

**Date: 19980615**

**Docket: T-2251-97**

**PRESENT: THE HONOURABLE MR. JUSTICE CAMPBELL**

**BETWEEN:**

**CLAUDE RANSON MILLARD**

**Applicant**

**- and -**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**ORDER**

For the written reasons provided, the Commissioner's decision is set aside, and this matter is referred back to him for determination in accordance with these reasons. I further direct that the only issues which remain for determination are those unaddressed by Chairperson Lynch in her recommendations being:

- i) On what date should Ms. Baker be recognized as the Grievor's spouse for the purpose of the Relocation Directive?
- ii) If the Grievor would normally qualify for reimbursement under HEAP, do other general principles of the Relocation Directive nevertheless prevent reimbursement in this particular type of case?

Judge

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OTTAWA, ONTARIO

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**REASONS FOR ORDER**

**CAMPBELL J.**

[1] This judicial review concerns whether the Commissioner of the RCMP made a reviewable error in interpreting the rules relating to certain relocation benefits available to Corporal Millard as a retiring member of the Force. Cpl. Millard's precise complaint is that the Commissioner erred in selecting the deemed purchase date of his principal residence for the purpose of evaluating the quantum of home equity assistance compensation. In my view, however, this issue is subsidiary to the larger question of whether a reviewable error has been made in the interpretation of the overall scheme of the relocation rules.

[2] In the following words used by Commissioner J.P.R. Murray<sup>1</sup>, it is clear that his decision to deny Cpl. Millard's application for compensation is heavily, if not exclusively, based on the findings of an External Review Committee:

The record in this matter has been read carefully including the Findings and Recommendations of the External Review Committee. Upon careful review of all the material before me, I am in agreement with the External Review Committee. In effect, the Committee's position is in agreement with the Force's interpretation of section 4.4.4 of the Relocation Directive.

I also agree with the Committee and find that the acquisition date for the Toronto residence is May 17, 1994. That date being when Cpl. Millard gave up the section 4.4.4 option and Ms. Baker was recognized as the member's spouse.

As there was no 10% market decline from May 17, 1994 to the date that the house was sold, Cpl. Millard does not meet an essential criteria of HEAP. As such, he is ineligible to recover any price difference.

This decision is taken in isolation of the examples provided by the Committee; ie. examples of circumstances that in the Committee's view could alter their view of the operation of section 4.4.4.

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<sup>1</sup>The decision is undated but noted on its face as "Protected 'A' 96G-1692".

Grievance denied.

[3] Given that the Commissioner's decision does not contain any independent critical analysis, I find that if the recommendation of the External Review Committee is based on an error of law, so is the decision of the Commissioner.<sup>2</sup>

**A. The relocation rules**

[4] For the rules to be properly interpreted, they must be considered together in their entirety.<sup>3</sup> To assist in the analysis which follows, however, the following extracts, including headings, provide insight into the overall scheme of the rules and their administration:

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<sup>2</sup>Sections 31 to 36 of the *RCMP Act* and sections 35 and 36 of the 1988 *RCMP Regulations* (the "*Regulations*") provide for the grievance procedure. That procedure is composed of several levels. The final level of the procedure is consideration of the grievance by the RCMP Commissioner (s. 32 of the *Act*). Before the Commissioner considers a grievance of a type prescribed by regulation, the Commissioner must, under subsection 33(1) of the *Act*, refer the grievance to the RCMP External Review Committee (the "*Committee*"). Paragraph 36(d) of the *Regulations* provides that grievances relating to the RCMP's interpretation and application of the RCMP Relocation Directive must be referred to the Committee.

The Committee Chairperson shall review grievances that are referred to the Committee pursuant to s. 33 of the *Act* (subsection 34(1) of the *Act*). If the Chairperson is satisfied with the disposition of the grievance by the RCMP, the Chairperson must prepare and send a report to that effect to the Commissioner and the member presenting the grievance (subsection 34(2)). If the Chairperson is not satisfied with the disposition of the grievance by the RCMP, the Chairperson may prepare and send to the Commissioner and the member presenting the grievance a report in writing setting out such findings and recommendations with respect to the grievance as the Chairperson sees fit, or institute a hearing to inquire into the grievance in greater detail.

<sup>3</sup>Subsequent to the hearing of this application, at my request, I was supplied with a complete copy of the applicable rules by the RCMP Directive Management Section, Ottawa. They are contained in the Relocation Administration Manual which is composed of the following: *Administration Manual VI.2 Relocation - K.5. Home Equity Assistance and Appendix VI-2-1 RCMP Relocation Directive* in effect from 1994 to 1995 composed of:

- Revision 4397 dated 91-03-15 (TofC, A. - Q.9.) K.5.
- Revision 4925 dated 93-08-06 (K.4.b.2.2 - K.6.d.1)
- Revision 4397 dated 91-03-15 (TofC/App. VI-2-1/pgs. 1-3)
- Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 1, 2)
- Revision 4490 dated 91-10-10 (App. VI-2-1/pgs. 3, 4)
- Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 5-14)
- Revision 4730 dated 92-09-16 (App. VI-2-1/pgs. 15, 16)
- Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 17-22)
- Revision 4731 dated 92-09-16 (App. VI-2-1/pgs. 23, 24)

Administration Manual VI.2:

1. **Relocation**

...

