Federal Court  Cour fédérale

Date: 20161104

Docket: T-1431-15

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[ENGLISH TRANSLATION]

Ottawa, Ontario, November 4, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

CHRISTIANE ALLARD, MARIE-ANDRÉE FREDETTE, HÉLÈNE GAGNON, EL MEHDI HADDOU, ALAIN LAJOIE, SONJA LAURENDEAU, JULIE NAGEL, DANIEL PERRON, FRANCE PROVOST, MARIE-CLAUDE SIMARD, HÉLÈNE SOUCY AND GENEVIÈVE TOUPIN

Applicants

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicants are employed by the Canadian Food Inspection Agency (the Agency). They all hold the position of "Area Program Specialist, Regulatory Veterinary Science" (the Subject Position).

[2] They are involved in a long dispute with the Agency regarding the classification of this position, deemed to be a VM-03 group and level position by the Agency, with an effective date retroactive to June 26, 2001. The applicants maintain that this position should be classified at the VM-04 level, with the corresponding adjustments in terms of remuneration and benefits. A first classification grievance, filed in June 2010 following the Agency's decision to maintain the VM-03 level [the 2010 Grievance], was unsuccessful. However, the Court, in a judgment rendered on August 10, 2012, by Justice Yves de Montigny, now a judge at the Federal Court of Appeal, set aside this decision, (*Allard v. Canadian Food Inspection Agency*, 2012 FC 979 [*Allard*]). De Montigny J. found that the Classification Grievance Committee overstepped its jurisdiction and did not respect the Classification Grievance Process in effect at the Agency by modifying the work description covered by the grievance. He concluded that in doing so, the Committee usurped the role of an arbitrator adjudicating a work description grievance and thus breached the principles of natural justice and rendered an unreasonable decision (*Allard*, at para. 41).

[3] Following this decision, a new Classification Grievance Process was initiated between the parties [the 2015 Grievance], but the outcome was the same: the grievance was dismissed. The applicants argue, pursuant to this application for judicial review, that the Classification Grievance Committee responsible for hearing this new grievance [the Committee] was guilty of the same error that was sanctioned by De Montigny J., i.e. that it reviewed the grievance, minimizing and even removing certain aspects of the work description for the Subject Position on which the parties had agreed, in April 2009, following a work description content grievance filed by the union representing the applicants. They further claim that the Committee also breached its duty of procedural fairness by assigning a role to one of its members that it should not have assigned. The member was to act on behalf of management's designated representatives.

[4] In the event that the Court were to reach the result contended for by the applicants, the applicants are asking the Court to render the decision which they believe the Agency should have rendered, and therefore order it to classify the Subject Position at the VM-04 level.

II. Background

[5] The Agency was created in 1997. For purposes of its employee relations, it is a "separate agency" within the meaning of the *Public Service Labour Relations Act*, S.C. 2003, c. 22. Under section 13 of its incorporating act, the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, it has the authority to appoint its employees, set the terms and conditions of their employment, assign duties to them and make decisions relating to organization and classification (see also: *Allard*, at para. 5).

[6] In this regard, the Agency implemented the *Organization and Classification Policy* (the Classification Policy) to which is attached the *Classification Grievance Process*, a separate procedure from the one used to deal with grievances involving the content of an employee's work description, which is governed by the collective agreement. A more detailed description of this system is provided in *Allard*:

> [6] The Agency adopted the *Organization and Classification Policy* (Classification Policy), which is used as a framework for managing and monitoring the Agency's organizational design and classification activities. Classification decisions, including those based on classification grievances, are made in accordance with this policy and the corresponding directives, guidelines and principles of organizational design, work descriptions and definitions of occupational groups and classification standards approved by the Agency. The classification standard used to evaluate the veterinary medicine group positions provides that the assessment of positions and the determination of their level of classification are based on the following five factors: nature of the work, complexity of the work, professional responsibility, administrative responsibilities and impact of recommendations and activities.
>
> [7] Unlike content grievances on an employee's work description, which involve the interpretation of the collective agreement, classification grievances are excluded from it and the applicable process is instead governed by the Agency's *Classification Grievance Process*. Under this *Process*, an employee must file a classification grievance in writing with his or her immediate supervisor within the Agency. Each grievance is reviewed on its merits and a recommendation on the position's classification is made by a Classification Grievance Committee (the Committee) to the Vice President of the Agency through the Manager, Classification and Organization Design. The Vice President, as the President's representative, reviews the Committee's report and may either confirm the Committee's recommendations, render a decision in cases of minority and majority reports or render a separate decision [*references omitted*].

