

CANADA / JUDGMENT

Burstyn v. Canada (Canada Customs and Revenue Agency)

2006 FC 744

COURT

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BETWEEN:

BARRY BURSTYN

Applicant

and

CANADACUSTOMS AND REVENUE AGENCY,

JOHN JRAIGE and RON GALBRAITH

Respondents

REASONS FOR JUDGMENT LAYDEN-STEVENSON J.

- [1] Can the respondent agency, having failed to seek judicial review of an Independent Third Party Review (ITPR) decision, achieve that objective in this proceeding, where the agency's refusal to implement the ITPR decision is being challenged? I have determined that, on the facts and circumstances of this particular matter, the answer is no. I. Background
- [2] Mr. Burstyn is an employee of the Canada Customs and Revenue Agency, now the Canada Revenue Agency (the agency). When a competition opened to establish a pool for permanent "Large File Case Auditor" positions in the agency's Windsor office, he applied. The competition closed July 31, 2002 and the results were released on October 28, 2002. Placements were not made right away. Rather, acting positions were filled on April 24, 2003 and permanent placements were made on December 1, 2003. Had Mr. Burstyn been successful, his employment classification would have changed from AU03 to AU04. The agency determined that Mr. Burstyn did not meet the minimum requirements to be placed in the position.
- [3] Mr. Burstyn complained that the agency's placement of the two successful candidates (the incumbents) was arbitrary and inconsistent with the agency's staffing principles of fairness and transparency. He maintained that he should not have been passed over for the position. Under the agency's Staffing Program and Directives on Recourse for Staffing, he attended individual feedback sessions in March and April of 2004. Ultimately, his complaint made its way to the ITPR.
- [4] In accordance with Mr. Burstyn's request, and the consent of the agency, the individual assigned to conduct the ITPR (the reviewer) decided to proceed by way of an oral hearing. A date was scheduled. Subsequently, the agency's manager of Human Resources, Southwest Sector (the manager) informed the reviewer that only a paper review, complemented by a telephone conference, was necessary. After hearing from the parties, the reviewer concluded that, in view of the issues involved (including credibility), an in-person hearing was preferable and she so advised the parties. The agency, through the manager, informed the reviewer that it would not participate in the oral process and that the reviewer could make a decision on the basis of the information that it (the agency) had already provided. The reviewer responded by acknowledging that there was no requirement to attend and reiterating her concern that, for a "balanced and complete view of the matter", it was preferable if all parties were present. The agency refused and asserted that it had included a response to Mr. Burstyn's list of allegations and "the [r]eviewer may make her decision on the information already communicated to the parties as well as the additional information contained herein".
- [5] The hearing was held on February 4, 2005. The agency did not appear. The reviewer heard evidence (from Mr. Burstyn, the incumbents, and a retired auditor) as well as submissions (from the incumbents and an employment relations officer on behalf of Mr. Burstyn). By

decision dated March 10, 2005, the reviewer concluded that the process was seriously flawed; the decisions leading to the exclusion of Mr. Burstyn from placement in a permanent AU04 position treated him in an arbitrary manner; and the agency's process offended the staffing principles of fairness and transparency. Relevant information was not taken into account and irrelevant information was used to put Mr. Burstyn in an inequitable position compared to the other candidates. The placements were not made in accordance with the established policy of the Staffing Program.

- [6] The reviewer then reviewed the range of possible corrective measures available to her and concluded, in the unusual circumstances of the case, that the only effective way to correct the error in the process was "to recommend that [Mr. Burstyn] be given a permanent AU04 position in the Windsor office". The reviewer left it to the agency to determine whether to implement the recommendation through revocation of one of the placements in question. The reviewer concluded that, to complete the correction of the errors (found to be cumulative), Mr. Burstyn should be compensated for any losses arising from the errors, including the difference between AU03 and AU04 salary from the period of the original placements to the date of Mr. Burstyn's assignment to a permanent AU04 position.
- [7] On May 3, 2005, the manager forwarded an email to Mr. Burstyn's employment relations officer indicating that the agency was not prepared to implement the ITPR decision. The manager further indicated that the agency was prepared to act according to the "process described in the memo and will commence this action shortly". The memo, attached to the email and authored by the manager, stated that the reviewer had gone beyond the Guidelines in her recommendation; the matter had been discussed with the Office of Dispute Management; and "another manager will be solicited to review the file and make the decision regarding the placement". The memo concluded with a comment that the agency "will proceed with whatever decision is made by the second manager".
- [8] On the same day, the employment relations officer emailed the reviewer and enclosed the manager's message. The employment relations officer requested that the reviewer "clarify her decision and corrective action". The reviewer informed the manager regarding the request and advised that she was prepared to provide clarification. She invited further comments (beyond the memo) from the agency. Although it is not altogether clear, it appears from the record that the manager then forwarded the reviewer's message to the Office of Dispute Management. The latter office responded to the reviewer by referring to a provision from the ITPR Guidelines dealing with clarification.
- [9] On August 8, 2005, the reviewer provided clarification. In doing so, the reviewer stated that she chose not to "recommend having another manager involved in the decision" because of the lack of evidence from the agency sufficient to answer the applicant's case, which was consistent with actual bias. After referring to the Guidelines, the reviewer commented that, where the errors are cumulative, correction may require more detailed direction than otherwise, particularly in circumstances where there was no evidence from the employer with respect to its perception of the cause of the errors. The reviewer reiterated her

recommendations.

- [10] On August 11, 2005, the employment relations officer forwarded correspondence to the Large File Case Manager demanding that the employer implement the decision of the ITPR. By correspondence, dated August 25, 2005, the Director of the Windsor Tax Services Office acknowledged receipt of the August 11th letter and stated: I have given careful consideration to the document [the reviewer] issued on August 8, 2005 clarifying her ITPR decision of March 10, 2005. After consultation with Human Resources, the Agency maintains the position that the reviewer has the authority to request corrective measures within a range of options clearly specified in the ITPR Guidelines: · Order correction of the error in process · Recommend revocation of the appointed employee · Recommend having another manager involved in the decision The Agency will not implement the corrective measures recommended by [the reviewer] as they are not within the above parameters. The Agency privileges this approach until the Federal Court of Canada renders a decision on this issue. The Agency has currently two cases before the said Court to review the reviewer's authority.
- [11] On September 1, 2005, Mr. Burstyn filed an application for judicial review of the agency's refusal to implement the decision of the ITPR. The supporting affidavit of the employment relations officer details the chronology of events. Exhibited to the affidavit are: Exhibit "A", copies of the Staffing Program; Exhibit "B", the Staffing Program Directives on Recourse for Staffing (Annex L); Exhibit "C", the Agency Conflict Management System Guidelines for Submitting and Processing a Request for an Independent Third Party Review (ITPR); Exhibit "D", the Canada Revenue Agency (CRA) Independent Third Party Review (ITPR) Processing Directive; Exhibit "E", the ITPR decision dated March 10, 2005; Exhibit "F", the team leader's email of May 3, 2005, with memo attached; Exhibit "G", the emails of May 3rd and 4th regarding clarification; Exhibit "H", the ITPR clarification dated August 8, 2005; Exhibit "I", the August 11th correspondence of the employment relations officer; and Exhibit "J", the August 25th refusal letter.
- [12] The affidavit of the team leader in the Human Resources Division of the agency is filed in response. Objection is taken to Exhibit "D" to the supporting affidavit on the basis that it was not in existence in March 2005 when the ITPR decision was rendered. The team leader deposes that on May 3, 2005, he advised [the reviewer] that the corrective measures adopted by her were "outside her jurisdiction and that the [a]gency would direct the file to another [m]anager for a decision". He further deposes that he now realizes (the affidavit was sworn on October 7, 2005) that the corrective measures that he proposed "were not possible in the face of the [r]eviewer's seriously flawed decision". I note, for the record, that the "team leader" who swore the responding affidavit and the "manager" referred to previously are one and the same person. II. The Arguments