K. **Disposition and Acquisition of Accommodation**

K. 5 **Home Equity Assistance** (App. VI-2-1, 4.4.10)

K. 5 a. **General**

1. The purpose of the Home Equity Assistance Program is to financially compensate a member who is facing a significant loss on the sale of his/her principal residence.
2. A decline in the general real estate market of at least 10 percent from the time the member purchased his/her principal residence until the sale of that residence must occur before individual circumstances can be considered for reimbursement.
- ...
6. When the criteria of general decline in the market have been met along with other criteria in K.5.a., reimbursement will be 90 percent of the difference between the purchase price and the sale price where sale price in the member's principal residence is lower than the purchase price.

Example:

Purchase Price	\$100,000.00	
Sale Price	<u>\$88,000.00</u>	
Loss		\$12,000.00

The member will be reimbursed 90 percent of \$12,000, i.e. \$10,800.

...

9. As a general rule, the purchase price is determined by using the amount of money the member actually expends on the principal residence including down payment and value of home mortgages, plus:
  - 1.the actual cost of improvements supported by receipts or statutory declaration, or
  - 2.the value by cost approach of improvements, to the maximum of the standards and norms of the community as provided by professional appraisers. See App. VI-2-1, 4.4.10(i)(ii) and App. "G" Sec. 5.

K. 5. b. **Member**

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- Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 25, 26)
  - Revision 4732 dated 92-09-16 (App. VI-2-1/pgs. 27-28a)
  - Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 29-40)
  - Revision 4629 dated 92-04-20 (App. VI-2-1/pgs. 41, 42)
  - Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 43-60)
  - Revision 4530 dated 91-11-26 (App. VI-2-1/pgs. 61, 62)
  - Revision 4397 dated 91-03-15 (App. VI-2-1/pgs. 63-71)
  - Revision 4397 dated 91-03-15 (App. VI-2-1/App. A - App. C)
  - Revision 4733 dated 92-09-16 (App. VI-2-1/App. D/pgs. 1, 2)
  - Revision 4397 dated 91-03-15 (App. VI-2-1/App. E - App. H/pg. 2)

1. Ensure you select a principal residence which you intend to purchase with due consideration of the Home Buyer's Guide at App. VI-2-1, App. "G".

NOTE: Failure to follow these guidelines and provisions of App. VI-2-1, 4.4.10(c) may result in nonacceptance of your application for equity assistance at the time of sale.

*Administration Manual Appendix VI-2-1:*

**1. Introduction**

**1.1 Purpose and Scope**

1.1.1 It is the policy of the RCMP that:

- (a) in any relocation, the aim shall be to relocate the member at a minimal cost to the public while reimbursing the member for all actual and reasonable relocation costs within the limits of this Directive;
- (b) RCMP relocation provisions will be based upon the needs of the relocated member and relocation policies in effect in the public and private sectors;
- (c) the relocation provisions which generally apply to moves within Canada shall provide only for the member's legitimate expenses, without opening the way for personal gain or for the underwriting of extravagances. Expenses resulting from misinterpretation or mistakes shall not be a basis for reimbursement;

...

**1.4 Definitions**

...

**Dependent** means any person who lives with the member and is either the member's spouse, a person for whom the member can claim exemption under the *Income Tax Act*, or a member's unmarried child, step-child, adopted child or legal ward who cannot be claimed as an income tax deduction but is in full-time attendance at school. A family member who is permanently residing with the employee, but who is precluded from qualifying as a dependent under the *Income Tax Act* because he/she receives a pension shall also be considered as a dependent under this policy.

...

**Principal residence** means a single-family dwelling owned, leased or rented by the member or dependent residing with the member, which was occupied continuously at the time of the relocation order, and which is recorded as the member's permanent address at division headquarters. Summer residences or other temporary or seasonal accommodation are excluded. (This definition will not apply for Sec. 4.4.4 and 4.4.9. In these cases, the residence involved must conform to the definition at the time the member elects to employ the particular section.) (The term "leased or rented" is effective 87-01-01.)

**Relocation** means the authorized geographical transfer of a member from one place of duty to another; or the authorized geographical transfer of a newly engaged member from his/her pre-engagement place of residence to his/her first place of duty upon being sworn into the Force (excluding training sites).

**Relocation Booklet** means the information document provided to each relocating member which serves as a summary of guidelines for planning and executing a transfer. The booklet itself is without statutory significance, and in the event of any interpretive conflicts, it will be superseded by this directive.

**Replacement residence** means a single-family dwelling purchased or leased at the new place of duty which will become the member's principal residence following the relocation.

...

**Spouse** means husband or wife.

**Spouse, Common-Law** means a person of the opposite sex who cohabits with the member and for whom evidence has been provided, by means of affidavit to the satisfaction of the Commissioner, that together they have been recognized as husband and wife and have represented each other as such for a continuous period of at least one year in the community or communities in which they have lived. If these conditions have been satisfied, a common-law spouse will be entitled to the same reimbursement as a spouse under this directive.

...