[7] I would add to this description that the Classification Policy uses classification standards to promote a classification system "that establishes the relative value of all work at the

Agency." For these purposes, the relevant classification standard in this case – the *Veterinary Medicine Group Classification Standard, Scientific and Professional Category* [the Classification Standard] – describes about 10 benchmark positions (BMPs), which are used to score the degree of difficulty of each of the five evaluation factors applicable in this case based on a five-level scale.

[8] As in the 2010 Grievance, of the five factors used to evaluate the Subject Position based on the Classification Standard, only the "*Kind of Assignments*" and *"Complexity of Work"* are at issue in the 2015 Grievance. This means that neither the assignment to the VM (Veterinary Medicine) professional group nor the evaluation of the *"Professional Responsibility"*, *"Management Responsibility"* and *"Impact of Recommendations and Activities"* factors are in dispute between the parties. As in 2010, the review of the 2015 Grievance was based on the work descriptions agreed to by the parties. The applicants contend that it is sufficient that one of the two contested factors be assigned a numerical difficulty score of 4 for the classification of the position to increase from a VM-03 level to a VM-04 level.

[9] With respect to the *Kind of Assignments* factor, when reporting on its deliberations, the Committee was of the view that the benchmark positions cited by the applicants did not warrant a numerical difficulty score greater than level 3. In the case of the Veterinarian, Infectious Diseases, BMP-5, the Committee found that the kind of assignments involved in the Subject Position were comparable, but not more difficult, as the applicants claimed, than this level 3 benchmark position. Moreover, the Committee was of the opinion that the kind of assignments involved in the Chief, Control Programs, Animal Health Division, BMP-9, level 4,

benchmark position were not comparable to the Subject Position, as the applicants claimed, but rather were more difficult.

[10] The Committee drew the same conclusions with respect to the *Complexity of Work* factor, deeming the work done by BMP-5 and BMP-9 incumbents to be of equal and greater complexity, respectively, than the work performed by the applicants.

[11] The Committee then examined the work descriptions for VM-04 group and level positions, proposed by the applicants "as relativity positions." It ultimately found that these two positions at the Agency's national headquarters – the "National Specialist, Meat Processing Program" and the "Senior Staff Veterinarian" positions – involved responsibilities "for work at a national level," requiring more extensive knowledge and a broader strategic understanding of national issues and "had a direct impact on operations at the Agency level having functional orientations on the [subject positions], as described in their work descriptions."

[12] Under the "Evaluation" heading, the Committee strove to demonstrate, by comparing the work description for the Subject Position to the work description for BMP-5, supra, BMP-4 (District Veterinarian) and BMP-8 (Veterinary Drugs Evaluator) positions, that the two factors at issue – *Kind of Assignments* and *Complexity of Work*, were correctly evaluated at the VM-03 level.

[13] It should be noted that the Committee did not consider it relevant to contact the two designated management representatives because one of the Committee members, Nicole Bouchard-Steeves, [TRANSLATION] "had extensive knowledge of the work performed by the complainants and was considered a subject matter expert."

III. Issues and standard of review

[14] This case raises the following three issues:

a) As in *Allard*, did the Committee breach its duty of procedural fairness by modifying the work description for the Subject Position, and by acting in this manner, did it render an unreasonable decision?

b) Did the Committee also breach its duty of procedural fairness by consulting one of its members as an expert instead of obtaining the desired clarifications from the designated management representatives?

c) If the Court is of the opinion that the application for judicial review should be allowed, what remedy is appropriate under the circumstances of this case?

[15] As De Montigny J. pointed out in *Allard*, although, according to the *Classification Grievance Process*, the final level decision in this matter is that of the Agency's Vice President, Human Resources, and that it is therefore, in principle, a decision subject to judicial review, it is well established that this decision, insofar as it endorses the Committee's recommendation, cannot be separated from the Committee's report, and any error made by the Committee will invalidate the Vice President's decision (*Allard*, at para. 19).

[16] It is also well established that the standard of correctness applies to the review of procedural fairness issues, which means in this case that the Court itself must be satisfied that

the procedure followed by the Committee in dismissing the 2015 Grievance is in accordance with the principles of natural justice and procedural fairness (*Allard*, at paras. 20-21; see also: *Canada (Attorney General) v. Sketchley*, 2005 FCA 404).

