Federal Court Cour fédérale

Date: 20240717

Docket: T-1922-22

Citation: 2024 FC 1116

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 17, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MATHIEU BOUCHARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mathieu Bouchard is applying for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Canada Pension Centre regarding an amount owing to him as the transfer value of his pension benefit.

[2] In fact, the decision regarding the amount communicated to the applicant on April 11, 2022, was more than 10% less than the estimated transfer value he was given in early December 2021, a few days after he resigned from his position as Chief of Staff to a minister. From November 22, 2015, to November 25, 2021, he worked as Chief Advisor to the Prime Minister, and later became Chief of Staff to a minister. After his departure, Mr. Bouchard was entitled to an annuity under the *Public Service Superannuation Act*, RSC 1985, c P-36 [Act]. The amounts communicated to the applicant in April 2022 were confirmed by email on August 17, 2022. It is this confirmation and its brief explanation that the applicant is challenging through an application for judicial review.

I. <u>The facts</u>

[3] The facts in this matter are not contested.

[4] The Canada Pension Centre finds it source in the *Department of Public Works and Government Services Act*, SC 1996, c 16, the department being currently designated as Public Services and Procurement Canada. It is the Pension Centre that manages the federal public service pension plan. The other important figure in this case is the Treasury Board Secretariat, which, according to the evidence submitted by the respondent, develops the policies involving the pension plan. The respondent's evidence also indicates that it provides instructions to the Pension Centre about the main guidelines and is responsible for the regulations that support the applicable law and give it life.

[5] After he resigned on November 25, 2021, Mr. Bouchard quickly received an information package from the Pension Centre. The mailing date was December 1, 2021, and it came further to Mr. Bouchard's request on November 29. After looking at the package, it is clear that it was not personalized for the applicant but was actually a generic form. To begin with, the package indicates that if the recipient wished to leave his job, he must advise his employer ahead of time; Mr. Bouchard had left his job one week before receiving the package.

[6] The uncontested evidence also reveals that Mr. Bouchard was in frequent contact with the Pension Centre through email and telephone interactions. The applicant was performing his due diligence because he wanted to receive the transfer value payment so the part that could be transferred to a tax-free retirement savings plan could be transferred before March 2022, the deadline to benefit from tax treatment in 2021.

[7] Pensioners must choose one of the retirement options available to them. The information package identifies several options, including immediate annuity, deferred annuity and transfer value. Mr. Bouchard chose the transfer value in January 2022 and undertook the steps with the financial institution with which he decided to do business to invest the transfer value.

[8] However, the transfer was not made easily since the Pension Centre stated that it could not reconcile the wages paid to the applicant with the relevant scales under the collective agreement for the positions corresponding to those held by the applicant. Thus, requests for [TRANSLATION] "clarification" were made in January 2022. It was only on April 6, 2022, more than two months later, that it was confirmed that exempt staff (often referred to as "political

staff") were paid according to guidelines that did not necessarily have to follow the scales in the collective agreement for positions that are more or less equivalent. The wages Mr. Bouchard indicated were therefore the ones to be used in the calculation of the retirement benefits he wanted to have converted to transfer value. The transfer was only completed on April 8.

[9] Mr. Bouchard made two complaints in an email sent April 22, 2022. He stated that he should not be penalized for the Pension Centre's delay in confirming his salary. According to the email, he was assured that the payment would be made in February if he completed the required formalities without delay, and he did. The increase in interest rates in March and April 2022 should not have made him lose significant amounts in the transfer value of the retirement benefits to which he was entitled. In this April 22, 2022, email, he stated that the steps he took with the Pension Centre in December 2021, completed with the last forms he filled in and sent on January 6, 2021, was to [TRANSLATION] "prevent such an eventuality to the extent possible". Then, the applicant asked for a review of his file [TRANSLATION] "such that the amount of the transfer be adjusted to reflect the situation at the time I sent my choice to the Pension Centre".

II. Steps and decision

[10] On April 11, 2022, the Pension Centre sent the applicant the various amounts to which he was entitled, according to the Centre. As is too often the case in these matters, the writing is far from clear. After doing a few calculations, Mr. Bouchard understood that the transfer value had been reduced by 18.3% from the estimate he had been given on December 1, 2021. The documents sent provide no explanation for the significantly lower amount that he would be paid as transfer value. This is what led Mr. Bouchard to complain.