#### **4. Disposition and Acquisition of Accommodation**

##### **4.1 General**

4.1.1 It is the intention of the RCMP to support a member in disposing of his/her principal residence at the old post and to acquire a replacement residence at the new post. Such support is available on one occasion only per relocation within a two year period from the date the member/dependents departed from the old post. While disposal of a principal residence is generally undertaken in connection with a relocation transfer, reimbursable disposal may also take place either before or after an authorized transfer provided the provisions of sections 4.4.4 or 4.4.9 are followed.

(a) Effective 84-02-09, the two-year period may be waived in exceptional circumstances with the approval of the Commissioner or his delegate, e.g. employer created impediment.

(b) Members purchasing property should refer to restrictions outlined in Sec. 4.4.2, 4.4.5, 4.4.6, and 4.4.10 respecting limited reimbursement on sale of the property.

...

##### **4.2 Rent in Advance of the Move**

...

##### **4.3 Lease Liability**

...

##### **4.4 Real Estate Broker's Fees**

4.4.1 The reimbursement of a real estate broker's commission is authorized to enhance a member's mobility by facilitating disposal of his/her principal residence. When a member is ordered to relocate within Canada and sells his/her principal residence at the old post, and if such commitments are made within two years (except under Sec. 4.4.4 and 4.4.9) from the date the member and/or his/her dependents departed from the old post, the fee charged by the real estate broker shall be reimbursed provided that:

(a) Except under sec. 4.4.9, at the time of notification of relocation, the principal residence was occupied by the member. See Sec. 4.4.4.

(b) The principal residence was on a lot of a size appropriate to its location;

(c) The fee charged is within the scale for the multiple listing service (MLS) in the area;

...

4.4.4 In cases where the member will occupy government supplied accommodation at the new post, or where, for personal reasons, he/she wishes to retain the residence at the old post, it will not be necessary for the member to have his/her residence continuously listed for sale. The following procedure may be followed:

(a) The member should obtain the advice of his/her sending division FSSB and persons qualified in the real estate field prior to opting for this course of action (See Sec. 4.5.1(a) and 4.6.1(a).

(b) The member shall submit a memorandum to the sending division FSSO within 90 days of his/her notification of transfer setting out his/her intent to retain the old post residence. This 90 day limitation may be waived only upon the authority of the Commissioner or his delegate.

(c) The maximum real estate fee to be reimbursed at the time of sale of the old post residence will be determined by the appraised value of the real estate commission rate (MLS) in existence at the time the member departs on transfer. Should real estate fees increase, the foregoing will remain the maximum amount reimbursable, but if real estate fees decrease, the actual fee will be reimbursable.

(d) The member must obtain a written appraisal of his/her residence and forward a copy to the sending division FSSB. He may submit a claim for payment of this expense accompanied by proof of payment.

...

(f) The appraised value of the house will be determined in the following manner:

...

(g) A member will be eligible to claim expenses for the disposal and acquisition of residences that occur after the retained residence is sold or that occur after the member gives up the option under this Section.

...

(j) Authority to retain the old post residence under this provision expires upon notice of the transfer/relocation to the location for which the authority was granted.

...

4.4.9 Members may choose to dispose of a principal residence for reasons other than an authorized relocation transfer and remain eligible for current disposal expenditures if subsequently authorized to relocate, provided that:

(a) The Commissioner or delegate has established that one of the following conditions exist:



- (i) housing values are steadily falling at the location;
- (ii) it is an area where there is a limited market; or
- (iii) it is at a location (such as a one-industry town), where “boom and bust” cycles are likely;

(b) In choosing this option, members will notify div. FSSB within 30 days of completing the transaction of the intention to claim disposal costs if subsequently authorized to relocate. FSSB shall be provided with copies of documents and receipts for all claimable expenses and will advise the member of the total reimbursable amount if subsequently relocated.

NOTE: If this option is exercised, no other residence will be considered for disposal costs at the location. Any local area moving expenses and any resultant lease penalty payments shall be the member’s responsibility. This option is intended to assist members in locations where economic or seasonal shifts may hinder disposal at the time of a subsequent transfer. It is not meant for members who intend to remain in the real estate market by purchasing another residence at the same post.

(c) For reporting requirements, see Sec. 8.2.1.

#### 4.4.10 **Home Equity Assistance** (Effective 90-04-01) <sup>4</sup>

- (a) This section provides partial equity protection to a homeowner who must relocate or who meets the conditions in RCMP Regulations, 1988, Sec. 79(1) when the following criteria are met:
- (i) There has been a decline of at least 10% in housing market prices since the principal residence was purchased by the member, and
  - (ii) the sale price of the principal residence is less than the purchase price.

...

- (e) Provisions of this section will be centrally controlled and the Commissioner may delegate approval authority only to personnel within Headquarters Corporate Management.
- (f) This section is applicable only to a principal residence to which there is a good and marketable title and which is owned and occupied by the member and/or spouse, including those residences for which approval has been received under Sec. 4.4.4 and 4.4.9.
- (g) Property not meeting the criteria of Section 4.4.1 and 4.4.2 will be subject to an assessment by the Commissioner or his delegate who will determine the acceptability of property for reimbursement under this section.
- (h) The Commissioner or his delegate shall establish procedures for the administration of this section including the distribution of the Home Buyer’s Guide at App. “G” and for inclusion in the Relocation Booklet required under Sec. 1.1.8(b).