[17] Moreover, there is no doubt that when the merit of a decision on a classification grievance is reviewed, it raises questions of mixed fact and law within the expertise of the decision-maker, which can be reviewed according to the standard of reasonableness (*Allard*, at para. 20). According to this standard of review, the Court must show deference to the decision-maker and intervene only if the decision at issue does not "fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47).

[18] In this case, given my response to the first issue, it will be necessary to deal with the third issue, but not the second.

IV. Analysis

A. *The Committee breached its duty of procedural fairness by modifying the content of the work description for the Subject Position and, in doing so, tainted the reasonableness of its decision.*

[19] As I have just noted, the Court is not required to exercise deference in determining whether the rules of procedural fairness have been followed in a given case. Moreover, I cannot undertake this exercise, in the particular context of this matter, without considering the *Allard* case, which, for all intents and purposes, involves the same parties as this case and the

same facts, including the same work description and legal issues. I must therefore ask myself, as the applicants have asked me to do, whether the decision rendered by the Committee is affected by the same flaws as those which led the Court to find that the Committee's decision was procedurally unfair, having considered the 2010 Grievance. I must also ask the same question regarding the reasonableness of the Committee's decision.

[20] If the Committee's decision is affected by the same flaws, I find that, although I am not technically bound by the decision rendered in *Allard*, the Court's intervention will be warranted. According to the principle of judicial comity, a judge is indeed invited to follow a decision rendered by a colleague when the ruling, unless it involves different facts, deals with the same issues, is obviously not erroneous in law and would not result in an injustice if it were applied (*Apotex Inc. v. Allergan, Inc.*, 2012 FCA 308 at paras. 46-48 and *Pfizer Inc. v. Canada (Health)*, 2007 FC 446 at para. 28).

[21] In this case, although the Committee structured its decision differently, I am of the opinion that it ultimately erred in the same way as the Committee that adjudicated the 2010 Grievance. It set aside the benchmark positions and the two relativity positions proposed by the applicants, minimizing, in particular, the national aspect of the work and responsibilities outlined in the work description for the Subject Position, thus ignoring the wording of the work description. It thus usurped the role of a work description grievance arbitrator, the only authority empowered to settle disputes concerning the content of a work description.

[22] As De Montigny J. pointed out in *Allard*, at paragraph 41, when a classification committee identifies a fundamental disagreement between the parties regarding the work description that it must assess, "it must remove itself from the grievance until there has been an agreement or, where applicable, an arbitral decision on the work description." If it fails to proceed accordingly, the classification committee breaches the dispute resolution procedure concerning the content of a work description, which is provided for by the collective agreement and takes precedence over the Classification Grievance Process. The Agency's *Classification Grievance Process* is clear in this respect:

> B. Classification grievance
>
> …
>
> 2. A classification grievance does not include disagreement concerning the work description content or the effective date of the classification decision. These matters are resolved through the labour relations grievance procedure provided for in collective agreements.
>
> 3. A labour relations grievance relating to work description content takes precedence over a classification grievance. A decision on a work description content grievance for a position must be rendered before a classification grievance on that position may proceed. If, the work description is modified as a result of a job content grievance, a new classification decision must be issued to which the employee may exercise the right of a new classification grievance. Thus, the initial classification grievance becomes obsolete.

[23] It goes without saying that, in the exercise of its duties, a classification committee may not modify the work description or refuse to consider the duties and activities it contains (*Allard*, at para. 26). I note here that an agreement was reached on the work description for the Subject Position pursuant to a work description content grievance raised under the collective agreement binding the applicants and the Agency.

[24] As in *Allard*, the issue to be resolved here is whether the Committee modified the work description and found, as the Committee that adjudicated the 2010 Grievance, that it should dismiss the grievance before it, or whether it has simply considered the information before it to ensure that it understands the nature of the applicants' duties.

[25] In *Allard*, De Montigny J. noted that the management representatives who had been called before the Committee had not simply modulated the applicants' responsibilities to take into account the context in which the activities in the work description were performed, but had in many respects challenged the very nature of these activities. He found that the evidence provided by the management representatives showed that the Classification Committee "did not merely assess the frequency or degree to which the duties in the work description were actually performed, but that it went further by modifying the work description itself" (*Allard*, at para. 34).