[11] On April 29, 2022, Mr. Bouchard received a response to the email he had sent the previous week. This response, sent by email, noted the following:

- The estimates provided are only estimates: they can change asinterest rates rise or fall.

- It is the *Public Service Superannuation Regulations*, CRC c 1358 [Regulations], that set out the calculation to be done. In the email, it states that [TRANSLATION] “there is no provision in the Act that allows us to use a different valuation date than the one during the month in which the transfer value is paid”. As we will see later, this is contested by the applicant.

- The email states the service standards (payment of the transfer value is to be made in the 45 days following receipt of the required documentation in 96% of cases), but indicates that this standard could not be met because of a delay receiving confirmation of the applicant’s salary. The email does not attempt to explain the three-month delay for a trivial verification within the same department (the Pay Centre that was to be consulted to confirm the salary belongs to the same department as the Pension Centre), which was noted in Mr. Bouchard’s April 22 email.

[12] The situation would not end there. Mr. Bouchard did his own research starting in May 2022, and tried to obtain a review by raising various issues. Ultimately, an email sent August 17, 2022, provided the decision for which judicial review is requested.

[13] It was on May 30, 2022, that the applicant wrote an email to the Pension Centre to report that his [TRANSLATION] "more thorough review of the rules for calculating transfer values led him to conclude that the application had led to a 'nonsensical situation to be corrected'". At this stage of the debate with the Pension Centre, Mr. Bouchard was seeking to present an argument regarding the inflation rate that the Bank of Canada, in its April 2022 Monetary Policy Report, recognized as being higher than previously expected according to the January 2022 projections. This essentially reduced the transfer value. Mr. Bouchard filed a formal request for review.

[14] The initial response came on June 23, 2022, from the manager of the Executive Services section. He stated that the calculation of the transfer value involved many factors. Section 90 of the Regulations set out the methodology to be followed and the assumptions considered. The Executive Services manager stated that [TRANSLATION] "Regulations also refer to the interest rate to use according to the Standards of Practice that apply to pension plans, published by the Canadian Institute of Actuaries". The email concludes with the statement that no discretion exists as to the method or assumptions that apply to a calculation because everything is prescribed by the Act and its Regulations: the only legislative changes [TRANSLATION] "originate from the Treasury Board Secretariat".

[15] Mr. Bouchard would not give up. He wrote to the manager in question on July 7, 2022, but this time, he was more direct. The argument was of a more legal nature.

[16] In this email, he noted that "valuation day" is defined in the Regulations at subsection 83(1). Paragraph (b) applies to his case. This paragraph states:

83 (1) The following definitions apply in sections 84 to 99.	83 (1) Les définitions qui suivent s’appliquent aux articles 84 à 99.
…	…
valuation day means	***date d’évaluation***
(a) in respect of a contributor who has ceased to be employed in the public service to become employed by a new employer, the later of	a) Dans le cas d’un contributeur qui a cessé d’être employé dans la fonction publique pour devenir employé du nouvel employeur, la plus tardive des dates suivantes :
(i) the date on which the contributor ceases to be employed by the new employer, and	(i) la date où il cesse d’être employé du nouvel employeur,
(ii) the date on which the contributor exercises an option for a transfer value; and	(ii) la date où il exerce un choix en faveur de la valeur de transfert;
(b) in respect of any other contributor, the later of	b) dans tout autre cas, la plus tardive des dates suivantes :
(i) the date on which the contributor ceases to be employed in the public service, and	(i) la date où le contributeur cesse d’être employé dans la fonction publique,
(ii) the date on which the contributor exercises an option for a transfer value. (*date d’évaluation*)	(ii) la date où il exerce un choix en faveur de la valeur de transfert. (*valuation day*)

According to this definition, the valuation date for establishing the transfer value would be the date Mr. Bouchard chose the transfer value instead of, for example, a deferred annuity.