- [13] The arguments of both Mr. Burstyn and the agency, while contained in their written memoranda of fact and law, were focussed more narrowly at the hearing due to the intervening decision of this court in *Attorney General of Canada v. Andrée Gagnon*, 2006 FC 216 (Gagnon). The respective positions can be succinctly stated.
- [14] Mr. Burstyn asserts that it is not open to the agency to disregard the ITPR decision. He claims that it is the court's duty to insist that organizations respect the decisions of tribunals unless those decisions are appropriately challenged. The agency's position on this application amounts to a collateral attack. Because the agency took the position that the reviewer's order for correction in the process was in excess of jurisdiction, it was incumbent on the agency to initiate an application for judicial review in relation to the ITPR decision. Having failed to do so, it cannot now, on this application, seek to attack the decision.
- [15] Mr. Burstyn bolsters his argument by reference to article P5.0-14 of the Staffing Program, which provides that recourse for staffing will be governed by the Directive on Recourse for Staffing. Article 6(c) of the Directive states that the agency will be bound by the decision of the ITPR. To the extent that a Guideline may differ from a Directive, the Directive must govern.
- [16] Relying on *Sherman v. Canada*(Customs and Revenue Agency)(2005), 269 F.T.R. 294 (F.C.) (Sherman) and *Nanjee v. Canada*(Attorney General)(2005), 144 A.C.W.S. (3d) 667 (F.C.) (Nanjee), Mr. Burstyn says, absent an application for judicial review, the agency is bound by the ITPR decision. Mr. Burstyn observes, by analogy to contempt proceedings, that a belief that an order is illegal, even if well-founded, does not provide a defence to contempt. The agency, according to Mr. Burstyn, had a choice: bring a judicial review application or live with the decision. Gagnon does not assist the agency because, there, it sought judicial review.
- [17] The agency views matters differently. It maintains that the doctrine of collateral attack is invoked only in those instances where a party is attempting to challenge the validity of a binding order in the wrong forum. The validity of the order comes into question in separate proceedings when the party has not used the direct attack procedures that were open to it. Aside from a passing reference in the Sherman case, the Federal Court jurisprudence is silent regarding collateral attack. Insofar as the Nanjee decision is concerned, it was guided by different legislation and cannot be relied upon in this matter.
- [18] The agency takes no issue with the underlying reasons of the reviewer. It emphasizes that the only problem is that the reviewer's order exceeds her jurisdiction. The Policy, Directives, and Guidelines all stem from sections 53 and 54 of the Canada Customs and Revenue Agency Act, S.C. 1999, c. 17 (the Act). Relying on Gagnon, the agency says that the Policy, Directives and Guidelines are tantamount to regulatory instruments. The reviewer does not have jurisdiction under the Policy or Directives to issue a specific remedy. The agency contends that it would be most unfortunate if the court were to give effect to the ITPR order where "the agency simply dropped the ball".

- [19] Further, the agency contends that there are two avenues available to it to obtain judicial review of the ITPR decision. First, the agency can apply for judicial review. Second, the agency can defend any application instituted by Mr. Burstyn by demonstrating that the ITPR decision is wrong. It is said that once the door is unlatched under section 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7, anything is possible under subsection 18.1(3). To adopt a "surgical" approach and find that it is the agency's "refusal to implement" that is the subject of the judicial review application, without examining the merits of the ITPR decision, would work an injustice. According to the agency, it is not open to the court to ignore the ITPR decision without examining the well-foundedness of it on the merits. III. The Concessions
- [20] As noted, the agency has no quarrel with the underlying reasons of the reviewer. Its only issue is with the recommendation for correction of the error in the process. Although not expressed in these terms, I take that concession to mean that the agency does not dispute that the reviewer had jurisdiction to conduct the inquiry and to order a remedy. The agency also concedes that it should have applied for judicial review and declined to do so because it was awaiting the outcome in Gagnon. In retrospect, the agency considers its chosen course of action to have been taken in error. It does not suggest that its decision not to seek judicial review in this matter was anything other than deliberative. IV. The Legislation and the Staffing Program
- [21] The agency is established as a body corporate under subsection 4(1) of the Act and pursuant to subsection 4(2) is, for all purposes, an agent of Her Majesty in Right of Canada. It is responsible for supporting the administration and enforcement of the program legislation (paragraph 5(1)(a) of the Act). The agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business (subsection 53(1) of the Act) and it must develop a program governing staffing, including the appointment of, and recourse for, employees (subsection 54(1) of the Act).
- [22] For completeness, the pertinent provisions of the Staffing Program, the Directives, and the Guidelines are attached to these reasons as Schedule "A". The Guidelines exhibited as "D" to the affidavit in support of the application, while in effect on August 25, 2005 (the date of the refusal to implement), relate to process (of the review procedure) and were not in effect at the time of the ITPR. While the document labelled Exhibit "D" does, in some respects, alter the content of the previous Guidelines (I will refer to them later in these reasons), in large part, the revised edition is a refinement of the earlier version. The revised Guidelines are not included in Schedule "A". V. Analysis
- [23] Although there is no authority directly on point, the nature and effect of the decisions of administrative agencies have been the subject of judicial comment.
- [24] Mr. Justice Létourneau, writing for the Federal Court of Appeal in *Grenier v. Canada* (2005), 344 N.R. 102 (F.C.A.) (Grenier) stated unequivocally, at paragraph 19, that a decision of a federal agency retains its legal force and authority and remains juridically operative and legally effective as long as it has not been invalidated.

- [25] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (*Danyluk*), Mr. Justice Binnie, writing for a unanimous court, discussed the principles of issue estoppel and collateral attack and their relevance to the decisions of administrative tribunals. He commented that "an aspect of the judicial policy favouring a finality to litigation is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it". Justice Binnie went on to explain that the rules were initially developed in the context of prior court proceedings, but have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals.
- [26] Speaking in terms of jurisdiction (in relation to administrative decision makers), Justice Binnie stated that once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. If the conditions precedent to the exercise of a judicial jurisdiction are satisfied, subsequent errors in its exercise, render the decision voidable, not void. These remarks constitute an affirmation of earlier comments made by Mr. Justice Beetz, in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at p. 585 where Justice Beetz stated: In the case at bar, it cannot be doubted that the committee of the council had jurisdiction to hear and decide upon appellant's application or memorial. There was no want of jurisdiction. In the exercise of this jurisdiction, the committee of the council erred in failing to observe the rules of natural justice. While it can be said in a manner of speaking that such an error is "akin" to a jurisdictional error, it does not in my view entail the same type of nullity as if there had been a lack of jurisdiction in the committee. It simply renders the decision of the committee voidable at the instance of the aggrieved party and the decision remains appealable until quashed by a superior court or set aside by the senate.
- [27] There is no issue taken with the jurisdiction of the reviewer to hear and decide Mr. Burstyn's recourse complaint. Nor is there any dispute that the reviewer was exercising adjudicative authority to determine the matter. Article P5.09 of the Staffing Program defines the ITPR as "the review of an individual's concern by a person external to the [agency] resulting in a binding and non-precedent-setting decision". The definition is repeated, verbatim, in the Annex L Directives. With the exception of the reviewer's incapacity to subpoena witnesses or documents, the ITPR process has all of the trappings associated with a judicial or quasi-judicial process. I entertain no doubt that the ITPR process culminates in a decision of a "judicial" character.
- [28] In *Danyluk*, the "complaint" in issue fell under the Ontario Employment Standards Act, R.S.O. 1990, c. E.14, in relation to unpaid wages, including commissions. *Danyluk*, in precise terms at paragraph 50, states that employees and employers should be able to rely on the determinations of the employment standards officer unless steps are taken promptly to set

them aside. In discussing the question of whether an administrative decision can provide the basis for an estoppel, the passage at paragraph 51 reads: In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin*, *supra*, and collateral attack in *Maybrun*, *supra*.

