latitude, autonomy and independence is required in making decisions based on significant professional, business and managerial experience. At this level, decisions involve making programs work in the operational environment and decisions impact how programs will be delivered, given the operational context and how the program affects operations.

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.

Appeal Book at p. 102

[37] It will be noted that the descriptions of degrees 5 and 6 Decision Making in the Classification Standard and the Guidelines do not refer to making recommendations let alone substantive recommendations. To understand why making recommendations is referred to under the heading of Decision Making, it is helpful to consider what the Committee had to say about the Work Description.

[38] At page 12 of its Report (Appeal Book at p. 597), the Committee wrote that it “quickly concluded that the generic work description ... does not accurately reflect the duties and

responsibilities of any of the positions occupied by the grievors; segments of the work description apply to some positions and not to others” (emphasis added). However, since the Work Description was the result of a content grievance and was signed and authorized by a management representative, the Committee believed that it had no choice but to evaluate the position as described even though this would result in a recommendation which would clearly “not apply in its entirety to any of the subject positions” (emphasis added): Appeal Book at pp. 597-598.

[39] The Committee concluded by observing that the Work Description was clearly inconsistent with central agency guidelines on the use of generic work descriptions “given that it only partially describes any of the subject positions[,] with some of the content not applying to most of the subject positions, that the subject positions exist in different organizational contexts from region to region and that the generic work description is used for some positions that do not in fact manage any programs”: Committee report at pp. 12-13, Appeal Book at pp. 597-598.

[40] The fact that the Work Description applies to positions which did not in fact manage any programs provides some insight as to the rationale for the inclusion of recommendation-making under Decision Making. If non-managerial positions were to be fairly classified, some mechanism would have to be provided to enable such positions to be scored appropriately under the Decision Making element, otherwise those positions would be under-rated and under-compensated. This suggests that making substantive recommendations was included as a mode of decision making to cover positions which had no program management responsibilities. It does not follow from this that making substantive recommendations is an essential element of

degree 6 (or any other degree) of Decision Making. It is simply another activity which can be counted as Decision Making.

[41] Is there any basis on which the Deputy Head's conclusion that substantive recommendations are "required for degree 6 of the Decision Making element to apply"? The only indicator which might support the Deputy Head's conclusion is found in the Examples of Work Activities in the Guidelines where two of the three examples refer to substantive recommendations. The other example aligns closely with the Committee's discussion of the MRP position's Decision Making.

[42] In *Wilkinson 1* where the Examples of Work Activity were relied upon to support the Deputy Head's conclusion to reject the Committee's recommendation, the Federal Court observed that using Examples of Work Activities to define essential requirements of the position "puts the cart before the horses": *Wilkinson 1* at para. 25. I agree with that assessment. An example is "a thing characteristic of its kind or illustrating a general rule": Judy Pearsall and Bill Trumble, eds, *The Oxford English Reference Dictionary*, (Oxford: Oxford University Press, 1995). Each of the examples is an illustration of the scope of work activities for an MRP, illustrating the broad scope of the position. It is not reasonable to conclude that because "substantive recommendations" appear in some of the examples that making substantive recommendations is an essential aspect of degree 6 Decision Making. It can be an essential part of some MRP positions and not a part of others.

[43] This is the where the Deputy Head rewrote the Work Description so as to require the making of substantive recommendations as an essential element of degree 6 Decision Making when neither the Classification Standard nor the Guidelines contain that requirement. At the risk of repeating myself, Decision Making includes the making of substantive recommendations, but the absence of those recommendations does not exclude a position from any degree of Decision Making.

[44] While on the subject of Examples of Work Activities, the Deputy Head's assertion that Examples 6.5.2 and 6.5.3 reflect appropriately the MRP degree of Decision Making is simply a gratuitous assertion and does not engage with the Committee's reasons on this issue. Nothing more need be said about this.

[45] In any event, the Committee found that the MRP position did make substantive recommendations, but not at the national level. As noted, it was careful to distinguish between substantive recommendations to districts and divisions within a region, as opposed to broad perspective advice and recommendations to senior management.

[46] As a result, I find that it was unreasonable of the Deputy Head to rely on the absence of substantive recommendations at the national level to reject the Committee's recommendation. None of the relevant documents require this.

[47] The second factor which the Deputy Head relied upon to reject the Committee's recommendation was that the latter failed to take into account the operational context in which the MRP operates as it relates to Decision Making: Appeal Book at p. 869.

[48] The Deputy Head observed that, as regards decisions of national policy and program development and implementation, the MRP's input is contributory. With respect, the Committee did not say otherwise. As has already been pointed out, the Committee was careful to distinguish between substantive recommendations made to regional entities and expertise and recommendations made to senior Agency management. The Committee's comment that the MRP's recommendations to senior Agency management would "directly affect how national policies and guidelines will be developed and implemented" is consistent with the Deputy Head's view that the MRP's role in national decision making was contributory.