[26] De Montigny J. illustrated this finding based on the way the Classification Committee dealt with seven (7) of the twenty-one (21) main activities listed in the work description—activities 1, 4, 6, 7, 10, 17 and 20. In this regard, it is appropriate to reproduce the relevant passages of De Montigny J.'s decision:

> [29] The first activity is "[d]evelops and maintains Canadian Food Inspection Agency (CFIA) regulations, policies, programs, procedures and standards concerning zoosanitary requirements and food safety". The applicants stated that they performed these duties and they provided examples to this effect, and their supervisors essentially confirmed their statements. However, the managers stated that this key activity [TRANSLATION] "is the responsibility of the positions at headquarters" and minimized the responsibility of the applicants, stating that the applicants are [TRANSLATION] "consulted" in developing policies and [TRANSLATION]

"participate" in writing some documents. Finally, the applicants had told the Committee that they develop policies for the Quebec region in consultation with colleagues in other parts of Canada, whereas the managers stated that they were responsible for [TRANSLATION] "keep up to date" documents for the Quebec region.

[30] Even more significant is the gap between activities 4 and 17 as described in the Work Description and the comments made by the supervisors and managers before the Committee. Activities 4 and 17 of the Work Description read as follows:

> 4. Consults with provincial governments and Area-based industry groups. Represents the CFIA on and leads international, national and regional committees and working groups participating in bilateral and multilateral consultations and negotiations relating to Canadian policies and programs concerning zoosanitary requirements and food safety.
>
> 17. Negotiates the requirements applicable to import and export certification as well as the requirements of programs concerning animals, animal products, animal by-products and other related products. Provides interpretation and advice regarding zoosanitary and food safety requirements applicable to imports/exports.

[31] With respect to activity 4, the supervisors denied that the applicants lead international groups, while the managers stated that the applicants [TRANSLATION] "are not at all involved at the international level and do not participate in bilateral and multilateral consultations relating to Canadian policies and programs concerning zoosanitary requirements and food safety". With respect to activity 17, the supervisors testified before the Committee that the applicants do not conduct negotiations as provided in this key activity because this kind of work is done in "Ottawa", while the managers categorically stated that the applicants [TRANSLATION] "do not have responsibilities relating to the first part of this key activity and this responsibility belongs at the national level".

[32] Activity 6 concerns developing and participating in the development of opinions, interpretations, recommendations and science-related talks concerning zoosanitary requirements and food safety programs, and presenting them to the Agency's senior

> management, Network and Operations personnel and other government and non-government organizations. On this point, the supervisors and managers alleged that the applicants performed this type of work [TRANSLATION] "in Quebec only".
>
> [33] Less of a disparity was noted between the work description and the comments from management about activities 7 and 10. However, activity 20 also reveals major disparities between the text of the work description and the managers' perception of it. This activity consists in responding to questions and in acting as national and regional spokesperson with respect to zoosanitary and food safety policies and programs, in response to questions from the Agency's personnel, representatives of national and foreign governments and the industry, the general public and the media. While the applicants stated that they regularly act as national spokesperson for the Agency, particularly in French, the supervisors and managers insisted that the applicants speak for the Agency [TRANSLATION] "mostly in Quebec, but also at the national level, especially because of the language".

[27] Noting that there were discrepancies between the applicants and management over essential aspects of the work description for the Subject Position, De Montigny J. concluded that the Classification Committee could not ignore this fact and review the classification grievance without first making sure that the parties agreed on the work description (*Allard*, at para. 37). He found that the Committee has thus exceeded its jurisdiction "by modifying the content of the applicants' work description without giving them the opportunity of being heard by an arbitrator" (*Allard*, at para. 38).

[28] I am of the view that this finding, which, with all due respect, appears to be based on a correct reading of the applicable law, is warranted in this case.

[29] I would point out at the outset, as De Montigny J. did in *Allard*, that although the work description is not the only element that a Classification Grievance Committee can consider in

assessing the relative value of a position, it nevertheless remains a crucial element (*Allard*, at para. 39). I would also note that the fact that the incumbents in a position may be called upon to perform duties which correspond only to part of the requirements of the work description "does not modify the job description or establish that the requirements which it embodies are no longer in effect" (*Eksal v. Canada (Attorney General)*, 2006 FCA 50 at para. 10). In this case, the applicants admitted that they do not necessarily perform all the duties listed in their work description (*Allard*, at para. 25). However, it must be assumed that, having been appointed to the Subject Position, they meet all the requirements specified in the work description for this position, which makes this position critically important as a comparison tool for assessing the relative value of a position for classification purposes (*Eksal*, at para. 10).