- [29] In *Grenier*, Justice Létourneau explained, in detail, the rationale underlying the legislated time limit within which an application for judicial review must be commenced. He also explained that the limitation exists in the public interest, specifically with respect to the finality of decisions. At paragraph 31 of *Grenier*, Justice Létourneau stated that the principle of the finality of decisions likewise requires that, in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters. His comments were made in the context of collateral attack in another forum. He refers to *Budisukma Puncak Sendirian Berhad v. Canada* (2005), 338 N.R. 75 (F.C.A.) (*Berhad*), a case where the owners of a vessel were suing the Crown following an administrative decision by two inspectors to order the seizure of their vessel, and specifically to paragraphs 61, 62, 65 and 66 of that authority.
- [30] At paragraph 62 of *Berhad*, there is reference to *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (*Maybrun*), an authority also referred to by Mr. Justice Binnie in *Danyluk*. The Federal Court of Appeal states in paragraph 62: ...Although the circumstances of that case differ slightly from those in the case at bar, the conclusions reached by the Supreme Court are nevertheless relevant to the present issue. If an accused, who has a right to full answer and defence, is not permitted in a penal proceeding to use as a shield a collateral challenge to the administrative order that is the basis for the charge that he faces, it seems to me that, in similar circumstances, a party should be discouraged from employing a collateral attack as a sword in a civil proceeding of the kind that the respondents initiated.
- [31] The noted authorities, as I have previously acknowledged, do not deal directly with the situation that is before me. The discussions to which I have referred regarding collateral attack relate to circumstances where the attack arose in a forum other than that in which the impugned decision originated. Nonetheless, in my view, many of the propositions, extrapolated, are relevant to this matter.
- [32] To ascertain the intent of the recourse package, regard must be had to its contents. The Staffing Program addresses Recourse for Staffing. Recourse is to provide the opportunity for individuals to raise concerns related to staffing and to have these concerns addressed in a

timely matter. The Staffing Principles state, among other things, that staffing decisions are to be free from political and bureaucratic influence and are to be equitable, just, objective and transparent. Communication should be open, honest, respectful, timely and clearly understood. Recourse mechanisms include individual feedback, decision review and ITPR, depending on the nature of the staffing activity.

- [33] Individual feedback is mandatory before proceeding to other forms of recourse. It is not merely a recourse mechanism; it is a key element in the career management process of the agency, allowing employees to receive input on development needs. The Staffing Program provides that Recourse for staffing will be governed by the "Directive on Recourse for Staffing".
- [34] The Annex L "Directives on Recourse for Staffing" begin with a listing of program statements that, in the main, repeat those contained in the recourse section of the Staffing Program. In Annex L, a definition is provided for each level of recourse. As noted earlier in these reasons, the definition for ITPR is "the review of an individual's concern by a person external to the [a]gency, resulting in a binding and non-precedent-setting decision".
- [35] ITPR applies to: permanent promotions without a selection process; selection process/pre-qualified pool placement decisions for permanent promotions; and entry (from within the agency) into an apprenticeship program.
- [36] Recourse, at all levels, is available on grounds of arbitrary treatment of the employee. Arbitrary is defined as: "[i]n an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale, on established policy; not the result of a reasoning applied to relevant considerations; discriminatory (i.e. the difference of treatment or denial of normal privileges to persons because of their race, age, sex, nationality, religion, or union affiliation)".
- [37] Authorized persons are accountable for taking appropriate corrective measures in a timely manner. An employee seeking ITPR must submit a written request on the prescribed form within seven days of receiving individual feedback.
- [38] The Guidelines with respect to ITPR appear to be an extract from a larger document entitled "Agency Conflict Management System". The Guidelines are concerned primarily with process and time limits. The reviewer is selected from a pre-established roster by the Office of Dispute Management. The reviewer must issue an "all-inclusive final and binding decision in writing within ten (10) calendar days after the final exchange of information between the participants and the reviewer".
- [39] When applicable, the reviewer is to "specify corrective measure as per the range of possible measures detailed in Appendix II". The range of corrective measures in Appendix II in relation to staffing are: order correction of error in process; recommend revocation of appointed employee; recommend involving another manager in the decision. The revised Guidelines (not in effect at the time of the ITPR) do not contain this provision. Rather, they

state that the reviewer specifies "which of the following corrective measures apply" and in relation to staffing say: "According to Agency Staffing Policy".

- [40] The Guidelines also contain a section entitled "post-review", which provides that: "[t]he appropriate level of management is responsible to implement the corrective measures issued by the reviewer, in as much as these are contained within the authority given to the reviewer in this area, in a reasonable time frame, and to provide timely feedback to the ODM (Office of Dispute Management) on actions taken". The manager is required to provide a written rationale to the Resourcing and Career Management Division within the Human Resources Branch, in the event the corrective measures are not implemented in whole or in part. This provision, too, is missing from the revised Guidelines.
- [41] It is evident that the intent behind the recourse process is to provide for a timely resolution of staffing issues. It is significant that the reviewer who conducts the ITPR is a person external to the agency. There is no provision for an appeal of the ITPR decision.
- [42] Here, there is no debate regarding the reviewer's jurisdiction to decide Mr. Burstyn's complaint. In accordance with the reasoning in Danyluk, if the reviewer stepped outside of that role, along the way or near the end, she did not lose jurisdiction for all purposes (paragraphs 48 and 51). However, there being no appeal provision, the decision would be subject to impeachment on judicial review. Consequently, when the ITPR decision is adverse to the employee, the only recourse is an application for judicial review of the decision. Should it be otherwise for the agency? For a variety of reasons, I think not.
- [43] Whether the reviewer exceeded her jurisdiction in making an order is a pure question of law. The agency applied for judicial review in two other cases involving the issue of what it considered to be an "excess of jurisdiction". It deliberately chose not to seek judicial review in this case, preferring instead to await the outcome of the other matters. Meanwhile, Mr. Burstyn, having requested recourse in March of 2004 and being the beneficiary of a positive decision from an objective third party reviewer, is left to his own resources while the agency, despite taking issue with the reviewer's order, does nothing.
- [44] The Gagnon matter was not heard until January 30, 2006 and the decision was released on February 17, 2006. The "refusal" decision in this matter was rendered on August 25, 2005, following the ITPR clarification of August 11th. Arguably, this matter, had it proceeded to judicial review, could have come on for hearing very close to the time when Gagnon was heard. More importantly, the result in Gagnon was not available to the agency when its decision in relation to this matter was made.
- [45] Further, the result in Gagnon does not necessarily guarantee a similar result in every case where "excess of jurisdiction" is argued. The facts and the impugned remedy in Gagnon are not the same as those that exist here. The reviewer described this situation as "unusual". The ITPR decision was highly critical of the agency. If ever there was a situation where the agency ought to have sought judicial review to address a legal error, rather than unilaterally make its own determination in that regard, this was such a case. As noted earlier, the

agency, now, recognizes and acknowledges its error in this respect.