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<sup>4</sup>This provision is known throughout the decision making in this case as “HEAP” meaning Home Equity Assistance Protection.

(i) **Definitions**

...

- (iv) The Commissioner or delegate shall determine the Purchase Price for the purpose of reimbursement under this section in considering:
- Reasonableness of initial purchase price considering market conditions at that time, along with recognition of guidelines within the Home Buyer's Guide. See App. "G".
  - Maintenance such that value is reasonably retained.
  - Reasonableness of sale price, recognizing current market conditions and RCMP requirement for a relocation.

...

(j) **Reimbursement**

- (i) A member who meets the criteria of this section, upon the sale of his/her principal residence may be reimbursed 90% of the difference between the purchase price and the sale price as established herein.
- (ii) In exceptional cases of hardship in which the circumstances of the case do not meet the criteria of this section, the Commissioner may, with the approval of the Secretary of Treasury Board of Canada, authorize reimbursements appropriate to the circumstances.

...

4.5 **Legal Fees**

...

4.6 **Other Expenses**

- 4.6.1 (a) (i) If a member who qualifies for the reimbursement of real estate and legal fees (see Sec. 4.4.1, 4.4.4, 4.4.9 and 4.5.2) must terminate the mortgage(s) on the sale of the principal residence at the old place of duty, and is required to pay a mortgage repayment penalty, that member shall, on presentation of proof of payment, be reimbursed the amount of the penalty payment not exceeding six months mortgage interest. Costs related to the termination of a second mortgage may only be reimbursed if there are no such costs incurred in relation to a first mortgage.
- (ii) Effective 85-11-07, in cases of demonstrated need or exceptional circumstances, the Commissioner or his delegate may authorize an extension not exceeding six months for a mortgage repayment penalty.
- (iii) Members who have elected to utilize Sec. 4.4.4 will only be able to claim mortgage penalty payments up to the amount of penalty which would have applied on their date of departure from the post where the residence was retained.
- (iv) Members who have elected to use Sec. 4.4.9 will only be able to claim mortgage repayment penalty up to the amount of penalty which would have applied on the date of transfer notice from the post where the principal residence was sold.

*Administration Manual Appendix VI-2-1 (App. "G"):*

**Home Equity Assistance**

**Home Buyer's Guide**

...

3. You should purchase a home that fits your budget and life style needs. Generally you can not pick the best time to sell and therefore a home should be chosen that's

readily resalable. A home appropriately priced and located in the right environment will generally sell within a reasonable time frame.

The following guidelines are provided:

(a) **Selecting a New Community**

...

(b) **Evaluating a Neighbourhood**

...

(c) **Choosing Your New Home**

You've selected your community, evaluated neighbourhoods and now comes the big decision - choosing your home. Home selection is personal, but in order to make the best selection be careful not to let your emotions buy - or not buy a house. Stay objective, and keep these points in mind:

-SETTING. Does the house fit the neighbourhood in terms of price and style with the surrounding homes? Does the home look like it belongs on the lot and in the neighbourhood?

-Decor and furnishings not to your taste can always be changed, but you should purchase a home to meet your personal needs to the extent possible.

-FUTURE EXPENSES. Is substantial fix-up needed? Look for cosmetic coverups of serious problems. Avoid purchasing a "handy man's special" unless that is really what you want.

***B. The factual and adjudicative history of Cpl. Millard's application***

[5] The history leading up to the decision the Commissioner ultimately reached is important since it provides the institutional context in which the decision was made.

[6] The Applicant is a retired RCMP Corporal. In 1992, Cpl. Millard worked in "E" Division in Victoria, B.C. where he owned a home and was married. During 1992, Cpl. Millard and Ms. Millard separated and subsequently divorced on September 17, 1993.

[7] On December 24, 1992, Cpl. Millard was transferred to "O" Division in Newmarket, Ontario and chose to retain his house in Victoria in accordance with section 4.4.4 of the RCMP Relocation Directive. On January 1, 1993, Cpl. Millard began cohabiting with Ms. Joyce Baker in Toronto in a residence that had been purchased by Ms. Baker in 1988 for

\$2,583,000.00. This is the residence for which Cpl. Millard made a request for compensation under the HEAP provisions.

[8] On April 21, 1994, Cpl. Millard advised the RCMP that he was going to make a pre-retirement move. Cpl. Millard requested information relating to his relocation benefits for such a move. The Financial Services and Supply Officer, "O" Division (the "FSSO") responded on April 22, 1994, informing Cpl. Millard that, as he and Ms. Baker had lived together for more than one year, she qualified as his spouse for the purpose of the Relocation Directive and that he qualified for relocation reimbursement with respect to their joint residence in Toronto. The FSSO also informed him that such reimbursement would only be possible if he first sold his house in Victoria, B.C. or gave up his option for this residence under s. 4.4.4 of the Relocation Directive.

[9] On May 17, 1994, Cpl. Millard gave up his option under s. 4.4.4 with respect to his Victoria residence and requested further information about his qualification for reimbursement under HEAP.