[17] However, the employer chose the date the payment of the transfer value was made as the valuation day, which resulted in a loss of 18.3%. To understand what this means, it must be recalled that under section 90 of the Regulations, "[t]he transfer value to which a contributor is entitled is equal to the greater of (a) the actuarial present value on valuation day of the accrued pension benefits that would be payable to or in respect of the contributor had the contributor become entitled to a[n] … annuity…". The valuation date is clearly a critical variable if the interest rates change. Mr. Bouchard noted, in all fairness, that subsection 83(2) creates confusion because it provides a different definition of valuation day. This text states the following:

(2) For the purposes of sections 84 to 99, valuation day is the day on which the transfer value referred to in section 13.01 of the Act is transferred or, if a contributor exercised an option in favour of a transfer value on or after June 20, 1996 and before April 30, 1997, the valuation day is April 30, 1997.	(2) Pour l'application des articles 84 à 99, la date d'évaluation est la date du virement de la valeur de transfert visée à l'article 13.01 de la Loi; toutefois, elle est le 30 avril 1997 dans le cas où le contributeur a effectué un choix en faveur de la valeur de transfert au cours de la période commençant le 20 juin 1996 et se terminant le 29 avril 1997.

[18] Mr. Bouchard stated that this confusion should be resolved in favour of the former employee. This is all the more true since the Standard of Practice to which the manager seems to refer in the May 30 email provides a deadline between the valuation date and the payment date of the transfer value. Standard 3520.03, in the version effective February 22, 2022, stated the following:

> .03 The commuted value should be adjusted for interest, taking into account the requirements of applicable legislation, between the valuation date and the first day of the month in which the payment is made. Unless otherwise required by applicable

> legislation, the interest rates used to calculate the commuted value should be used for such adjustment. [Effective December 1, 2020]

The question to the Pension Centre was therefore why not use the date the choice was made to receive the transfer value payment instead of the transfer date?

[19] Secondly, the applicant complained that although Standard of Practice 3550.01 required the disclosure of the actuarial assumptions used "in determining the commuted value and the rate of interest to be credited between the valuation date and the first day of the month in which the payment is made", these assumptions were never shared with him. In fact, the applicant required very specific information.

[20] The answer, which ultimately became the decision for which judicial review is sought, was only given on August 17, 2022. It contains the following elements:

- Interest rates account for most of the fluctuations in transfer values.

- After consultation with the Treasury Board Secretariat, it stated that subsection 83(2) applies. I can find no explanation given for this decision. The manager indicates that the Secretariat intends to [TRANSLATE] "repeal" the other definition of [TRANSLATION] "valuation day". He also states that he has no choice but to apply the Act and its Regulations in accordance with the directives received.

- With regard to the demographic and economic assumptions, they were not provided in the applicant's specific case. The manager instead referred to section 92 of the Regulations, which indicates what they are; the explanation was

that they [TRANSLATION] “are programmed into the pension software”, the mysterious [TRANSLATION] “black box”.

- The decision also provided the short- and long-term interest rates (undefined) that would have been used to calculate the estimate in November 2021 (done on December 1) and the payment made in April 2022.

- It is repeated that [TRANSLATION] “the higher the interest rates are, the lower the initial investment you will need to obtain the pension to which you would be entitled if you had opted for a deferred annuity”.

The end result is that the decision remained unchanged.

III. Arguments

[21] It could be useful to briefly and simply explain what lies at the core of the dispute.

[22] Annuities are paid to contributors to a pension plan. The annuity, as a monthly benefit according to the evidence on the record, would have been paid to Mr. Bouchard when he reached 65 years of age (allowances before this age but after 55 are possible). The record does not reveal how the amount of the monthly deferred benefit was determined. However, these provisions have no impact on the case at bar.

[23] For those who choose the transfer value, according to the information package provided to the applicant in December 2021, this consists of “a lump sum equal to the value of your future pension benefit (deferred pension)” (Pension Entitlement Information Package, p 5/17). At

paragraph 17 of these reasons, I reproduced part of the definition of valuation date that was used in the calculation of the transfer value at section 90 of the Regulations. A different result would have been obtained if the definition at subsection 83(1), reproduced at paragraph 16 of these reasons, had been used. Section 90 of the Regulations states the following. It is neutral as to the valuation day to be used:

Determination of Transfer Value	**Calcul de la valeur de transfert**
90 The transfer value to which a contributor is entitled is equal to the greater of	90 La valeur de transfert à laquelle le contributeur a droit correspond à ce qui suit :
(a) the actuarial present value on valuation day of the accrued pension benefits that would be payable to or in respect of the contributor had the contributor become entitled to a deferred annuity under section 13 or 13.001 of the Act on ceasing to be employed in the public service, and	a) la valeur actuarielle actualisée, à la date d'évaluation, des prestations de pension acquises qui seraient versées à celui-ci ou à son égard s'il avait droit à une pension différée en vertu des articles 13 ou 13.001 de la Loi au moment où il cesse d'être employé dans la fonction publique;
(b) the amount of a return of contributions that would be payable on valuation day if the contributor were eligible to receive a return of contributions.	b) s'il est plus élevé, le montant du remboursement de contributions qui devrait lui être payé à la date d'évaluation s'il y avait droit.