- [46] In my view, the unilateral action of the agency (without the benefit of any jurisprudence on the issue) in the circumstances of this matter does nothing to enhance the credibility of its staffing program. On the contrary, it undermines it.
- [47] To suggest, on this application, that I should now review the merits of the ITPR decision exacerbates the problem. The agency claims that to fail to do so would give credence to an unlawful decision. I do not see it that way. To repeat the proposition from Danyluk: if the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here) subsequent errors in its exercise render the decision voidable not void (paragraph 47). The only method, of which I am aware, of discrediting the ITPR decision is to apply for judicial review of it. This, the agency chose not to do.
- [48] Mr. Burstyn's analogy of contempt proceedings is not totally inappropriate. At the hearing, I suggested to the agency's counsel that had an extension of time within which to commence an application for judicial review been sought, it would have been incumbent upon the agency to satisfy the criteria articulated in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.). Failure to satisfy the criteria would result in a dismissal of the motion thereby leaving a decision (that the agency viewed as "unlawful") as it stood, without ever having been subject to judicial review. I asked if such a scenario could give rise to an allegation that the court would be giving credence to an unlawful decision, but received no response. In my view, the agency misplaces the responsibility.
- [49] In summary, the agency cannot use the back door to accomplish what it should have done through the front door. It ought to have applied for judicial review of the ITPR decision and it did not. It concedes this point. It cannot, now, on this application, obtain judicial review of the ITPR decision, on the merits. Rule 302 of the Federal Courts Rules, SOR/98-106 provides that unless the court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought. No such order was requested or granted in this matter. The decision that is before me, and that is the subject of this application, is the decision refusing to implement the ITPR order.
- [50] Judicial review of the "refusal" decision requires that I conduct a pragmatic and functional analysis to determine the applicable standard of review. I should mention that it is not at all clear to me who, in this case, determined that the ITPR recommendation was allegedly made in excess of jurisdiction. The Guidelines, in effect at the relevant time, appear to provide for a manager of a staffing unit to submit a written rationale to the Resourcing and Career Management Division within the Human Resources Branch where corrective measures are not implemented in whole or in part. I cannot ascertain, with certainty, if that happened. The email and memo from the manager (of Human Resources) does indicate that "we have reviewed the decision of [the reviewer]" and "the manager cannot implement the corrective measures". Further references to the "manager" in the memo appear to relate to a manager of a staffing unit.

- [51] The responsive affidavit of the team leader (who is one and the same as the manager of Human Resources) indicates that he advised the reviewer that the corrective measures adopted by her were outside of her jurisdiction. He does not say that he was the person who made that decision.
- [52] The correspondence of the director of the Windsor office, dated August 25, 2005, states that the director has given careful consideration to the August 8th clarification with respect to the ITPR decision of March 10, 2005. The author then refers to consultation with Human Resources and states that the agency maintains its position and will not implement the recommended measures because they are not within the parameters of the Guidelines.
- [53] Since the refusal letter emanated from the director of the Windsor Tax Services Office, I will proceed on the basis that the director is the decision maker. I should also note that the decision under review is not whether the reviewer exceeded her jurisdiction, but whether the refusal to implement the ITPR recommendation is sustainable on the applicable standard of review.
- [54] The submissions on the standard of review are scant. The agency considered this issue only in the context of the ITPR decision and it is not, as I have stated, the decision under review. There are four factors to be considered in the pragmatic and functional analysis.
- [55] The first factor is the presence or absence of a privative clause or a statutory right of appeal. In this case, there is neither a privative clause nor a statutory right of appeal. In such circumstances, this is normally considered to be a neutral factor.
- [56] The second factor is the expertise of the tribunal relative to that of the reviewing court on the issue in question. I do not know the director's area of expertise, if any, for I have not been provided any information in that regard. I am prepared to assume, from his title, that he has expertise in tax services and perhaps in relation to staffing practices. The issue in question - the propriety of the implementation of the ITPR recommendation - turns on a question of pure law. The director has no expertise (of which I am aware) relative to that of the court. Accordingly, this factor results in no deference owing to the director.
- [57] The third factor is the purpose of the legislation and the provision in particular. In this case, it is the Staffing Program, the Directives and the Guidelines that relate to the staff recourse procedure. This package is designed to provide efficient and timely recourse to staff claiming to be aggrieved. The particular provision in question relates to a review, of the agency's process, by an independent, external third party. The recourse procedure is still in its infancy. There is nothing before me to suggest deference is owing to the director's perception, interpretation, or application of the recourse package generally or the ITPR specifically. This factor militates against deference.
- [58] The nature of the question, as I see it, is whether it was open to the director to substitute his opinion for that of the ITPR and refuse to implement the reviewer's recommendation without the benefit of judicial guidance. No deference is owed on this factor.

- [59] A balancing of the factors leads me to conclude that no deference is owed to the director in relation to this decision. The director's purported attempt to adjudicate and pronounce on the reviewer's exercise of jurisdiction, without expertise in such matters and without the benefit of jurisprudence in relation to this, or any, matter regarding the recourse procedure, renders his decision incorrect.
- [60] If I am wrong in my conclusion with respect to the applicable standard of review and some deference is owed to the director, I nonetheless conclude that the decision is unreasonable for want of a proper analysis to support it. The director refers to one extract from the Guidelines, fails to refer to any other extracts that could potentially yield a different result, fails to consider whether there is ambiguity and fails to address the reasoning of the reviewer. In the absence of an analysis leading to the conclusion, the conclusion does not withstand a somewhat probing examination and consequently is unreasonable.
- [61] In the result, the application for judicial review will be allowed and the decision of the director dated August 25, 2005 will be quashed. The applicant has requested costs and is entitled to them. Judgment will issue accordingly.
- [62] At the outset, I stated that my determination is based on the facts and circumstances of this particular matter. I reiterate that comment here. The decision under review was made without the benefit of Gagnon and it has been judicially reviewed on that basis. "Carolyn Layden-Stevenson" Judge Ottawa, Ontario June 13, 2006 SCHEDULE "A" T-1500-05 Canada Customs and Revenue Agency Staffing Program 1.0 introduction The purpose of the Staffing Program is to set the overall directions for staffing decisions in the Canada Customs and Revenue Agency (CCRA), for both EX' and non-EX positions. 1.1 Legal Authorities 1.1-1 The CCRA authority to develop its Staffing Program is set out in the CCRA Act (s.c. 1999, ch.17, s54) hereafter referred to as CCRAA. 1.1-2 The CCRA is subject to other legislation, including the Official Languages Act, Employment Equity Act, Canadian Human Rights Act, Access to Information Act, Privacy Act and Public Service Staff Relations Act. 1.1-3 The CCRA Act (CCRAA s53) provides the Commissioner with authority to make appointments and to delegate this authority to managers or other appropriate persons (CCRAA s37). 1.1-4 The Board of Management may amend the Staffing Program as appropriate. However, the Board of Management authorizes the Commissioner to establish and amend directives as part of the Staffing Program. 1.2 Scope of the Staffing Program 1.2-1 Part I of the Staffing Program applies to staffing activities for all non-EX positions and is comprised of the following:
1. Program Components (Delegation and Accountability; Staffing Plan; Staffing Processes; Recourse for Staffing; Special Considerations; Official Languages Requirements; Post-appointment Situations; Fraudulent Practices; Monitoring and Evaluation) Canada Customs and Revenue Agency Staffing Program
 2. Any staffing Directive established or amended by the Commissioner.