[49] The Deputy Head then pointed out that "[I]t cannot be said, then that the MRP job has a direct line of sight from its recommendations to the decisions related to national policy development ... it would be more reasonable to interpret the MRP role as input, rather than direct decision making accountability": Appeal Book at p. 870. Once again, the Committee never said otherwise.

[50] The Deputy Head's comments about the organizational structure are more closely related to organizational context:

... the job [MRP] is one of many within a region and there are many regions. There are Regional Directors to whom the MRP job ultimately reports to and a

whole senior regional executive management structure above who have a role to play in providing guidance and making decisions in this regard.

Appeal Book at p. 870

[51] This suggests that the Deputy Head disagreed with the idea that the MRP positions made substantive recommendations at the national level because their position in the organizational hierarchy did not support the idea that their recommendations could be implemented without further analysis and guidance from the levels of management above them. This may be true, but the Committee did not say that the MRP positions made substantive recommendations to the higher levels of the Agency hierarchy.

[52] Taken together, these comments show that while the Deputy Head said that the Committee's mistake was in failing to take into account the operational context in which the MRP operates, his real objection had to do with substantive recommendations and his view that substantive recommendations at the national level are a necessary condition of degree 6 Decision Making. That position is not supported by the Classification Standards, the Guidelines or the Committee's report.

[53] The respondent argues that the internal inconsistencies in the Work Description justified the Deputy Head in resorting to the organizational context to reject the recommendation of the Committee. In fact, the Deputy Head did not refer to inconsistencies in the Work Description and his reference to the organizational context did not refer to any inconsistencies. The fact that counsel are now able to identify some is irrelevant. In any event, any incoherence in the Work

Description should have been resolved in the context of the Work Description grievance and not by further incoherence in the classification process.

[54] At paragraph 85 of *Vavilov*, the Supreme Court held that "... a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker". In this case, the Deputy Head's decision was at odds with the Committee's conclusions as to the attributes of the MRP position and the requirements of the Classification Standard and Guidelines for those positions. The Committee's findings constrained the Deputy Head to the extent that he was required to justify his rejection of its recommendation by reasons which were "tied directly to the justification used by the committee in arriving at its recommendation". In fact, the Deputy Head appears to have misapprehended the Committee's reasons for its recommendation.

[55] The Classification Standard and Guidelines constrained the Deputy Head by identifying the elements of the various degrees of the MRP position's Decision Making. While these documents contemplate that degree 6 Decision Making might involve making substantive recommendations, they could not reasonably be taken to require the making of substantive recommendations as a necessary element of degree 6.

[56] As a result, I find that the Deputy Head's decision was unreasonable.

VI. Remedy

[57] The MRP positions in issue in this appeal were created and classified at the FB-06 level effective February 21, 2007. The Work Description and classification were grieved. The Work Description grievance was allowed in November 2010 and the Committee rendered its decision in July 2012. Since then, the Deputy Head has rejected that recommendation three times and on each occasion, that decision has been found to be unreasonable. A reasonable uninterested bystander could be forgiven for suspecting that the Agency does not have an open mind when it comes to the appellants' classification and the Committee's recommendation.

[58] The Committee acknowledged that the Work Description was a problem and was unequivocal in criticizing it, pointing out that it was inconsistent with central agency guidelines in a number of ways. However, the Committee felt obliged to carry out its mandate. The Agency, on the other hand, does not appear to have come to terms with the Work Description, which has had unfortunate consequences for the appellants.

[59] The usual remedy in judicial review proceedings is to return the matter to the original decision maker for redetermination, often with directions as to how to proceed: see s. 52 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. This has been tried unsuccessfully twice now. Given the length of time this matter has dragged on and the obvious resistance to implementing the Committee's recommendation, the time has come to return the matter to the Deputy Head but with substantive directions so as to bring this long running saga to an end.

[60] In *Allard*, this Court commented that the Federal Court judge who took it upon himself to settle the classification of a position ought not to have done so in the circumstances of that case. In *Allard*, a classification grievance was heard by a first classification grievance committee who found that the existing classification should be upheld. This was set aside on judicial review on the basis that the committee had impermissibly modified the work description by construing it so as to effectively rewrite it. The matter was returned to a second classification grievance committee who came to the same conclusion as did the first committee. This finding was again set aside on judicial review on the same basis as the first decision, namely that the committee had impermissibly modified the work description by misconstruing it.

[61] The judge who heard the second application for judicial review acknowledged that the courts are reluctant to make decisions that have been conferred to administrative tribunals except in extraordinary circumstances. However, the judge felt that he was in the presence of such circumstances and directed the employer to “recognize” the position at the higher classification as requested by the appellant. The factors which led the judge to do so were the fact that both Committees made the same mistake and the passage of time since the grievance was filed.