[30] In this case, just as the Classification Committee that studied the 2010 Grievance, the Committee, in its review of the *Kind of Assignments* factor, said it disagreed with the choice of the BMP-9, level 4 (Chief, Control Programs, Animal Health Division) benchmark position, essentially on the basis that several of the key duties and activities of the Subject Position were, contrary to those of the BMP-9 benchmark position, performed at the regional or provincial levels, rather than at the national level. It will be helpful to reproduce the Committee's deliberations on this issue, which, it is important to specify, make up the heart of the Committee's report, the part that must clearly indicate how the Committee arrived at its decision (*Laplante v. Canada (Food Inspection Agency)*, 2004 FC 1345, at paras. 18-19). The relevant portions of these deliberations are:

> [TRANSLATION] [The applicants' representative] noted that both positions are responsible for ensuring compliance with the provisions of the *Animal Disease and Protection Act* and, where appropriate, ensuring that regulations made under the Act are

> adequate to control/eradicate diseases. The Committee found that BMP-9 is senior to the [Subject Positions] because, in order to ensure that regulations made under the Act are adequate across Canada, the BMP must assess the effectiveness of disease control programs by coordinating multi-region surveillance methods, ensuring that adequate statistical data compilation systems are in place and issuing directives and guidelines to the field veterinarians through Regional Veterinarians. Also, the [Subject Positions] ensured that regulations made under the Act were adequate in the region by monitoring program implementation, assessing program effectiveness, and making recommendations at the operational level.
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> [The applicants' representative] also said both positions provide interpretations and recommendations on regulations and programs in their fields of specialization. The Committee found that BMP-9 is senior to the [Subject Positions] because the incumbent is responsible for providing the Associate Director with recommendations on the implementation of national programs that have an impact across Canada. Also, the [Subject Positions] had to make recommendations to the Director through his (sic) immediate supervisor, the Program Manager, on program implementation or when programs were not implemented as expected.
>
> [The applicants' representative] said both positions must "ensure the equitability of maximum compensation rates for animals ordered destroyed under the *Animal Disease and Protection Act*." The Committee found that BMP-9 is senior to the [Subject Positions] because not only does the incumbent obtain the relevant information from the owners, he resolves problems because husbandry conditions differ between provinces in Canada. Consequently, the uniformity of the programs is often altered unintentionally and the BMP must be able to identify these deviations nationally and take corrective action whereas the [Subject Positions] were responsible for their region.

[31] However, a review of the work description for the Subject Position reveals that there is nothing to limit the duties of the incumbents of the Subject Position. In particular, with respect to the adequacy of the regulations, the incumbents of the Subject Position are responsible for developing and updating regulations (Work description, Respondent's record, Vol. 1, page 64), which includes the responsibility to [TRANSLATION] "determine the need to amend the

regulations" and [TRANSLATION] "to amend regulations" in consultation with the Agency's and the Department of Justice's Regulatory Affairs and Legal Services staff and animal health and food safety stakeholders (Work description, Respondent's record, Vol. 1, pages 66-67). Nothing in the work description limits this work to ensuring that regulations made under the Act be [TRANSLATION] "adequate in the region" and which would involve only making [TRANSLATION] "recommendations at the operational level" for these purposes.

[32] Nor do I see anything in the work description that limits the responsibility of the incumbents of the Subject Position to a strictly regional role in seeing to the implementation of programs and the assessment of their effectiveness. On the contrary, the national scope of this responsibility is clearly indicated in the wording of the work description:

> [TRANSLATION] Review, develop comments and make appropriate recommendations when programs are not implemented as expected. Ensure Canada-wide uniformity in implementing the various meat inspection and animal health programs (Work description, Respondent's record, Vol. 1, page 65);
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> Supervise program implementation, and assess the effectiveness of programs concerning zoosanitary requirements and food safety. Plan, implement and conduct audits on the implementation of programs provided either by [the Agency] or federal programs delivered in the provinces (Work description, Respondent's record, Vol. 1, page 65);
>
> Monitor, evaluate and review developments in veterinary science, zoosanitary requirements and food safety at the regional, national and international levels. Identify emerging concerns and risks to improve [Agency] programs (Work description, Respondent's record, Vol. 1, page 65);
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> Review and analyze scientific and technical information on dangers to human and animal health; assess the need for new policies or changes to existing programs; prepare policy proposals to respond to identified needs; […] (Work description, Respondent's record, Vol. 1, page 66);