This is sufficient for our purposes. It must be noted that section 92 of the Regulations state the actuarial assumptions to be used when calculating the actuarial present value of the acquired pension benefits.

[24] Since this involves future cash flow, for which the actuarial present value is being sought, the interest rate needed to generate the cash flow is used to determine the capitalized value (or

current value), namely the capital needed to produce the cash flow. Thus, if a low interest rate is used, a greater nest egg or capital is required to result in the cash flow at maturity to which the pensioner is entitled. Conversely, if the interest rates are higher, the nest egg to attain the same cash flow will be smaller because the return generated by a higher interest rate allows for a smaller capital to be sufficient.

[25] This is what happened in this case. At the time an estimate was given of the capital (or nest egg) required to generate the cash flow, the interest rates were very low. If the valuation date used is the one under paragraph 89(1)(b) of the Regulations, the transfer value will be higher than if subsection 89(2) of the Regulations is used when interest rates had increased according to the decision under judicial review by 120 basis points for short-term interest rates and by 50 basis points for long-term interest rates. According to the calculations that were made, this would result in a reduction of 18.3% of the capital required to generate the cash flow.

A. *The applicant*

[26] The application for judicial review is focused on two issues. First, an order in the nature of *certiorari* to quash the Pension Centre’s decision to refuse to reassess the April 11, 2022, decision setting the transfer value at an amount lower than the amount that would have been paid earlier in the year. Second, a request for a declaration by the Court that the transfer value should have been assessed on the date the applicant opted for the transfer value. Alternatively, it was requested that the case be returned to the administrative decision maker for a recalculation based on the reasons and findings of the Court.

[27] The reasons raised in support of the application for judicial review clearly address the reasonableness of the decision made. Thus, the August 17, 2022, decision refusing to reconsider the April 11, 2022, decision is unreasonable because:

- there is a refusal to exercise jurisdiction;
- there are errors of law; and
- the findings of fact are erroneous and made in a perverse and capricious manner.

More specifically, the application challenges the decision maker's reasoning as not rational or based on logic: the decision-maker uses circular reasoning relying on false dilemmas and on generalizations that are unfounded or based on an absurd premise.

[28] Relying on paragraph 18.1(3)(b) of the *Federal Courts Act*, the applicant is seeking a determination by the Court of the valuation date to be used in this case.

[29] The confusion caused by the co-existence of subsections 83(1) and 83(2) of the Regulations, generating different valuation dates, is amplified by the package sent to the applicant in December 2021. It explains what the valuation date is. The text of the paragraph in question, under "3.2.1 Transfer Vale" from the document "Pension Entitlement Information" at page 5/17 states the following:

> The Transfer Value is calculated as of the valuation date, which is the later of your date of termination of employment or your date of option. Your date of option is the date on which you complete and sign the *Pension Benefit Options Statement* (PWGSC-TPSGC 2011E-PF) or the *Appendix – Pension Benefit Options*. The Transfer Value is based on a number of economic assumptions including net interest rate assumptions. The payment amount may differ from the estimate amount due to the fluctuation of interest rates. These interest rate assumptions vary monthly and the rates in

> effect at the later of the date of option or termination date will be used to determine the amount of the payment.

[30] Moreover, the forms to be completed in January 2022 mention the same choice regarding what constitutes the valuation date. In an affidavit by Mark Doiron, an employee of Public Services and Procurement Canada at the Government of Canada Pension Centre, the affiant states that the form “Important Information Regarding Transfer Values and the Transfer Value Out-limit Payment Options Form” was sent to Mr. Bouchard on January 5, 2022 (affidavit, para 42) and received the following day. It states:

> [TRANSLATION]
> **The actual transfer value payment amount may differ from the estimated amount** considering that the rates in force on the valuation date (the latter of your termination date or the date on which the transfer value option is made) determine the actual payment amount. Higher rates will result in a lower transfer value, since it assumes that plan members will obtain a higher rate of return on their investments.
>
> Your **valuation** date is the following:
> • your **termination** date, or
> • your transfer value **option** date.
>
> Your transfer value **option** date is determined as follows:
>
> • When your transfer value option is received in the 30 days following the signature date, the signature date is the option date.
>
> • When your transfer value option is received more than 30 days following the signature date, the date on which the option is transmitted to the Pension Centre is the option date.