3. This document deals with staffing for non-EX positions. 1.2-2 Part II of the Staffing Program applies to EX positions and is referred to in Chapter 5 of the Policy Framework for the Executive Cadre._ 1.3 CCRA Staffing Principles 1.3-1 The Staffing Program is governed by Staffing Principles outlined in the Summary of the Corporate Business Plan (C-43, s49). The CCRA is authorized to appoint individuals whom it considers necessary for the proper conduct of business (C-43, s53). The Staffing Program is guided by the following Staffing Principles: CCRA Staffing Principles Non-partisanship: The workforce must conduct itself in a manner that is free from political and bureaucratic influence. Staffing decisions must be free from political and bureaucratic influence. Representativeness: The composition of our workforce reflects the available labour market. Competency: The workforce possesses the attributes required for effective job performance. Fairness: Staffing decisions are equitable, just and objective. Transparency: Communications about staffing are open, honest, respectful, timely and clearly understood. Efficiency: Staffing processes are planned and conducted having regard to time and cost, and linked to business requirements. Adaptability: Staffing processes are flexible and responsive to the changing circumstances and to the unique or special needs of the organization._ Productiveness: Results in appointment of the necessary number of competent people for the proper conduct of business. Canada Customs and Revenue Agency Staffing Program 1.4 Review/Reporting Requirements 1.4-1 The extent to which staffing activities are conducted in accordance with the Staffing Program and the Principles will be reviewed periodically, as outlined in the CCRA's Monitoring and Evaluation Framework. 1.4-2 The Commissioner will seek, as required, a report on the conduct of staffing under the CCRA. 1.4-3 The CCRA's Annual Report to Parliament will include any reports made by the Public Service Commission on the consistency of the Staffing Program with the Staffing Principles set out in the Summary of the CCRA's Corporate Business Plan (CCRAA, s. 88(2(b))). 2.0 Staffing Plan 2.1 Staffing Plan 2.1 -1 Authorized Persons are accountable for developing Staffing Plans and strategies, which identify short and long term business requirements of the CCRA at the various levels of the organization. 3.0 Delegation and Accountability 3.1 Delegation of Authorities P3.1 -1 The Commissioner has the authority to appoint. P3.1 -2 The Commissioner may authorize any person (hereafter referred to as Authorized Persons) to exercise or perform appointment authority under section 53 of the CCRAA on the Commissioner's behalf. (C-43, s37). P3.1 -3 The levels of staffing authority provided to Authorized Persons are as outlined in the Schedule for the Delegation of Staffing Authorities. P3.1 -4 There will be an instrument outlining the accountabilities with respect to Canada Customs and Revenue Agency Staffing Program staffing activities, which will include the applicable terms and conditions. P3.1-5 Training must be undertaken prior to individuals receiving staffing authority and being designated Authorized Persons. 4.0 Staffing Processes 4.1 Area of Selection P4.1-1 An area of selection determines the eligibility of individuals for consideration in a selection process or a pre-qualified process or to have access to recourse for certain staffing processes (e.g., other promotions without selection process). P4.1-2 Authorized Persons will determine the area of selection appropriate to the particular staffing activity having regard to business requirements, the CCRA's Staffing Principles and the Directive on Area of Selection. P4.1-3

The area of selection will be defined in terms of geography and/or organization and/or occupation_(including type of employment). P4.1-4 Authorized Persons are responsible for ensuring that the area of selection identified for a particular staffing activity contributes to the efficiency and effectiveness of the Staffing process. P4.1-5 Areas of selection may be established to include employees of the Public Service governed by the Public Service Employment Act (PSEA), and other Federal Organizations. P4.1-6 There will be prescribed minimum areas of selection for certain groups and levels, as part of the Directive on Areas of Selection. Under exceptional circumstances, Authorized Persons may restrict the prescribed areas of selection. P4.1-7 In establishing the area of selection, Authorized Persons, supported by business needs can express a preference that only permanent employees be considered for eligibility, as outlined in the Directive on Area of Selection. P4.1-8 Where there is a demonstrated under-representation as shown in the Employment Equity plan and where other staffing options have been exhausted, Authorized Persons may establish, for external recruitment, an area of selection that targets only candidates from Employment Equity designated groups. Canada Customs and Revenue Agency Staffing Program their own personal assessment information. 4.3.4 Placement P4.3.4-1 Placement is the stage of the selection process in which selection is made from amongst qualified candidates based on established job specific requirements linked to business needs. P4.3.4-2 Placement is a comparison of a candidate against specified placement criteria and is not a ranking of individuals. P4.3.4-3 Where all qualified candidates identified by the assessment stage are to be placed, Authorized Persons may proceed directly to appointment. P4.3.4-4 Individuals considered for placement will be informed of how the placement criteria were applied in the placement decision and of the results of the placement decision. P4.3.4-5 Recourse will be available, upon request, in the form of Individual Feedback to candidates who are qualified but not selected for placement and who meet the geographic criterion at placement. Where appropriate, corrective measures will be taken. P4.3.4-6 For internal selection processes resulting in permanent appointments, qualified candidates who have concerns following Individual Feedback can request either Decision Review or Independent Third Party Review, as per the Staffing Program and the Directive on Recourse for Staffing. Where appropriate, corrective measures will be taken. 4.4 Lateral Moves P4.4-1 Lateral moves can be made either on a temporary or permanent basis at an equivalent or lower level. Lateral moves are applicable to both permanent and term employees. P4.4-2 Consent from the employee being moved will be sought by Authorized Persons prior to lateral moves. P4.4-3 The following are the only circumstances where lateral moves can be made without obtaining the consent of the employee, as stipulated in the Directive on Lateral Moves

- a. Where consent is part of the Terms and Conditions of employment.
- b. In exceptional circumstances, such as harassment situations, urgent temporary operational requirements and organizational change situations. Canada Customs and Revenue Agency Staffing Program P4.10-8 Promotions within an apprenticeship program are subject to Decision Review and available to all participants in the apprenticeship program. 4.11

Appointment / Tenure P4.11-1 The tenure of office of an employee is during pleasure subject to this Program and any Act and the regulations thereunder and, unless some other period of employment is specified, on a permanent basis. P4.11-2 An employee who is appointed on a term basis ceases to be an employee at the expiration of the period specified in the contract. 5.0 Recourse for Staffing P5.0-1 Recourse provides the opportunity for individuals to raise concerns related to staffing and to have these addressed in a timely manner. P5.0-2 Individuals have access to recourse mechanisms including Individual Feedback, Decision Review and Independent Third Party Review, depending on the nature of the staffing activity and as per the Directive on Recourse for Staffing. P5.0-3 Individual Feedback is provided upon request by the person(s) responsible for that particular staffing process or stage of the selection process. P5.0-4 Individual Feedback applies to such circumstances as:

- a) Term extensions;
- b) Rehire of term employees;
- c) Temporary lateral moves;
- d) At the pre-requisite stage of internal selection processes; and
- e) Actings less than 6 months, without selection process. P5.0-5 Individual feedback is also a mandatory step before proceeding to other forms of staffing recourse. P5.0-6 The provision of Individual Feedback is not merely a recourse mechanism for unsatisfied employees. Individual Feedback is a key element in the career management process of the CCRA, allowing employees to receive input on development needs. P5.0-7 Decision Review is available in such circumstances as: Canada Customs and Revenue Agency Staffing Program
 - a) Acting appointments (6 months or over) without selection process;
 - b) Permanent lateral moves (of permanent employees);
 - c) Promotions following reclassification;
 - d) Promotions within an apprenticeship program; and
 - e) For the assessment stage of internal selection processes to individuals whose concerns were not addressed through Individual Feedback. P5.0-8 In a Decision Review Process, the supervisor of the Authorized Person, or a delegate, is responsible for conducting the review and rendering a decision. P5.0-9 Independent Third Party Review (ITPR) is the review of an individual's concern by a person external to the CCRA, resulting in a binding and non-precedent-setting decision. P5.0-10 Independent Third Party Review applies to:
 - a. Permanent promotions without a Selection Process;
 - b. Internal selection Process/Pre-qualified Process placement decisions for permanent appointments; and