> Develop program-related documents, and create policies, procedures, guidelines, memos and standards to be applied nationally and regionally and disseminate them and make changes to manuals and training materials (Work description, Respondent's record, Vol. 1, page 67);
>
> Identify programs that are inadequate, inappropriate, incomplete or unachievable. Identify what is essential to the restructuring of programs and related documents (Work description, Respondent's record, Vol. 1, page 67);
>
> Plan and conduct audits and evaluations of programs concerning zoosanitary requirements and food safety. Verify whether [Agency] inspection staff comply with the relevant requirements. Inspect documents and reports. Consult with Network and Operations staff and participate in the audit of these programs or conduct these audits to ensure compliance with applicable legislation and standards. […] Revise policies or procedures to be implemented at the national level (Work description, Respondent's record, Vol. 1, page 68).

[33] Finally, the Committee's opinion that the incumbents of BMP-9 are better equipped than the incumbents of the Subject Position to ensure the equitability of maximum compensation rates for animals ordered destroyed because of their knowledge of the various husbandry conditions in the various Canadian provinces also poses a problem. Here again, according to the Committee, the expertise of the incumbents of the Subject Position is strictly regional in this respect. However, I see no such limitation in the work description.

[34] In terms of the *Complexity of Work* factor, I note that the Committee's finding on the rationale for assigning a level 4 to incumbents of BMP-9 is again based on the national character of the duties they are required to perform, as opposed to the regional nature of the duties of the incumbents of the Subject Position:

> [TRANSLATION] […] The Committee found that BMP-9 is senior to the [Subject Positions] because they (sic) are responsible for

> establishing compensation rates that are to be applied nationally for animals destroyed whereas the [Subject Positions] were responsible for the Quebec region.
>
> […] The Committee found that the BMP-9 is senior to the [Subject Positions] because the incumbent is responsible for ensuring that an adequate national statistical data compilation system is in place to capture the information provided by the regions. Also, the [Subject Positions] were responsible for capturing relevant information in their province and providing provincial statistics to the national level of the Policy and Programs Branch for the National Capital Region (NCR).
>
> […] The Committee found that the BMP-9 is senior to the [Subject Positions] because the incumbent must inform the Deputy Minister (Assistant Vice President), on the status of various animal diseases across Canada whereas the [Subject Positions] informed management levels up to the Executive Director (EX-03) on the status of various animal diseases in the Quebec region.
>
> [The applicants' representative] said the positions are equivalent because both ensure that programs that have been developed to control animal diseases are implemented so as to achieve the required outcomes. […] The Committee found that the BMP-9 is senior to the [Subject Positions] **because the incumbent's general responsibility is at the national level whereas the [Subject Positions] were at the level of their region**."
>
> (Emphasis added.)

[35] I also share the applicants' view regarding the process the Committee used to compare the Subject Position to the BMP-5 benchmark position, in particular by minimizing the responsibilities of the incumbents of the Subject Position to a consultation role subject to the more extensive expertise of the National Specialists or Senior Veterinarians. As De Montigny J. before me (*Allard*, at para. 29), once again, I fail to find any support for this in the work description for the Subject Position.

[36] I would point out, in conclusion, that the Committee, like the Committee that dealt with the 2010 Grievance, did not select the "National Specialist, Meat Processing Program" or the "Senior Staff Veterinarian" positions, both at the VM-04 level, proposed by the applicants "as relativity positions" because these positions included responsibilities "for work at a national level," thus relegating the scope of the responsibilities of the incumbents of the Subject Position to a strictly regional or provincial level, which, as we have seen, does not reflect the content of the work description for the Subject Position.

[37] Given the above, it seems clear to me that the Committee made the same error as its predecessor in ignoring the wording of the work description, something it could not do without usurping the role of a work description content grievance arbitrator, thus breaching the principles of natural justice because this meant that it was short-circuiting the procedure set out in the collective agreement and the Agency's policies for discussing the accuracy of the content of a work description.

[38] I would like to reiterate that the work description for the Subject Position was approved by the employer in April 2009, although the manager who settled the work description content grievance on behalf of the Agency indicated that she may not have read the contents of said work description. Insofar as the employer continued to disagree on essential aspects of the work description, as clearly seems to be the case, it was the employer's responsibility, as De Montigny J. noted in *Allard*, to "file a content grievance that would have been heard by an impartial arbitrator subject to the judicial review of this Court" (*Allard*, at para. 37). The issue must not be resolved by the Classification Grievance Process, but through the grievance

procedure set out in the collective agreement governing the relationship between the applicants and the Agency.

[39] Moreover, it appears that the Committee misrepresented its reflection when it stated that its task not only involved establishing the appropriate group and level for the work description covered by the classification grievance, but also involved evaluating the work description [TRANSLATION] "based on the duties and responsibilities assigned by management, which were performed by the employees," as if it were allowed to deviate from the content of the work description on the basis ultimately of management's view of the work description.

[40] This procedure is all the more questionable in that, at the hearing of the grievance, the Committee did not find it useful to appeal to either of the designated management representatives, preferring to rely on the expertise of one of its members of its confidential deliberations. The Agency argues that the Committee was perfectly entitled proceed as it did. That may be so, but in the particular context of this dispute between the applicants and the Agency, which had already requested the intervention of the Court, this choice, in my view, did affect the transparency of the process.

[41] Finally, I cannot accept the Agency's argument that the Committee did not minimize the content of the work description for the Subject Position, but merely [TRANSLATION] "put it into perspective" by pointing out its regional vocation, based on the organizational background. This approach failed in *Allard*. It must also fail in this case.

[42] As in *Allard*, and for the same reasons, I too come to the same conclusion, because their correlation is very strong here as in *Allard*, that the Committee's breach of the principles of natural justice had a determinative impact on the Committee's classification of the Subject Position to the point that its reasonableness was affected (*Allard*, at paras. 3940).

[43] The applicants' application for judicial review is therefore allowed. However, I still have to determine what remedy is appropriate in the circumstances of this case where, for the second time in as many instances, the Court sets aside, for essentially the same reasons, the decision of a Classification Grievance Committee involving the same parties and dealing with the same work description.

B. *The appropriate remedy*

[44] The applicants are asking the Court to substitute the Agency's decision with its own rather than referring the matter to a new Classification Grievance Committee for reconsideration of their grievance. In other words, they are requesting an order directing the Agency to classify the Subject Position at the VM-04 level. The Agency argues that the Court does not have that power since it is not for the courts of law, in its view, to substitute their opinion for that of the administrative decision-maker.

[45] Subsection 18.1(3) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, underpins the remedial powers available to the Court when it receives an application for judicial review. This provision reads as follows:

Powers of Federal Court	**Pouvoirs de la Cour fédérale**
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[46] It is important to note in this regard that the application for judicial review is inherently an extraordinary remedy and that the resulting remedial power is in essence, discretionary (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, at para. 30; *Letarte et al, Recours et procédure devant les Cours fédérales*, Montréal: Lexis Nexis, 2013, pages 73-76).

[47] The applicants believe that, although the process is exceptional, the Court is nevertheless empowered, by virtue of its discretion, to render the decision that should have been made by the administrative decision-maker where: (i) once the error that tainted the administrative decision-maker's decision has been corrected, the only legitimate means for that decision-maker to exercise its powers is to grant the application before it; and (ii) a further delay would

cause harm. They cite *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55 at para. 14 [*LeBon*]; *Murad v. Canada (Citizenship and Immigration)*, 2013 FC 1089 at paras. 66-67; *Boogaard v. Canada (Attorney General)*, 2014 FC 1113 at paras. 85-90; and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at para. 18 [*D'Errico*] as examples.

[48] The applicants argue that the Committee almost entirely based its dismissal of their grievance on the fact that they do not perform their duties at the national level and that they could consult national specialists when developing policies and regulations. They also contend that, in all other respects, the Committee, in its comparative exercise, had for all intents and purposes accepted their arguments that, but for these two errors, the only legitimate way for the Committee to exercise its discretion in the 2015 Grievance would have been to allow it. In this respect, they note that according to the Classification Standard, assigning a numerical difficulty score of 4 to either the *Kind of Assignments* or the *Complexity of Work* factor is sufficient, in principle, to shift the Subject Position to a level 4 classification.

[49] With respect to harm, the applicants argue that a second referral of the review of their grievance to a Classification Grievance Committee would add to the substantial delays that have already occurred in this case. They note in this respect that the dispute between them and the Agency concerning, firstly, the contents of the work description for the Subject Position and, secondly, the classification of the position, dates back to October 2007, and that this dispute involves determining the legal position of the parties on this issue retroactively to at least June 2001.