[31] The applicant submits that the standard of review is reasonableness. The August 17 decision to confirm the April 11 decision, thereby imposing an 18% loss in the transfer value by using a later valuation date (payment date) instead of the date expressly chosen by the applicant

(date he opted to use the transfer value) does not meet the requirements of the standard of reasonableness. It requires that not only the result, but also the reasoning followed, be reasonable. This is not the case.

[32] Two arguments were raised. They are summarized at paragraph 28 of the applicant's memorandum as follows:

> [TRANSLATION]
> 28. The Pension Centre's decisions regarding the calculation of Mr. Bouchard's transfer value are unreasonable for two main reasons. First, the decision maker neglected to consider the legal interpretation rule under which the Act and the Regulations should be interpreted in a broad and liberal manner such that any ambiguity is resolved in favour of the applicant. Then, the decision maker acted unreasonably by ignoring subsection 83(1) in favour of subsection 83(2) according to the TBS instructions, when the two provisions are equally valid and in light of the arguments it made to the applicant and the subsequent delays created by the decision maker itself.

[33] Regarding the first component, the applicant argues that a broad and liberal interpretation is required since the legislation provides a benefit. Any ambiguity should be resolved in favour of the individual. Additionally, the Pension Centre was solely responsible for the delay, which cannot be ignored. Indeed, the August 17, 2022, decision does not meet the requirements of justification, one of the two reasons a decision will fail to meet the standard of reasonableness. Similarly, the administrative decision maker cannot ignore subsection 83(1) of the Regulations by simply declaring that the Treasury Board Secretariat had determined that subsection 83(2) is preferable. The decision maker's discretion required it to be used in favour of the applicant. No explanation was given other than the Centre was acting under the Secretariat's direction.

[34] The applicant states he is raising a legitimate expectation, citing *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at paragraphs 68 and 69. He states that the administrative decision maker cannot abdicate its decision making power in favour of the Treasury Board Secretariat. The Pension Centre wrote that the transfer value was something other than what was later decided. An explanation is required. The claim that subsections 83(1) and (2) constitute a [TRANSLATION] "legislative oversight" does not stand after eight years.

[35] Lastly, the applicant is seeking a "directed verdict" under paragraph 18.1(3)(b) of the *Federal Courts Act*. Essentially, the applicant wants the Court to determine the valuation date in place of the administrative decision maker.

B. *The respondent*

[36] The respondent essentially attempted to justify why the directive given to the Pension Centre to determine the transfer value on the day the funds are transferred could have been appropriate. It all begins with a "legislative oversight" in the Regulations. Why this "oversight" had not been repaired eight years later was not explained. Instead, applying statutory interpretation rules, it is subsection 83(2) that should take precedence.

[37] The respondent notes that subsection 83(2) was adopted by the executive in June 2016. Subsection 83(1) has not been amended since. I have found no explanation for this.

[38] While the package sent to Mr. Bouchard provided a valuation date that corresponded with subsection 83(1) of the Regulations, the respondent emphasizes that the letter included with this

package mentions a different valuation date. This letter is submitted with Mark Doiron's affidavit, under his Exhibit H. The passage from the accompanying letter is reproduced here:

> [TRANSLATION]
> The amount of the transfer value is based on several economic and demographic assumptions, including assumptions regarding net interest rates. These interest rates vary monthly and can have a significant impact on the calculation of the transfer value. The final transfer value will be determined on its payment date, based on the actuarial assumptions in force on that date.
>
> For estimation purposes, your transfer value was calculated on December 1, 2021. If you decide to choose a transfer value, remember that the final amount could be very different from the estimated amount due to the fluctuation of actuarial assumptions between the estimation date and the payment date.