[62] This Court, in *obiter*, commented that while a reviewing court may direct a particular outcome, that power should only be exercised in the clearest of circumstances. Without purporting to exhaust the circumstances where such a power should be exercised, this Court went on to say that it “should only be exercised when there is only one possible reasonable outcome open to the decision-maker”: see *Allard* at para. 45.

[63] An example of a case where the Court found that there was only one possible reasonable outcome is *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, [2013] F.C.J. No. 196 [*LeBon*]. LeBon, a Canadian, was serving a prison sentence in the United States and applied to serve his sentence in Canada pursuant to the *International Transfer of Offenders Act*, S.C. 2004, c. 21. Of the ten factors to be considered, only one weighed against him. The Minister's original decision was set aside on the basis that he had not considered and weighed all the factors. Upon reconsideration, the Minister came to the same conclusion. In the second judicial review, the Federal Court found that the Minister had only paid lip service to the previous decision and that he had a closed mind. The Court ordered the Minister to authorize the transfer.

[64] This Court upheld the Federal Court's decision. It found that there were two sources of power enabling the Court to exercise its discretion in favour of making a mandatory order. First, once the factor upon which the Minister relied was excluded (because there was no support for it in the record), all of the remaining factors favoured LeBon's return to Canada. It was open to the Court "to conclude on this evidence that the only lawful exercise of discretion [was] the granting of transfer". Second, this Court found that a mandatory order was required to prevent further delay and harm that would be caused if the matter were returned to the Minister for a third decision in circumstances where the Minister did not give serious consideration to this Court's previous decision: see *LeBon* at para. 14.

[65] This case resembles *LeBon* in many ways but differs in at least one respect: the Deputy Head was given a third chance to consider the Committee's recommendation and the result was the same as it was in the previous two cases.

[66] As in *LeBon*, the delay in resolving this matter has caused harm to the appellants. The details of that harm, as particularized in paragraphs 49-51 of the Affidavit of Jerry Jesso, include increased stress in the workplace and in their personal lives, financial hardship, reduced pension benefits (which are particularly acute for those who have retired since these proceedings were begun), and reduced career mobility. The prevention of further delay and harm is a factor justifying this Court's intervention.

[67] In the same way as in *LeBon*, the Deputy Head was unable to come to grips with the issues. Thus, the reasons given by the Deputy Head for rejecting the Committee's recommendation, the absence of substantive recommendations at the national level and the Committee's failure to consider the organizational context are simply not borne out.

[68] Once these elements are taken off the table, to use the phrase this Court used in *LeBon*, all the remaining factors discussed by the Deputy Head closely track the Committee's description of the MRP job. In those circumstances, the only reasonable conclusion is that the Committee's recommendation should be accepted.

[69] I would point out that this is not a case where the underlying classification issue is being determined by the Court. That issue was considered at length by the Committee which prepared a

comprehensive report. This Court's intervention rests on its core strength which is determining if the justification for a decision is reasonable. Having found that the Deputy Head's rejection of the Committee's recommendation was unreasonable, and considering that in three attempts to justify his conclusion, the Deputy Head has been unable to formulate a rationale which withstands review on a deferential standard, this Court is not overreaching in requiring the Minister to accept an expert recommendation that he is unable to justify rejecting.

[70] The decision which the Deputy Head had to make was binary. He could either accept or reject the Committee's recommendation. If he is unable to justify rejecting the Committee's recommendation, the only choice left is to accept it.

[71] As a result, I would allow the appeal, set aside the judgment of the Federal Court, and return the matter to the Deputy Head for redetermination on a basis consistent with this decision and the recommendation of the Classification Grievance Committee within 30 days of the date of this judgment.

VII. Costs

[72] The appellants ask for elevated costs. It is true, as pointed out by the appellants, that the Deputy Head has taken inordinate amounts of time to render decisions in a matter which began in 2007. However, to the extent that the appellants have recovered their costs in earlier proceedings, those periods of delay, if they justify increased costs, have been taken into account. On the other hand, these proceedings result from the Deputy Head's third unsuccessful attempt to justify the rejection of the Committee's recommendation. Notwithstanding the guidance

provided in earlier judicial decisions, the Deputy Head's decision repeated earlier mistakes such as turning elements of Examples of Work Activities into required elements. In the circumstances, the appellants are entitled to elevated costs but not at the level they requested. I would allow them their costs in this Court and in the Federal Court at the top end of Column 4.

"J.D. Denis Pelletier"

J.A.

"I agree.

Yves de Montigny J.A."

"I agree.

Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY: DE MONTIGNY J.A.
RIVAOLEN J.A.

DATED: DECEMBER 22, 2020

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