[50] As the Agency points out, in *Canada (Attorney General) v. Gilbert*, 2009 FCA 76 [*Gilbert*], a case similar to ours, the Federal Court of Appeal reversed a judgment of this Court that directed the decision-maker to assign a given score to the position held by the respondent. According to the judgment, when this Court determines that an application for judicial review ought to be granted with respect to a decision following a Classification Grievance Committee recommendation, it should refer the matter back to the decision-maker for reconsideration in deference to the high level of expertise of these committees and decision-makers and the special and specialized nature of the regime, which they are both called upon to implement (*Gilbert*, at paras. 21-23). This judgment, says the Agency, is perfectly aligned with *Gauthier v. Canada (Attorney General)*, 2008 FCA 75 [*Gauthier*], where the Federal Court of Appeal ruled that neither it nor this Court had the authority to decide the substantive issue during a judicial review, its primary function in this case being to rule on the legality, not the propriety, of the decision under review (*Gauthier*, at para. 48).

[51] However, as we have seen, there are situations which are an exception to this rule, where the outcome of a case was dictated on the margins of a judicial review. The issue is whether this case is one of them. I believe it is.

[52] In *D'Errico*, supra, the Federal Court of Appeal noted that the exceptional power to decide the outcome of a case recognizes "that administrative tribunals should be allowed another chance to decide the merits of the matter and not have the reviewing court do it for them" (*D'Errico*, at para. 17). Here, the Agency has been given a second chance, just as it was given to the Minister of Justice in *LeBon*, supra. In that case, which involved a transfer

application under the *International Transfer of Offenders Act*, the Federal Court of Appeal found that this Court had solid grounds to make a mandatory order against the Minister instead of sending the matter back to him a third time in the hope that he would render a decision that would "follow Parliament's law and the Courts' decisions" (*LeBon*, at paras. 11, 14 and 15). In that particular instance, the Minister claimed, as does the Agency in this case, that in granting the second judicial review this Court had no other alternative but to refer the matter back to the Minister.

[53] In *D'Errico*, the Federal Court of Appeal also pointed out that there are exceptions to the principle that the Court can make a mandatory order only where the outcome of the case on the merits is a foregone conclusion – in other words the evidence "can lead only to one result" (*D'Errico*, at para. 16). These exceptions include instances where there has been "substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute" (*D'Errico*, at para. 16). In this case, based on this exception, the Federal Court of Appeal opted to decide the outcome of the matter although it was dealing for the first time with an application for judicial review of the Pension Appeals Board's dismissal of the appeal filed by the applicant against the Minister of Human Resources and Social Development Canada's refusal to pay him a disability pension under the *Canada Pension Plan*.

[54] Here, I reiterate that contrary to the situation in *Gilbert*, the Agency has already had a second chance to rule on the classification grievance filed by the applicants, but made the same errors as it did the first time. I would also point out that the dispute opposing the parties involves only two of the five evaluation factors established by the Classification Standard. Following the decision rendered in *Allard* and the decision that I am rendering today, the evaluation of the two factors at issue has in both cases been decided, for all intents and purposes, on the basis of considerations that the Committee, and the committee that dealt with the 2010 Grievance before it, could not cite without overstepping its jurisdiction.

[55] If we exclude these considerations, I tend to think that the evidence on record leads to a foregone conclusion, that the *Kind of Assignments* and/or *Complexity of Work* factors must receive a numeric difficulty score of 4. If I am wrong on this issue, I find that because the dispute between the parties has been ongoing since 2007 and directly involves the applicants' level of remuneration and the resulting employee benefits retroactive to June 2001, the additional delay attributable to remitting the matter to the Agency would threaten to bring the administration of justice into disrepute. In such a scenario, what would prevent the Agency from committing the same error a third time? That is a good question.

[56] I am fully aware that in matters of position classification, the Agency and the committees that deal with classification grievances exercise specialized functions and that deference is required when the Court is called upon to review their decisions in this area. I am also aware that the financial issues for the Agency are considerable given the retroactive period involved. However, these issues are just as considerable for the applicants.

[57] I am therefore of the opinion that, given the particular context of this case, it is appropriate that I exercise my discretion and make an exception to the rule that the Court should refrain from deciding the outcome of a case. To further delay this dispute does not appear to me to serve the interests of justice.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review be allowed;
2. The decision of the final level of the grievance procedure, rendered on July 7, 2015, by the Vice President, Human Resources, of the Canadian Food Inspection Agency, be set aside;
3. The Court directs the Vice President, Human Resources, of the Canadian Food Inspection Agency to recognize the position of Area Program Specialist, Regulatory Veterinary Science at the VM-04 level;
4. The whole with costs to the applicants.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 5, 2016
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	NOVEMBER 4, 2016

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