Remember that the "Important Information Regarding Transfer values and the Transfer Value Out-limit Payment Options Form" sent in January 2022 mentioned a valuation date that corresponds to subsection 83(1), and so did the information package sent in December 2021. This is confusing. Not only are there two statutory instruments that contradict each other, but the accompanying documents also seem to contradict each other.

[39] The respondent agrees that the standard of review is reasonableness. He cautions the Court to give respectful attention to the reasons given by the administrative decision maker; the Court should not substitute itself for the decision maker and conduct a *de novo* analysis that will lead to a correct solution.

[40] Against all expectations, the respondent then attempts to justify *ex post facto* why the transfer date, practically three months after the applicant had chosen the transfer value, should be used.

[41] The respondent raises implied repeal, the precedence of subsequent “acts” and the judicial power to correct drafting errors.

[42] Since the Court finds that this is a clear case where the decision rendered does not meet the minimal standards of justification for a decision, it is preferable to not have an *ex post facto* explanation. I will make some comments on this in the following section of the reasons for judgment.

IV. Analysis

[43] The applicant complains, correctly in my opinion, about the quality of the reasons given on August 17, 2022. The Supreme Court specifically stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], that administrative decision makers must adopt a culture of justification.

[44] The parties agree, and the Court agrees, that there is a contradiction between subsections 83(1) and 83(2) of the Regulations. Even the August 17, 2022, decision makes note of it. However, the decision maker does not try to explain the conflict or resolve it in any way. There is no consideration for possible discretion, especially since the information package sent to the applicant on December 1, 2021, and the form with important information about the transfer value sent on January 5, 2022, mention a valuation date consistent with subsection 83(1), when the letter accompanying the information package seems to refer to a valuation date set on the date of the funds transfer. The administrative decision maker does not use reasons that could be reasonable for a reviewing court that is bound by the principle of judicial deference and must

respect an administrative decision (*Vavilov*, at paras 13–14) to attempt to provide any justification for its decision to choose one valuation date over another, aside from stating that directives from the Treasury Board Secretariat imposed this choice.

[45] In these circumstances, why would the decision maker not choose to respect the applicant's choice? The only answer the decision maker provided was that the Treasury Board Secretariat, a group of public servants, decided that [TRANSLATION] "the applicable provision is subsection 83(2), meaning the valuation date is the date on which the transfer is made (payment date)". There is no other justification.

[46] The culture of justification is the subject of explicit comments in *Vavilov*. Paragraph 14 states that "administrative decision makers must adopt a culture of justification…" that will demonstrate to citizens that the decisions made are justified. Thus, the reviewing court is interested in the result but also in the justification (*Vavilov* at paras 83–87). The reasons "show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power" (*Vavilov* at para 79). This is precisely what is missing here.

[47] Not only does the discipline of writing encourage careful reasoning, but it also establishes the justification, transparency and intelligibility of the decision, all hallmarks of a reasonable decision (*Vavilov* at para 99).

[48] This has a direct impact on the role of a reviewing court. It conducts a review and, as a general rule, refrains from deciding the issue itself since it does not ask what decision it would have made in the administrative decision maker's place. As the respondent correctly stated, the reviewing court does not "conduct a *de novo* analysis" (*Vavilov* at para 83).

[49] At paragraphs 84 and 85 of *Vavilov*, the Court explains the method to follow:

> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.
>
> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, 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. The reasonableness standard requires that a reviewing court defer to such a decision.

[50] In the end, the reasons are of particular importance: they are the expression of the justification for the decision made, its intelligibility and its transparency. In my opinion, paragraph 95 of *Vavilov* seems particularly relevant, clear and tangible:

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. <u>It would therefore be unacceptable for an administrative decision maker to provide an affected party formal</u>

> reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.
>
> [Emphasis added.]

Indeed, in *Vavilov,* the Court states at paragraph 96 that "it is not open to a reviewing court to disregard the flawed basis of a decision and substitute its own justification for the outcome: *Delta Air Lines* [*Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] 1 SCR 6], at paras 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion."

[51] Rather paradoxically, the respondent, who noted that the reviewing court should not conduct a *de novo* analysis, in fact asks the Court to accept an *ex post facto* justification of the decision made. On the other hand, the applicant alleges that the only reasonable decision would have been to order that the valuation date be the one provided under subsection 83(1) of the Regulations: this would justify a "directed verdict" under paragraph 18.1(3)(b) of the *Federal Courts Act*.