- c. Entry (from within the CCRA) into an apprenticeship program. P5.0-11 For external selection processes, hiring managers will address concerns raised by candidates and take corrective actions when required. P5.0-12 Recourse will be conducted in the official language of choice of the individual seeking recourse. P5.0-13 Authorized Persons are accountable for addressing complaints and taking appropriate corrective measures, in a timely manner. P5.0-14 Recourse for staffing will be governed by the Directive on Recourse for Staffing. 6.0 Special Considerations 6.1 Employment Equity P6.1-1 Authorized Persons can appoint and promote qualified members of Staffing Program Annex L Directives on Recourse for Staffing Program Statements:
- Recourse provides the opportunity for individuals to raise concerns related to staffing and to have these addressed in a timely manner.
 - Individuals have access to recourse mechanisms including Individual Feedback, Decision Review Process and Independent Third Party Review, depending on the nature of the staffing activity and as per the Directive on Recourse for Staffing.
 - Individual Feedback is provided upon request by the person(s) responsible for that particular staffing process or stage of the selection process.
 - Individual Feedback applies to such circumstances as: Term extensions; Rehire of term employees; Temporary lateral moves; and At the pre-requisite stage of the selection process.
 - Individual feedback is also a mandatory step before proceeding to other forms of staffing recourse.
 - The provision of Individual Feedback is not merely a recourse mechanism for unsatisfied employees. Individual Feedback is a key element in the career management process of the Agency, allowing employees to receive input on development needs.
 - Decision Review Process is available in such circumstances as: Acting appointments (over 6 months); Permanent lateral moves; Promotions following reclassification; Promotions within an apprenticeship program; and For the assessment stage of the selection process to individuals whose concerns were not addressed through individual feedback.
 - In a Decision Review Process, the supervisor of the Authorized Person, or a delegate, is responsible for conducting the review and rendering a decision.
 - Independent Third Party Review (ITPR) is the review of an individual's concern by a person external to the Agency, resulting in a binding and non-precedent-setting decision.
 - Independent Third Party Review applies to: Permanent promotions without a Selection Process; Selection Process/Pre-qualified Pool placement decisions for permanent promotions; and Entry (from within the Agency) into an Apprenticeship program.
 - There is no formal recourse for external recruitment, however hiring managers will address concerns raised by candidates.
 - Recourse will be conducted in the official language of choice of the individual seeking recourse.
 - Authorized Persons are accountable for addressing complaints and taking appropriate corrective measures, in a timely manner.
 - Recourse for staffing will be governed by the Directive on Recourse for Staffing. Directive Statements: 1. Access to Recourse
 - All employees have access to the recourse mechanisms as outlined for each staffing process in the Agency's Staffing Program. Annex L FINAL VERSION

2. Types of Recourse There are three types of recourse available, Individual Feedback, Decision Review Process and Independent Third Party Review. The type of recourse available is commensurate with the nature and significance of the staffing decision as outlined in the following table:

Type of Staffing Process	Recourse Mechanism	Who has Access to Recourse
Review of Pre-Requisite	Individual Feedback	Candidates not meeting the pre- stage of the Selection requisites.
Process Rehire	of term Individual Feedback	Those term employees who are employees eligible for rehire.
Lateral moves (that are Individual Feedback Employees in the work unit to temporary in nature)	which the lateral move is being made and the employee moved.	Lateral moves of Individual Feedback Employees in the work unit to temporary employees which the lateral move is being made and the employee moved.
Term Extensions	Individual Feedback Employees in the work unit in which the term extension takes place.	Acting Appointments Individual Feedback Employees in the work unit in (less than 6 months) which the acting appointment is taking place.
Assessment stage of the Individual Feedback and Candidates who were assessed.	Selection Process	Decision Review Process
Acting Appointments Individual Feedback and Candidates in the area of	With Selection process	Decision Review Process
selection who are qualified but not placed.	Acting Appointments Individual Feedback and Employees in the work unit.	Without Selection
Decision Review Process	Process (at 6 months)	Lateral Moves (that are Individual Feedback and Candidates in the area of permanent in nature)
Decision Review Process selection who are qualified but resulting from Selection not placed.	Process Lateral Moves (that are Individual Feedback and Employees in the work unit and permanent in nature)	Decision Review Process the employee moved.
Without Selection process	Directives on Recourse for Staffing - Page 3 Annex L FINAL VERSION	Type of Staffing Process
Recourse Mechanism	Who has Access to Recourse	Change in tenure (term to Individual Feedback and Employees in the work unit. permanent)
Decision Review Process	Promotions within an Individual Feedback and Participants in the Apprenticeship	Apprenticeship Program
Decision Review Process program.	Reclassification Individual Feedback and Employees in the work unit in	Decision Review Process which the reclassification is taking place.
Placement stage of the Individual Feedback followed	Candidates in the area of Selection	Process by either Decision Review selection who were considered
Process or Independent Third for placement but not selected for	Party Review that particular selection process	Permanent Promotions Individual Feedback followed
Employees within the area of without a Selection by either	Decision Review or selection Process, not including Independent Third	Party Promotion following
Review Reclassification or promotion within Apprenticeship Program	At a minimum, the work unit refers to the smallest organizational unit to which an employee can belong.	In all cases, Individual Feedback must precede
Decision Review Process or Independent Third Party Review.		
3. Grounds for Recourse In all cases, the grounds for recourse for Individual Feedback, Decision Review Process and Independent Third Party Review is whether the employee exercising recourse was treated in an arbitrary way. The focus should be on the treatment of the individual in the process and not on the evaluation of other candidates or employees.

For each of the three recourse processes, the review shall be limited to the circumstances directly related to that phase of the Selection Process or Staffing Process. For example, Independent Third Party Review would be limited to the placement phase of the selection process. Arbitrary is defined as follows: "In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale, on established policy; not the result of a reasoning applied to relevant considerations; discriminatory (i.e. difference of treatment or denial of normal privileges Directives on Recourse for Staffing - Page 4 to persons because of their race, age, sex, nationality, religion, or union affiliation."

4. ATIP/Disclosure of Information · Recourse for the Staffing Program is subject to the Access to Information Act and the Privacy Act. · For Individual Feedback and Decision Review, Authorized Persons may not divulge personal information of other employees without that employee's express written permission. · Information regarding the assessment or treatment of another candidate in the selection process is considered to be personal information and may not be disclosed. · Authorized Persons shall disclose all information relevant to the employee who is exercising recourse, except any information that could compromise national security, compromise the integrity of any standardized assessment method, or any information that would contravene the Privacy Act.
5. Corrective Measures · Authorized Persons are accountable for taking appropriate corrective measures, in a timely manner. During the Selection process, these corrective measures must be taken immediately so that the process is not unnecessarily delayed. · For staffing, the range of possible corrective measures includes: order correction of the error in the process; recommend revocation of appointed employee, if required; recommend having another manager involved in the decision.
6. Roles and Responsibilities a) Individual Feedback: The person responsible for the staffing process or stage of the selection process (e.g., hiring manager or his/her delegate, Screening or Assessment Board Member, Pool Manager or Human Resources Consultant): · Will communicate the decision to candidates at each of the three stages of the Selection Process in a timely way allowing employees sufficient time to within 7 calendar days of having received Individual Feedback in order to initiate Decision Review process. · Must complete the available standard form which will include the following information: employee's name, work location, unit type of staffing decision taken by management (e.g. reclassification) specific information regarding nature of concern or issue supporting rationale results of Individual Feedback official language of choice · Should ensure that the concerns are sufficiently detailed to allow the Authorized Person's supervisor to respond to them. Incomplete requests for Decision Review, as deemed by the hiring manager's supervisor, will not be accepted. · May choose to be accompanied by an individual of their choice. c) Independent third party review The Authorized Person: · Will receive written requests for independent third party review (ITPR) from employees who have received individual feedback and have elected not to avail themselves of decision review. · Will attempt to resolve the matter with the employee prior to processing the request for ITPR. · Will

complete the appropriate sections of the request for ITPR form. · Will forward the Request for ITPR form to the Office of Conflict Management. · Will be provided the opportunity to present his or her case to the ITPR. · May be accompanied if desired, by an individual of their choice, including human resources consultants. · Will provide relevant information and/or documentation to the ITPR related to the placement phase of the selection process or to the promotion without selection process. · Will provide input into any possible corrective measures. · Will be bound by the decision of the ITPR. · Is responsible for taking corrective measures as appropriate. The employee: · Must submit a written request for ITPR using the prescribed form to the Authorized Person within 7 calendar days of receiving Individual Feedback. · Forward a copy of the request for ITPR to the Office of Conflict Management. · Should attempt to resolve the matter with the hiring manager prior to forwarding the request to the Office of Conflict Management. · May choose to be represented by an individual of their choice. The Human Resources Consultant: · Will be responsible for providing advice and support to managers throughout the ITPR process. · For further details regarding the Independent Third Party Review process, refer to the "Agency Conflict Management System - Guidelines for Independent Third Party Review Process", of which the staffing portion forms part of the Staffing Program. Effective October 1 st, 2003 AGENCY CONFLICT MANAGEMENT SYSTEM GUIDELINES FOR SUBMITTING AND PROCESSING A REQUEST FOR AN INDEPENDENT THIRD PARTY REVIEW (ITPR) PURPOSE To establish procedural guidelines for the ITPR process. APPLICATION These guidelines apply to the following situations: 1- Staffing in the following circumstances (excluding EX staffing): · A permanent promotion without a selection process; · During the placement phase of an internal selection process leading to a permanent promotion; and · Entry into an apprenticeship program. 2- Staff relations in the following circumstances: · Termination or demotion for non-disciplinary reasons of a permanent employee for incapacity, incompetence, or abandonment of position; or · Involuntary layoff of a permanent employee (for those employees who do not have access to the Public Service Staff Relations Board); or · Grievances or complaints related to certain Agency policies as per joint union-management memorandum of understanding. Only those individuals not subject to the Agency's Human Resources policy framework for the Executive Cadre may request an ITPR. Effective October 1st, 2003 GUIDELINES Filing a request The requestor should submit a request to the Office of Dispute Management (ODM) using the "Request for an Independent Third Party Review " form (form number RC l 17 is available from the local human resources office or on Infozone <http://infozone.rc.l1c.ca/en0ish/r2732472/conflict/disputeindependent.asp> A copy must also be forwarded to the manager who made the decision under review (hereafter referred to as the manager) or the local Human Resources (HR) office. The request must be received by the ODM within 7 calendar days from the date of receiving a response regarding the mandatory rights-based grievance / complaint process that precedes the right of the requestor to access ITPR, e.g. individual feedback (IF) at the placement phase of a selection process. A request given to the manager or the local human resources office within the 7-day timeline, and subsequently forwarded to the ODM, will be considered to have met the timing requirement. A request for an ITPR must include the

following information: · Identity of the requestor, e.g. name, daytime and/or alternate telephone number, mailing address, personal record identifier (PRI) and work location; · Name and phone number of decision-making manager; · Type of decision taken by management, e.g. not selected for placement at the placement phase of a selection process; · Description of what was arbitrary (for staffing related request); it is not sufficient to simply state that the decision was arbitrary; · Date of receiving a response regarding the mandatory rights-based grievance / complaint process that precedes access to ITPR. An incomplete submission will not be processed any further and the requestor will be advised accordingly by the ODM. The requestor should consider having an informal discussion with the manager at any time to resolve the matter, with or without the assistance of an impartial person of their choice. For the purpose of these guidelines, reference to a requestor or a manager includes their respective representatives when one is identified. Effective October 1st, 2003

Manager's input The manager should consider having an informal discussion with the employee at any time to seek clarification of the issue and try to resolve the matter, with or without the assistance of an impartial person of their choice. If the request for ITPR is related to a staffing situation, the manager should share all information determined by the manager to be relevant to the issue at hand and related to the jurisdiction of an external reviewer with the requestor before a request is given to the reviewer for processing, taking into consideration the requirements of the Privacy Act. Examples include: document of employee's evaluations used in placement decisions, and rationale of the choice of the placement criteria. The final decision regarding documents/information to be shared rests with the manager. Preliminary review of request and referral to reviewer The ODM reviews the incoming request to verify whether it meets the requirements for further ITPR processing by an external reviewer, as per the circumstances and grounds defined in the subject-specific Agency policy and listed in Appendix I (attached). The ODM may contact the requestor and the manager to clarify matters contained in the original submission. A request for ITPR will be considered as being abandoned by the requestor if s/he does not respond within 30 calendar days to a number of attempts (by telephone, e-mail, and/or surface mail) by the ODM to contact him/her in the context of this phase of the review process. If a request for an ITPR is accepted for further processing, the ODM assigns the file to an external reviewer selected from a pre-established roster. The criteria for the selection of an external reviewer from the roster include: · Geographic location; · Knowledge of the working language of the parties; · Availability, i.e. can complete a case within eight (8) weeks; and · "Next in line on the roster" approach. The ODM informs the requestor and the manager of the name of the reviewer. At this point in time, the external reviewer becomes responsible to manage the review process until: a decision on the substantive issues is rendered, the parties in dispute agree to settle the matter prior to a decision by the reviewer, or the reviewer terminates the review prior to reaching a decision on the substantive issues (see section on termination of a review). Effective October 1st, 2003 The manager will advise the successful candidates that an ITPR process is being initiated and that they are entitled to participate in the review process. The manager will be required to confirm to the reviewer the names of the successful candidates who wish to participate, and to ensure that the

successful candidates are kept informed of the steps in the process and granted the appropriate leave. The ODM will assign ITPR requests regarding the same management decision or selection process from more than one requestor to one reviewer, to be processed at the same time. When feasible, requests about more than one management decision from a single requestor will also be assigned to one reviewer to be processed at the same time. The ODM will provide written feedback to the requestor when a request is not suitable for further processing. All documents forwarded to the ODM by the requestor as part of the request for ITPR will be shared with the reviewer and the manager (assuming the latter has not received the information directly from the requestor). The review process After being assigned a case, the reviewer will be required to contact the parties in dispute, together, within seven (7) calendar days to:

- Describe his/her mandate and role, and to clarify the role and responsibilities of the requestor and the manager;
- Clarify the nature of the case;
- Determine and describe the review process and timelines, e.g. a paper review with teleconference, or an in-person meeting or a videoconference (in whole or in part);
- Lead a discussion on the nature of relevant documents to be shared by the parties, including timelines;
- Confirm the participation of the successful candidates and clarify their role; and
- Review and discuss the next steps keeping in mind the need to balance processing fairness with administrative efficiency throughout the process.

The reviewer will keep the ODM abreast of processing events and timelines. Even though the reviewer's mandate is to render a final decision with respect to the substantive issues being reviewed, s/he should seek to set a collaborative tone regarding the discussions among the participants. This could include allowing the requestor and the manager to settle the dispute by themselves, if and when the opportunity arises, prior to rendering a decision on the substantive issues. Therefore, the role of the reviewer is not to mediate such an agreement. A typical review process could consist of:

- Effective October 1st, 2003
- Exchange/receipt of all relevant documents by the parties and the reviewer, subject to the requirements of the Privacy Act, and
- An opportunity for either party to respond or to ask questions about the other party's case and for the reviewer to clarify matters of interest.

The access to and disclosure of any personal information, is subject to the requirements of the Privacy Act and the Access to Information Act. Personal information regarding the requestor and relevant to the case should be readily provided to him/her and the reviewer, by the manager. Personal information regarding other individuals could be available to the requestor and the reviewer at management's discretion, i.e. they judge that a "consistent use" applies in the context of the Privacy Act. A reviewer cannot order a manager to release information that may be requested by the requestor, and will be free to consider the type of impact related to the lack of availability of information in his/her final decision. The reviewer will:

- Limit participation to the requestor, the manager and the successful candidates and/or their representatives who elect to participate at the onset. The participation of witnesses should be limited to the time of their direct involvement.
- Decide on and make all processing arrangements, in consultation with the parties, with a view to minimize the potential direct costs to the parties involved.
- Remind the participants that the case is a private matter and not to disclose personal information related to the case to anyone who is not involved.
- Give expression to the

principles of procedural fairness throughout the review process (i.e. the right to be heard, to question opposing party's arguments, to access documents introduced by the opposing party, etc). Seek to process the case as expeditiously as possible. Conduct the process bearing in mind that it is meant to be an administrative review and, as such, should not be too litigious, e.g., swearing in of witnesses, rules of evidence, cross-examination, etc. Comply with the laws governing the Agency and its employees. Determine the relevancy of the information provided by the participants. The reviewer will not have the power to subpoena witnesses or documents. Effective October 1st, 2003 On staffing matters linked to a selection process, the reviewer will be limited to examining the events and decisions related only to the placement phase and not to those related to the assessment or prerequisite phases. Ensure people with disabilities are reasonably accommodated and that the language of choice of the requestor is respected. Request internal subject-matter experts to provide policy-related interpretations as required. Such information will be made available to the participants. Consider each case on its own merit, i.e. the reviewer will not be bound by previous ITPR decisions. Encourage the participants to act in good faith when required, e.g. providing documentation as agreed and being present at scheduled discussions; remind them of the potential adverse impact of not acting in good faith, e.g. allow the request, terminate the review process. Proceed with part or all of the review process with the requestor and the manager when a successful candidate who wishes to participate is not acting in good faith according to the reviewer. Issue an all-inclusive final and binding decision in writing within ten (10) calendar days after the final exchange of information between the participants and the reviewer. The report would be forwarded directly to the participants and to the ODM. The final decision shall include the following: the names and work location of the participants, the nature of the issue, the arguments presented by all participants, an analysis of the situation, the decision taken including rationale, and corrective measures where applicable. The report should include a reminder to the participants not to disclose case-related personal information about other individuals, and should not contain sensitive business related information such as taxpayer data. A detailed transcript of the hearing is not required. A reviewer may be requested to clarify the understanding of corrective measures contained in the final written decision in response to a question from one of the participants. In such instances, the additional information would be issued in writing to all participants and the ODM. However, the reviewer does not have the jurisdiction to oversee the application of corrective measures. This is the responsibility of the authorized manager. In the event the requestor and the manager agree to settle the matter prior to the release of a final decision by the reviewer, the latter shall issue a memorandum to that effect and the case will be considered as being closed. A reviewer cannot remain seized of a case while and after the parties implement their settlement, even if requested by the parties. Effective October 1st, 2003 When applicable, specify corrective measures as per the range of possible measures detailed in Appendix II. Termination of review: The requestor will have the option of withdrawing a request on his/her own volition at any time during the process before the reviewer decides the outcome of the request. This must be done in writing to the reviewer and/or the ODM. The reviewer will terminate the

review before issuing a final decision on the substantive issues when: • A request is found to be frivolous or vexatious as per the reviewer's interpretation of these terms; • There is no jurisdiction to proceed as prescribed in the subject-specific policy; • The requestor and the manager settle the issues by themselves. In such cases the reviewer's mandate is automatically terminated; • The requestor is uncooperative, e.g. declines to produce relevant documents or fails to notify the reviewer of absences to pre-scheduled events and no justification exists for these absences; or • The reviewer discovers during the process a conflict of interest or any other condition that could adversely impact his/her impartiality or ability to continue. A decision to terminate a review, including the rationale used, will be documented and forwarded to the participants and to the ODM. If a review process is terminated prior to the reviewer issuing a final decision, except where the reviewer declares a conflict of interest or the partiality of the reviewer, the requestor cannot file another request for ITPR with respect to the same management decision. The reviewer shall inform the ODM promptly in all situations when a review process is terminated prior to issuing a final decision on the substantive issues. Post-review: The appropriate level of management is responsible to implement the corrective measures issued by the reviewer, in as much as these are contained within the authority given to the reviewer in this area, in a reasonable time frame, and to provide timely feedback to the ODM on actions taken. The manager will be required to provide a written rationale to the ODM and, if a staffing situation, the Resourcing and Career Management Division within the Human Resources Branch, in the event the corrective measures are not implemented in whole or in part. Effective October 1st, 2003 The ODM will monitor the use of the ITPR, including the implementation of corrective measures, in cooperation with local and/or regional offices. A sanitized version of the reviewer's decision will be prepared by the ODM, and made available to various stakeholders on request and by posting on Infozone. A copy of the reviewer's complete decision will be sent to the responsible Assistant Commissioner, and the relevant functional division within the Human Resources Branch. The ODM will process the costs invoiced by the reviewer to the responsibility center account of the manager involved in the case. The reviewer must submit all case-related documents to the ODM, except personal notes, for inclusion in the official case record. Effective October 1st, 2003

Appendix I REQUIREMENTS FOR ITPR PROCESSING

Subject Circumstances Grounds Staffing Qualified and not selected during the placement phase of a selection process leading to a permanent promotion, or a promotion without selection process, or entry into an apprenticeship program.

- The employee feels s/he was treated in an arbitrary manner. Arbitrary means... Overall eligibility criteria
- In an unreasonable • Has received Individual Feedback with respect to the placement phase or a staffing decision for which there was no selection process manner, done capriciously
- Not done or acting according to reason or • Has requested ITPR within 7-calendar days from the day a response to individual Feedback was received

judgment

- Not based on rationale or • The motive of the complaint is linked to the placement phase where a selection process is involved on established policy
- Not the result of reasoning • Has not selected Decision Review mechanism at the placement phase applied to relevant considerations • Is an employee of the Agency or the Public Service; Is the first request for an ITPR by the employee with respect to the staffing decision taken •
- Discriminatory (i.e. difference of treatment or denial of normal privileges • Is an internal staffing process, i.e. not external recruitment situation to persons due to the grounds listed in the • Staffing decision is not a result of the application of corrective measures from a previous request for ITPR Canadian Human Rights Act) • Is not an EX staffing decision Non-disciplinary • Is a permanent employee of the Agency and is not in the Insufficient, inappropriate, or termination or demotion EX group unsubstantiated cause • Employee was terminated or demoted • Unfavorable response to internal grievance step has been given • PSSRB not an option, e.g. not claiming disguised discipline • Is not under probation Involuntary layoff • Is a permanent employee of the Agency and is not in the EX group Selection for layoff alleged to be arbitrary • Employee has received a layoff notice • Has not volunteered to be laid off • Does not have access to the PSSRB Grievances or complaints related to certain Agency policies as per joint union- management memorandum of understanding. TED TED Effective October 1st, 2003 Appendix II RANGE OF CORRECTIVE MEASURES Subject Range of corrective measures b Staffing = Order correction of error in process
- Recommend revocation of appointed employee
- Recommend involving another manager in the decision Non-disciplinary
- Order re-instatement of employee or return of employee to initial classification termination or demotion group and level
- Order a duty to accommodate
- Order remittance of lost salary and benefits Involuntary layoff
- Order correction of error in process
- Order re-instatement of employee (not a situation of job creation)
- Order remittance of lost salary and benefits and payback of all layoff-related allowances received
- Recommend involving another manager in the decision Grievances or complaints related to certain Agency policies as per joint union-management memorandum of understanding. TBD FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1500-05 STYLE OF CAUSE: BARRY BURSTYN v. CANADA CUSTOMS AND REVENUE

AGENCY, JOHN JRAIGE and RON GALBRAITH PLACE OF HEARING: Ottawa, Ontario DATE OF HEARING: May 23, 2006 REASONS FOR JUDGMENT: LAYDEN-STEVENSON J. DATED: June 13, 2006 APPEARANCES: Steven Welchner FOR THE APPLICANT Alexander Gay FOR THE RESPONDENTS SOLICITORS OF RECORD: Welchner Law Office Ottawa, Ontario FOR THE APPLICANT John H. Sims, Q.C. Deputy Attorney General of Canada FOR THE RESPONDENTS

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