[10] On June 13, 1994, the FSSO responded that he had been advised by the Chief Financial Officer (the "CFO") that, for the purpose of the HEAP reimbursement, the purchase price of Cpl. Millard's Toronto residence would be the estimated value of the residence as of the date that Cpl. Millard and Ms. Baker starting cohabiting together. He also informed Cpl. Millard that he would only be entitled to reimbursement if there had been a 10% market decline since the time of his cohabitation. The FSSO requested that Cpl. Millard provide the RCMP with an opinion letter from a real estate agent with respect to whether a 10% decline had occurred.

[11] On July 13, 1994, Cpl. Millard sent the RCMP a letter from a real estate broker which stated that there had been a 23% decline in the Toronto real estate market between February 1993 to June 1994. Cpl. Millard requested that he be considered under HEAP.

[12] On August 5, 1994, Ms. Baker sold the Toronto house for \$1,350,000.00.

[13] On August 11, 1994, the Acting OIC Financial Management Section requested a legal opinion on the questions of whether Ms. Baker could be considered Cpl. Millard's spouse under the RCMP's Relocation Directive, whether property rights differed for married versus cohabiting partners, and whether the RCMP was obliged to offer assistance under HEAP given that there was no indication that Cpl. Millard had contributed to the purchase price of the Toronto home.

[14] On October 4, 1994, Cpl. Millard requested that he receive reimbursement under HEAP for \$207,000.00. This amount represents 90% of the difference between the sale price and the appraised value of the house on January 1, 1993, the day Cpl. Millard began cohabiting with Ms. Baker. The RCMP requested market values of the house from private appraisal companies.

[15] On October 25, 1994 a Financial Control analyst provided a report to the Acting OIC Financial Control regarding Cpl. Millard's HEAP application. Contrary to the information given to Cpl. Millard by the FSSO, this analyst determined that the time frame for consideration of whether assistance should be provided should run from May 17, 1994, being the date when Cpl. Millard relinquished his option on his Victoria home under s.4.4.4, to August 5, 1994,

being the date the Toronto home was sold. Since there was only a negligible market decline during this time period, it was determined that Cpl. Millard was not entitled to reimbursement under HEAP.

[16] On October 28, 1994, the Acting OIC Financial Officer agreed with the Financial Control analyst's report and informed the FSSO of his decision. The FSSO, in turn, contrary to his previous advice, informed Cpl. Millard that his HEAP application had been denied.

[17] Cpl. Millard commenced a Level I grievance on November 29, 1994. The Level 1 decision is dated October 13, 1995 and was issued by the Director of Finance and Supply. The decision upheld the position that Cpl. Millard was not entitled to reimbursement under HEAP.

[18] As a result, Cpl. Millard commenced a Level II grievance which resulted in the Commissioner's decision under review in this application.

### ***C. The interpretation of the rules by the External Review Committee***

[19] In her March 6, 1997 "Findings and Recommendations", the External Review Committee Chairperson, Ms. Jennifer Lynch, Q.C., identified the following issues for determination:

i) Should the acquisition date of the Toronto property be determined in relation to the date that the Grievor [Cpl. Millard] gave up his Relocation Directive 4.4.4 option on his residence in Victoria?

ii) On what date should Ms. Baker be recognized as the Grievor's spouse for the purpose of the Relocation Directive?

iii) If the resolution of the previous two issues is such that the Grievor would normally qualify for reimbursement under HEAP, do other general principles of the Relocation Directive nevertheless prevent reimbursement in this particular type of case?

[20] Respecting the first issue, the Chairperson made the following findings: Section 4.4.4 has a potential impact on HEAP through the determination of the date of purchase of a residence at the new post. In turn, the determination of the date of purchase is relevant for the purpose of establishing the time period for measuring market decline: the 10% market-decline criterion is measured from the date of purchase to the date of sale.

There are at least two alternative views on how section 4.4.4 should operate in conjunction with determination of the date of purchase for the purpose of HEAP. The first view is that once an option under section 4.4.4 is relinquished, the fact that the option was held should have no effect on the deemed purchase date, for the purpose of HEAP, of another property at the new post. That is, the purchase date would be determined by the otherwise applicable method and would not be deemed to be the date that the member gave up his option under section 4.4.4. This is the view supported by the Grievor. In his opinion, once a section 4.4.4 option on a previous residence is relinquished, it is deemed never to have been held and has no effect on reimbursement of expenses with respect to relocation costs of subsequent residences.

The alternate view is that section 4.4.4 does have a direct impact on the determination of the date of purchase for the purposes of HEAP. This is the view supported by the OIC Financial Control and which has been applied by the Level I adjudicator. Under this view, maintaining a section 4.4.4 option on a residence at a former post has the effect of deeming this residence to be the member's principal residence. Therefore, the residence at the new post is not deemed to be acquired for the purpose of Part 4 of the Directive (4. "Disposition and Acquisition of Accommodation") until the section 4.4.4 option on the residence at the old post is relinquished.

...

How does the option under section 4.4.4 operate in conjunction with HEAP? Paragraph 4.4.10(f) indicates that HEAP can apply when a house retained under section 4.4.4 is sold. More to the point, paragraph 4.4.4(g) indicates that once a residence retained under section 4.4.4 is sold, or the option is given up for this house, a member will be eligible to claim expenses associated with the acquisition or disposal of a residence after that date. *It is not disputed that the HEAP expenses are included in the expenses eligible to be claimed once the section 4.4.4 option expires.* The dispute, rather, relates to the method by which paragraph 4.4.4(g) operates with respect to the purchase date of the house under the HEAP provisions. None of the provisions in the Relocation Directive would appear to directly address this issue.

One must consider the basic purpose of paragraph 4.4.4(g), the central provision in this grievance. It does not appear to be disputed that this provision, in its effect, provides certain restrictions on reimbursement of expenses associated with disposal and acquisition of future residences: only those expenses that occur after the date of sale of the section 4.4.4 residence, or the date the section 4.4.4 option is given up, can be reimbursed. What is the purpose of such a provision? *In my view, this provision has the purpose (among other purposes) of preventing section 4.4.4 from being used as a means to subsidize a member's*

*transaction in investment real estate, other than a single principal residence. If it were not for the restriction at paragraph 4.4.4(g), a member could use section 4.4.4 as a means of retaining a residence as an investment at the former post, with the Force underwriting the transaction costs and any equity loss, while at the same time the member has been provided Force assistance with the transaction costs of purchasing a residence at the new post.*

...  
*Paragraph 4.4.4(g) guards against the use of section 4.4.4 as a means of a member having two principal residences, at any one time, for the purposes of the Directive. The restriction logically may be interpreted as extending to a restriction against having concurrent HEAP guarantees running on two residences at the same time.*

...  
*I therefore support the Force's interpretation of the interaction between section 4.4.4 and the HEAP provisions. The deemed acquisition date of the Toronto residence should be the first date on which the Grievor had both given up his section 4.4.4 option on the Victoria residence and was recognized as Ms. Baker's spouse. The Grievor gave up the section 4.4.4 option on May 17, 1994. While there is a disagreement with respect to the exact date on which the Grievor was recognized as Ms. Baker's spouse, it is clear that the Grievor was so recognized prior to the date the section 4.4.4 option was relinquished. I find, therefore, that May 17, 1994 is the relevant date. As it is not disputed that there was no 10% market decline between this date and the date that the house was sold, I find that the Grievor did not meet one of the basic criteria for HEAP eligibility. [Emphasis added]*<sup>5</sup>

[21] After reaching this conclusion, the Chairperson then said this:

Given my findings, it is not necessary for me to address the second and third issues identified at the beginning of the analysis above.<sup>6</sup>

However, she did go on to make “Additional Comments” as follows:

I must express some caution with respect to my support for the Force's interpretation of the deemed acquisition date of the new-post residence under HEAP. Notably, to the extent that the disposition of this grievance is a precedent for other cases, my support for the Force's interpretation should be taken as limited to the general type of factual circumstances discussed in the present case. It is difficult to anticipate all possible factual circumstances and it is possible that the strictures of the Force's interpretation might not apply to every possible set of events.

Two possible exceptions to the interpretation immediately come to mind. First, there may be circumstances where a member retains a residence at the old post, but does not do so under section 4.4.4; *i.e.* the residence is not retained on an indefinite basis under 4.4.4, but rather the residence has been listed for sale, has not yet sold at the time of the member's move, and is continuously listed for sale after the move. In these circumstances, it might not be in accordance with the

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<sup>5</sup>Findings and Recommendations, pp.9 - 13.

<sup>6</sup>*Ibid.*, p.13.



purpose of the policy to restrict the deemed acquisition date of the new home to the date that the old-post residence is sold. While this supplement to the interpretation could have the result of allowing HEAP guarantees on two residences at the same time, it might be permissible exception. The exception might be justifiable because it does not arise in circumstances where a member has specifically invoked an option to retain a previous residence as a principal residence, but rather arises where the member has chosen the new residence as the principal residence and has been temporarily unable to sell the previous residence despite making all efforts to do so. In these circumstances, it might be a legitimate interpretation of policy to find that the date of sale of the old-post residence has no effect on the date that the new-post residence was deemed to have been acquired as the principal residence.

Another possible exception is a situation where a residence is retained at the old post under section 4.4.4, another residence is acquired at the new post, and the residence at the new post has appreciated in value by the time the old-post residence is sold or the section 4.4.4 option is relinquished. Assuming further that the new-post residence subsequently depreciates in value by the time it is sold, such that it becomes potentially eligible for HEAP, it might be contrary to the purposes of the policy to interpret the deemed acquisition date of the new-post residence as being the date the 4.4.4 option expired. Where the new-post residence had a higher value on the date the 4.4.4 option expired than the actual purchase date, the higher value perhaps should not be used because using the higher value would have the effect of allowing members to obtain HEAP reimbursement on amounts greater than the member's actual loss; this result could be seen as contrary to the purposes of the Relocation Directive expressed at section 1.1.1, which refers to "actual and reasonable relocation costs". Thus under the possible supplemental interpretation discussed here, the deemed acquisition date (and value) of the new-post residence would be the date (and associated value) where the new-post residence had the lower value, as between the date of purchase and the date the 4.4.4 option expired. While a 'lower of the two values' approach might initially seem unfair to members, upon closer examination it may well be the interpretation which best respects the purposes of the Relocation Directive as discussed in this analysis.

There may, of course, be other exceptions in addition to the two potential supplemental interpretations discussed immediately above. I wish to emphasize as well that the circumstances discussed above are raised only as hypothetical examples and I am not stating that I would necessarily support the supplemental interpretations. I discuss these supplemental interpretations only as possibilities illustrating the need for caution in extrapolating the interpretation in the present grievance to other circumstances. Whether the supplemental interpretations would actually be supported, and whether there are other possible supplemental interpretations, are questions I would prefer to leave to possible future deliberations in which such issues arise and are fully argued.<sup>7</sup>

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<sup>7</sup> *Ibid.*, pp.15 - 16.

***D. Reviewable error in the External Review Committee's recommendation***

[22] Since the Chairperson's recommendation only determined the first of three issues identified, my analysis and decision will be similarly confined, with one exception which is outlined below.

[23] In my opinion, each of the italicized portions of the Chairperson's recommendation reflects errors in the interpretation of the rules, which taken together, constitute an error in law.

***1. Overall scheme of the relocation rules***

[24] The idea expressed in s.1.1.1 of the rules is that members should be provided with reimbursement and compensation for claims arising from relocation which are considered to be bona fide. Obviously, an interpretation must be found which works to accomplish this objective. The interpretation adopted by the Chairperson, by her own admission in the "Additional Comments" does not work in bona fide cases. These cases can hardly be classified as "exceptional hardship" under s.4.4.10(j)(ii) thus qualifying for special relief. Therefore, the Chairperson's principal interpretative finding of a relationship between s.4.4.4 and s.4.4.10 is, in my opinion, fundamentally flawed.

[25] The apparent agreement between the parties to a relationship between the two sections does not limit the requirement to decide if this is a correct conclusion. The Chairperson acted on the agreement without scrutiny, which led her to a conclusion which she agreed did not fit with the facts of easily predictable cases.

[26] Regarding the overall scheme of the rules, under s.4 “Disposition and Acquisition of Accommodation”, s.4.1.1 provides that it is the intention of the RCMP to provide relocation “support”. There are a number of kinds of support listed:

- s.4.2 **Rent in Advance of the Move**
- s.4.3 **Lease Liability**
- s.4.4 **Real Estate Broker Fees**
- s.4.5 **Legal Fees**
- s.4.6 **Other Expenses**

[27] Section 4.4.4 allows an old post residence to be retained. Because s.4.4.4(j) alludes to “*authority to retain the old post residence under this provision*”, and s.4.4.10(f) speaks of “residences for which *approval has been received* under s.4.4.4 and s.4.4.9”, although it is not specifically stated in the section itself, it seems that s.4.4.4(a) intends that permission be obtained to retain an old post residence. This requirement to gain authority and approval apparently arises as an implicit adjunct of the terms of s.4.4.4(b) which require that a member who wishes to retain an old post residence must give written notice of an intention to do so.

[28] The approval requirement implies that there must be a good reason to retain the residence. For example, perhaps the member will be relocated back to the place of the retained residence; s.4.4.4(j) is a specific provision contemplating this situation. The requirement in s.4.4.4(a) for a member to seek advice before deciding to retain an old post residence implies that a good Force reason, or a good real estate market reason, should exist.

[29] Section 4.4.4(c) stipulates the maximum real estate fee which can be paid on an old post retained residence being that based on the appraisal process outlined in s.4.4.4(f). The question is: is that also the type of “expenses” referred to in s.4.4.4(g)?

[30] Some light is thrown on the answer to this question by reference to other sections of the relocation rules which reinforce the topic of s.4.4.4. In this respect, of note are the opening words of s.4.6.1(a)(i) “if a member who qualifies for the *reimbursement of real estate and legal fees* (see Sec. 4.4.1, 4.4.4, 4.4.9 and 4.5.2)...., and the terms of s.4.4.9 which speak specifically about “*current disposal expenditures*” as the issue under s.4.4.

[31] Given the consistent theme within s.4.4.4, the reinforcing words in the other provisions noted, and the general lay-out of the rules, I find that the “expenses” referred to in s.4.4.4(g) are only “broker’s fees”.

[32] A distinct break occurs in the continuity of the rules between s.4.2 and s.4.6 with the injection of s.4.4.10, which under its new bold heading addresses yet another category of support being “Home Equity Assistance”. The purpose of s.4.4.10 is stated in rules s.4.4.10(a) and K.5(a)(1), and when they are read together, “partial equity protection” is considered “compensation”. In my opinion, providing this form of compensation is something different than “the reimbursement of real estate broker’s commission” as expressed in s.4.4.1.

[33] Thus, while s.4.4.10 admittedly, but inexplicably, found its way into s.4.4, on a literal interpretation of the terms of the rules I find that the provisions of “Home Equity Assistance” under s.4.4.10, and the rules relating to retained residences under s.4.4.4 and specifically s.4.4.4(g), must be read and applied separately.

[34] By considering the rules separately, s.4.4.4 is not difficult to interpret. It provides rules respecting the timing and amount of the payment of broker’s fees that can be made when a member retains a residence. Similarly, s.4.4.10 has its own self contained criteria, the principal one of which is that compensation only applies to a member’s principal residence.

[35] Whether a residence is a person's "principal residence" is a question of fact. It is possible that a member might own more than one residence in a particular location, but the one that qualifies for HEAP is the one that meets the definition of principal residence. The recording of a particular residence in division headquarters serves to clearly identify the residence that the member wishes to be his or her principal residence.

[36] While it is true that a member can only have one principal residence at a given point in time, on my interpretation of the rules, the compensation process applies to a member's principal residences over time from which he or she has relocated.

[37] Therefore, in my opinion, HEAP liability can exist for two residences at any one time. And why not? The purpose is to financially support a relocating member going through the relocation process. The member does not collect HEAP as a windfall benefit. It is compensation provided over and above a loss already suffered. There might very well be two or more HEAP liabilities outstanding depending on the rapidity and frequency of a member's relocation. Regardless, if they are bona fide, they should all qualify for compensation.

[38] Under the compensation provisions there are additions to the definition of "principal residence" for the purposes of obtaining compensation; not only must it be the principal residence, that is the one that meets the definition, but it must also be one which the member and/or spouse owned and occupied.

## ***2. Ms. Baker's qualification as a "spouse"***

[39] Apart from the issues which arise from Cpl. Millard's retention of the Victoria residence which was a principal focus of Chairperson Lynch's recommendation and the Commissioner's decision, an issue which was also argued before me is: what effect does Cpl. Millard's marriage to Ms. Millard have on Ms. Baker's potential status as "spouse common-law"?

[40] HEAP compensation is only available respecting a principal residence "to which there is a good and marketable title *and which is owned and occupied by the member and/or spouse*". Clearly, Cpl. Millard at no time owned the Toronto residence, although he did occupy it with Ms. Baker.

[41] Cpl. Millard's only ability to take advantage of the HEAP provision with respect to the Toronto residence is through Ms. Baker's ownership and occupancy. Indeed s.4.4.10(f) allows this to occur if Ms. Baker qualifies as Mr. Millard's "spouse". Since at the times in issue Cpl. Millard and Ms. Baker were not husband and wife, and, therefore, Ms. Baker could not fit the definition of "spouse" in the definition section of the relocation provisions, Ms. Baker would have to fit the definition of "spouse, common-law" in order to qualify.

[42] Given that Cpl. Millard's divorce to Ms. Millard became final on September 17, 1993, well after Cpl. Millard and Ms. Baker began to cohabit, the Respondent argues that Cpl. Millard cannot have a "spouse" and at the same time be recognized as having a "spouse, common-law". Cpl. Millard argues that, with respect to the relocation rules including the HEAP provisions, it is possible.

[43] The legal concept of “common law marriages” is set out in the following passage of

Dysart J. in *Blanchett v. Hansell* [1944] 1 D.L.R. 21 at 25:

The express exclusion of a “common law wife” does not affect Nellie Blanchett.  
A common law wife is a woman who is united to a man by marriage which though informal is such as was recognized as valid by the common law.

There is some confusion as to what formalities could be dispensed with without invalidating the marriage. The English view as laid down in *Reg. v. Millis*, 10 Cl. & Fin. 534, 8 E.R. 844, is more rigid than the view generally held in most of the United States and in Canada. But whatever else the requirements of a “common law marriage” anywhere were, two essentials had to be present - (1) legal capacity to marry, and (2) agreement to marry: Bishop on Marriage Law, 6th ed., pp. 270 *et seq.*; 19 A. & E. Enc. Of Law, 2nd ed., p. 1193; 38 Corp. Jur., p. 1315. Neither of these elements was present in this case. John Hansell, having a wife living, lacked capacity to marry - a fact which was known to Nellie Blanchett as well as to himself. There is no suggestion, nor reasonable probability, that in the face of this known incapacity, these parties went through the empty form of an agreement to marry. Nellie Blanchett is therefore not, on this ground at any rate, excluded from eligibility to take as beneficiary.

[44] The Respondent’s argument would benefit by the importation of the concept of common law marriage into s.4.4.10(f). However, there is absolutely no indication in the rules that this is the intention. Indeed, the contrary is true. The definition of “spouse, common-law” stipulates that “if *these conditions* have been satisfied, a common law spouse will be entitled to the same reimbursement as a spouse under this directive.” The conditions referred to are only those set out in the definition. Thus, none other, including freedom to marry, is a factor to be considered.

[45] Therefore, I find that Cpl. Millard’s marriage to Ms. Millard has no effect on Ms. Baker’s potential status as a “spouse, common-law”.

**E. Conclusion**

[46] As I have already said, the Chairperson's recommendation reflects errors in the interpretation of the rules, which taken together, constitute an error in law. Because of the reliance placed on the Chairperson's recommendations by the Commissioner, I also find an error of law in his decision.

[47] Accordingly, the Commissioner's decision is set aside, and this matter is referred back to him for determination in accordance with these reasons. I further direct that the only issues which remain for determination are those unaddressed by Chairperson Lynch in her recommendations being:

- i) On what date should Ms. Baker be recognized as the Grievor's spouse for the purpose of the Relocation Directive?
- ii) If the Grievor would normally qualify for reimbursement under HEAP, do other general principles of the Relocation Directive nevertheless prevent reimbursement in this particular type of case?

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Judge

OTTAWA, ONTARIO