[52] The decision under review does not meet the minimal standards of justification. As such, it must be overturned. However, the Court must not accept the applicant's suggestion to impose a directed verdict. Subsection 18.1(3) of the *Federal Courts Act* does not have the scope the applicant expects:

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.

[53] The Federal Court of Appeal’s case law dictates that the “option of directing an administrative tribunal on how to decide an issue within its jurisdiction can only be exercised in exceptional circumstances” (*Canada (Attorney General) v Allard*, 2018 FCA 85 [*Allard*] at para 44). The Court of Appeal cites *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31, 286 NR 385 :

> [14] While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances….

[54] In *Allard,* the Court of Appeal stated how rare this is: “generally speaking, this type of discretion should only be exercised when there is only one possible reasonable outcome open to the decision-maker” (at para 45). This is certainly not the case here.

[55] In *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 [*Yansane*], Chief Justice de Montigny insisted on the exceptional character of paragraph 18.1(3)(b). He noted that instructions have been given in the case law for the following:

- to set a deadline
- to limit reconsideration to a specific question
- to take certain documents into account
- to exclude a piece of evidence
- to forbid a specific result

A proper directed verdict would only be appropriate in the clearest of cases, such as when only a single outcome is possible. The principle reasons are set out in paragraph 18:

> [18] In my view, the same caution is warranted for the directions and instructions that this Court may issue when it allows an application for judicial review. We must never lose sight of the fact that such directions or instructions depart from the logic of a judicial review, and that their abusive or unjustified use would go against Parliament’s desire to give specialized administrative organizations the responsibility for ruling on questions that often require expertise that common law panels are lacking. This is especially the case for eligibility and weighing of evidence, which are central to the mandate of administrative decision-makers.

[56] In my opinion, these statements are reinforced with the advent of the legal framework renewed in *Vavilov* and confirmed recently in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, 458 DLR (4th) 583. Legal questions regarding the administrative decision maker’s

interpretation of the enabling statute are subject to the reasonableness standard (*Vavilov* at para 25). Even "legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence" (*Vavilov* at para 71) do not lead to the creation of a category of legal questions to which the correctness standard would apply.

[57] Here, the issue revolves around two provisions in a regulation, side by side, which seem to contradict each other if they cannot be reconciled. The issue is not whether there can be a difference between the estimated value and the transfer value eventually paid. Rather, it is to determine which valuation date is to be used. The administrative decision does not seek to resolve the conflict. The decision maker instead stated it was acting under the direction of someone else without explaining why one provision is preferred when even the information documents feed the confusion.

[58] Unusually, in my opinion, the evidence before the Court indicates that the contradiction was recognized by certain government officials without [TRANSLATION] "the legislative oversight's being corrected during the eight years that followed". Moreover, other provisions in the same Regulations were amended but the simple repeal of subsection 83(1) did not occur. If subsection 83(1) is an error or oversight, it is difficult to understand why it is still in force. An eight-year oversight is rather inane, as the applicant submits.

[59] With respect, the Treasury Board Secretariat officials are not "Parliament" or the regulatory authority. In my opinion, saying that [TRANSLATION] "the intention of Parliament has

always been the same” (Respondent’s Memorandum at para 65) when referring to exchanges between public servants seems to be an exaggeration.

[60] The respondent argues that the implied repeal, the precedence of later texts and the judicial power to correct drafting errors justify no longer considering subsection 83(1). It is not that simple. In addition to *ex post facto* explanations, it is difficult to imagine how the judiciary could correct an error that is clearly not a drafting error. When an oversight lasts for eight years, it is not “drafting mistakes,” especially considering that regulations are much easier to adjust than laws. The fact these Regulations were amended to modify related provisions without the repeal of subsection 83(1) could just as easily suggest that the absence of a repeal was not *per incuriam*. Indeed, the information documents provided to the applicant when he made his choice clearly state that the valuation date is the date of the choice. Why would the transfer date be the correct one? The decision makes no mention other than it was the Treasury Board Secretariat that wanted it. All other attempts to explain are *ex post facto*.

[61] The respondent relies on Professor Sullivan’s “The Construction of Statutes” to argue that three criteria are used when correcting drafting errors: a manifest absurdity, a traceable error, and an obvious correction. These conditions are not met and, at any rate, the judiciary should not interfere when opportunities to make corrections were not taken.

[62] With regard to the other two suggestions, which are in fact only one, namely, that a later text takes precedence, this is the issue here. It is the administrative decision maker that determines whether this is the case and why. I will merely note that the respondent only referred

to Professor Sullivan again, where she states at paragraph 11.05 of her work that implied repeal follows from the principle that parliaments and legislative assemblies are not bound by previous legislation: Parliament is sovereign. This situation involves regulations. Is the same justification sufficient? It would be up to the administrative decision maker to consider the ins and outs of this issue, as the applicant argues that the coexistence of the two provisions suggests that the choice he made, under the Regulations and the information documents that were sent to him in December 2021 and January 2022, continued to allow the choice of the transfer value on the valuation date; it corresponds to the time he made the choice, in January 2022. How can denying this choice be justified?

[63] The administrative decision maker could also possibly consider the fact that the Pension Centre was solely responsible for the delay in making the transfer. This possibility could be considered if there were a discretion because of subsections 83(1) and 83(2) of the Regulations. The decision under judicial review indicated that it was acting under the direction of the Treasury Board Secretariat.

[64] The case under review could very well be unique. It is the case of a person who chose to receive the transfer value of his pension. If the payment had been made at an appropriate time, he would have benefitted from the interest rates at the time. But it took Public Services and Procurement Canada three months to realize that political staff are paid on a different scale than public servants. One would have thought this was a well-known fact. It is still surprising that it took three months for the public servants responsible for compensation to realize a known fact. An explanation would be welcome. This seems to have led to a substantial loss of value.

V. Conclusion

[65] The respondent objected to the applicant's argument that the doctrine of legitimate expectations should apply. The applicant did not raise this in his application for judicial review. I agree.

[66] In any event, the doctrine of legitimate expectations is an aspect of procedural fairness. This leads us to the realm of procedure. However, as the Supreme Court of Canada recognized in *Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 SCR 559, at paragraph 97, "[a]n important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights…. In other words, '[w]here les conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the "legitimate" expectation' (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, para 131 (emphasis added))."

[67] However, the applicant is complaining that the administrative decision maker abdicated its decision making power. The applicant did not convince me that the doctrine of legitimate expectations applied in this case or that it had been violated such that a procedural remedy other than the remedy ordered is necessary.

[68] The Court therefore concluded that the application for judicial review should be allowed. As for giving specific instructions to the new administrative decision maker, the Federal Court of Appeal insisted in *Yansane* that if such instructions are to be given, they must be in the conclusions of the judgment:

> [19] According to that logic, I believe it is essential to interpret the possibility of issuing directions or instructions restrictively, such that only those explicitly stated in the judgment may bind the administrative decision-maker responsible for re-examining a case. This must be the case not only so that Parliament's decision not to allow appeals is respected, but also so that the law is predictable and appropriately guides those who must re-examine a question when the first decision was set aside. Consequently, I am of the opinion that only instructions explicitly stated in the judgment bind the subsequent decision-maker; otherwise, the comments and recommendations made by the Court in its reasons would have to be considered mere obiters, and the decision-maker would be advised to consider them but not required to follow them.
>
> [Emphasis added.]

[69] As a result, the application for judicial review is allowed since the reasons provided by the administrative decision maker could not meet the minimum requirements of justification. As for the respondent's *ex post facto* explanation of the conflict between subsections 83(1) and 83(2) of the Regulations and how it should be resolved, the explanation cannot be considered as a substitute for the administrative decision maker's deficient reasons. It will be the decision maker's responsibility to review this issue, while possibly taking the Court's obiters into consideration.

[70] The applicant will be permitted to resubmit his representations to the new administrative decision maker.

[71] The applicant specifically declined his costs. The Court grants his wish.

JUDGMENT in T-1922-22

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed. The file is returned to the Canada Pension Centre, which the applicant specifically requested to reconsider the decision to apply a valuation date that resulted in a shortfall of 18.3% of the transfer value. The issue will be reconsidered by a decision maker other than the one who rendered the August 17, 2022, decision.

2. No costs are awarded.

"Yvan Roy"

Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1922-22
STYLE OF CAUSE:	MATHIEU BOUCHARD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 19, 2023
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 17, 2024

APPEARANCES:

Charles R. Daoust	FOR THE APPLICANT
Charles Maher	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David|Sauvé S.R.L./LLP Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT