Federal Court  Cour fédérale

Date: 20210430

Docket: T-787-20

Citation: 2021 FC 389

Ottawa, Ontario, April 30, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KEVIN BROWNE, BRADLEY LUNDEEN AND THE NATIONAL POLICE FEDERATION

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants are Constable Kevin Browne and Sergeant Bradley Lundeen, who are both members of the Royal Canadian Mounted Police [RCMP], and the National Police Federation [NPF], the RCMP's bargaining agent. They bring this application challenging the Treasury Board's interpretation and application of provisions of the RCMP's relocation policy concerning the sale of RCMP members' principal residence in circumstances where the market value of the residences has decreased. The Applicants do not challenge any decision applying or

interpreting the relocation policy. Instead, they submit that the application and interpretation of the policy constitutes an ongoing course of conduct and is prejudicial and detrimental to the Applicants and other members of the RCMP.

Background

[2] Since about 1999, the relocation of RCMP members has been governed by a relocation policy. Various versions of the relocation policy have been published over the years, all of which include home equity assistance provisions. At issue in this matter are the Integrated Relocation Program, Relocation Policy for the Royal Canadian Mounted Police, effective April 1, 2009 [IRP 2009] and its immediate successor, the RCMP Relocation Directive for the Royal Canadian Mounted Police, effective April 1, 2017 [IRP 2017]. The section of each of those policies entitled "Sale of Principal Residence" states that the purpose of the section is to assist RCMP members in the sale of a principal residence at the former place of duty when transferred from one place of duty to another. Those provisions in the IRP 2009 are the Home Equity Assistance Program [HEAP] and the Depressed Market Status [DMS]. IRP 2017 contains Home Equity Assistance [HEA] provisions but does not contain a DMS provision. The HEAP, HEA and DMS provisions are intended to assist RCMP Members who sell their principle residence at a loss when relocating.

[3] In the IRP 2009, section 3.09 is the HEAP provision. Pursuant to s 3.09(2), a RCMP member who sells their residence for less than the original purchase price (at the time of initial posting) may be reimbursed the difference (with the residence value capped at $300,000). Under s 3.10 Depressed Market Status, a RCMP member seeking to access the DMS benefit is required,

with a realtor, to build a business case for depressed market status, defined as a community where the housing market has decreased more than 20% since the time of purchase. Building a business case is done by submitting the listed documentation to the contracted relocation service provider [CRSP] for furtherance to the DNC/delegate (department national coordinator) for authorization by the Project Authority at the Treasury Board Secretariat.

[4] Section 4.16, Home Equity Assistance (HEA) of the IRP 2017 permits a RCMP member who sells their residence for less than the original purchase price to be reimbursed 80% of the difference, up to a maximum of $30,000, from the Core Account. There is no DMS provision.

[5] The Applicants assert that the Treasury Board wrongly interprets the DMS provision in IRP 2009 as being subject to a $300,000 cap on the purchase price of a home and unfairly and unjustly relies on IRP 2017 to deny the DMS protections to members who purchased their home while the IRP 2009 was in place. The Applicants seek orders: declaring that IRP 2017 may not be applied retrospectively to prevent RCMP members who purchased their home when the IRP 2009 was in effect from accessing and applying the DMS benefit; that the DMS provisions contained in the 2009 IRP apply to RCMP members who purchased a residence while IRP 2009 was in effect; and, that the DMS provisions in IRP 2009 do not apply only to homes purchased for less than $300,000. They also seek a declaration that IRP 2017 is invalid and of no force and effect, if and to the extent that it operates retrospectively to prevent members who purchased their residences when IRP 2009 was in effect from accessing and applying the DMS provisions.

Policy Provisions

[6] The relevant provision of IRP 2009 and IRP 2017 [collectively, the policies] are contained in Annex A of these reasons.

Issues

[7] The Applicants, in essence, frame the issues as follows:

1. Is the Treasury Board's application and interpretation of IRP 2009 and IRP 2017 unreasonable as it denies access to the DMS, contained in IRP 2009, to members who purchased their homes when IRP 2009 was in effect and prior to April 1, 2017, but sold them after April 1, 2019 and, in applying the $300,000 cap to the DMS?
2. Was the RCMP's method for implementing IRP 2017 procedurally fair?

[8] The Respondent raises three preliminary issues:

1. Is this application for judicial review premature?
2. Should the NPF be granted public interest standing?
3. Should the supporting affidavits filed by the Applicants be struck in whole or in part?

[9] In the alternative, if the application is not premature, then the Respondent submits that the Treasury Board reasonably interpreted and applied IRP 2017 and that its implementation was procedurally fair.

[10] In my view the issues can be organized and framed as follows:

1. Does the Court have jurisdiction to hear this application?
2. Is the application premature?
3. Should the NPF be granted public interest standing?
4. Should the Applicants' affidavits, or portions of them, be struck?
5. If the Court has jurisdiction and the application is not premature, was IRP 2017 implemented in a procedurally fair manner and is the Treasury Board's application and interpretation of IRP 2017 reasonable?

Standard of review

[11] The Applicants submit that the interpretation and application of the IRP policies is subject to review on the reasonableness standard and that the implementation of IRP 2017 is a matter of procedural fairness that is to be reviewed on the correctness standard.

[12] The Respondent submits that policies can only be challenged for their lawfulness and that the legality of a policy goes to its validity, not its application. As the Applicants have not established that IRP 2017 is unlawful, it is not subject to judicial review. Therefore, the standards of review have no application.

[13] For the reasons set out below, I agree with the Respondent that in these circumstances the standards of review have no application. However, if the actual application and interpretation of the policies were under review, then the reasonableness standard would apply *(Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65) and the correctness standard would apply to the review of whether IRP 2017 was implemented in a procedurally fair manner

(*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

Issue 1: Does the Court have jurisdiction to hear this application?

[14] More specifically, is this a "matter" subject to review under s.18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]?

Applicants' position

[15] The Applicants submit that the ongoing application and interpretation of the IRP policies by the Treasury Board constitutes a "matter", as the term is used in s.18.1(1) of the *Federal Courts Act*, and it is therefore subject to judicial review. The Applicants state that while no particular decision or order of the Treasury Board is under review, the application is brought to review the way the Treasury Board is interpreting and applying the IRP policies, particularly as it relates to the availability of the DMS under 2009 IRP. Relying on the Federal Court of Appeal's decision in *May v. CBC Radio Canada*, 2011 FCA 130 [*May*], the Applicants assert that the word "matter" in s.18.1(1) encompasses more than a decision or order and includes "anything in respect of which relief may be sought" and that ongoing unlawful policies may be challenged at any time.

[16] The Applicants also submit that policies that are binding may be subject to judicial review in the appropriate context, referencing *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156 a para 42 [*Ishaq* FC]. The Applicant relies on *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 64 [*Federation*

of Students] for the proposition that policies that establish a norm or standard of general application are “law” or “legislative in nature”. The Applicants submit that IRP 2009 had the force of law because the policy established rights and obligations of a general, rather than specific, nature. The provisions of IRP 2009 constituted contractual or quasi-contractual terms that the Treasury Board was legally bound to properly apply and follow as if those terms had the force of law. The Applicant submits that IRP 2009 set out terms on which members are entitled to rely and that give rise to vested rights that are binding on the parties. Further, that the DMS provision found in IRP 2009 is the functional equivalent to a policy of insurance, available as a framework for assessing the rights of members claiming relocation expenses.

[17] The Applicants assert that the RCMP has taken the position that the DMS is a Treasury Board issue, falling outside the administration of the affairs of the RCMP. Therefore, that RCMP Members do not have standing to grieve Treasury Board decisions or actions concerning the DMS through the internal RCMP process.

Respondent’s position

[18] The Respondent submits that this is not a challenge to a decision actually applying any version of the IRP policy by the RCMP or the Treasury Board. And, as the Applicants seek to have their interpretation of IRP 2009 apply, they are not challenging the lawfulness of that version of the policy. The application for judicial review is therefore concerned only with the lawfulness of IRP 2017.

[19] The Respondent submits that for a "matter" to be justiciable under s 18.1(1) of the *Federal Courts Act* it must be both amenable to judicial review and the applicant must be directly affected by the policy or "matter" in question. However, the grounds on which a policy may be challenged are limited to its legality, that is, whether it is unlawful or unconstitutional. The wisdom or soundness of a government policy cannot be challenged on judicial review. Further, legality goes to the validity of a policy rather than its application, which is why an illegal policy can be challenged at any time and, in that circumstance, an applicant need not wait until the policy has been applied to his or her specific case.

Analysis

[20] Section 18.1(1) of the *Federal Courts Act* states:

> **Application for judicial review**
>
> > **18.1(1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[21] The word "matter" in s 18.1(1) of the *Federal Courts Act* includes not only a decision or an order but any matter in respect of which a remedy may be available under s 18. As stated by the Federal Court of Canada in *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 [*Air Canada*]:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought". A "matter" that can be subject of judicial review includes not only a "decision or order", but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2

> F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing", a "decision", an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action", not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> (emphasis in original)

[22] The Applicants submit that a policy can be binding and subject to challenge on judicial review in appropriate contexts. In support of this proposition they refer to *Ishaq* FC. At issue in *Ishaq* FC was the constitutionality or lawfulness of a policy requiring *niqab*-wearing women to remove the *niqab* while taking the citizenship oath. When considering a prematurity argument, this Court held that:

> [42] Case law has established that not all policies are equal and some may be binding law (see: *Thamotharem* at paragraph 65; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paragraphs 58-65, [2009] 2 SCR 295). As the Federal Court of Appeal recognized in *Thamotharem* at paragraph 63: "the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision." Indeed, part of the reason that policies are published is so that people can know of them and organize their affairs accordingly, and the Policy in this case could be dissuading women who wear a *niqab* from even applying for citizenship. In such circumstances, a direct challenge to the Policy is appropriate.

[23] Ultimately, in *Ishaq* FC it was determined that the policy was not valid. This was because the policy was mandatory in nature and compliance with the policy conflicted with the citizenship judge's obligations under the *Citizenship Regulations.* The citizenship judge could not comply with both the policy and the regulations. This Court held that the regulations prevailed and the policy was invalid.

[24] Relying on *Federation of Students*, the Applicants submit that IRP 2009 established rights and obligations of general application, and that those provisions constituted contractual or quasi-contractual terms that the Treasury Board was legally bound to apply and follow as if those terms had the force of law. *Federation of Students* was a constitutional challenge. There the Supreme Court of Canada considered whether the infringement of the respondents' freedom of expression under s 1 of the *Charter* was "a reasonable limit prescribed by law". In that context, the Supreme Court discussed the difference between policies that are administrative in nature and those that are legislative, concluding that legislative policies may be considered "law" but administrative policies will not.

[25] In my view, *Ishaq* FC and *Federation of Students* do not support that simply because a policy is binding or mandatory, or that it may be legislative in nature, that it will be subject to judicial review.

[26] Rather, the jurisprudence establishes that the grounds on which a policy may be challenged are limited. In order for a policy to be a "matter" subject to judicial review under s 18.1(1) of the *Federal Courts Act*, the lawfulness of the policy must be at issue.

[27] For example, in *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273 [*Moresby*] it was argued that mere policies, as opposed to decisions based on policies, are not subject to judicial review. However, the Federal Court of Appeal did not agree and held that:

> [24] The grounds on which a policy may be challenged are limited. Policies are normally afforded much deference; one cannot, for example, mount a judicial challenge against the wisdom or soundness of a government policy (*Maple Lodge Farms*

> *Ltd. v. Canada*, [1982] 2 S.C.R. 2, at 7-8). This does not, however, preclude the court from making a determination as to the legality of a given policy (*Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 751-752; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 140). **Because illegality goes to the validity of a policy rather than to its application, an illegal policy can be challenged at any time**; the claimant need not wait till the policy has been applied to his or her specific case (*Krause v. Canada (C.A.)*, [1999] 2 F.C. 476, at para. 16).
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> (Emphasis added)

[28] This is also reflected in *May*, relied upon by the Applicants. There the applicant sought judicial review of the Canadian Radio-television and Telecommunications Commission's [CRTC] *Broadcast Information Bulletin 2011-218* [Bulletin] that required the CRTC to issue a set of guidelines within 4 days of an election writ being dropped. The applicant argued that the Bulletin was a decision or order of a federal board within the meaning of s 18.1(2) of the *Federal Courts Act* and that judicial review was impossible until such a decision or order had been made. The Federal Court of Appeal disagreed, stating:

> [10] This argument, in my respectful view, is wrong. While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: *Krause v. Canada*, [1999] 2 F.C. 476 at 491 (F.C.A.). **Ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment**: *Sweet v. Canada* (1999), 249 N.R. 17.

(also see *Fortune Dairy Products Limited v Canada (Attorney General),* 2020 FC 540 at paras 80-83.)

[29] Thus, the jurisprudence is clear that ongoing policies that are unlawful or unconstitutional are “matters” that can be challenged at any time under s 18.1(1) of the *Federal Courts Act*. An applicant can discretely challenge a policy for its legality and can do so in the absence of a decision applying and or interpreting that policy. That is, challenging the lawfulness of a policy can be a distinct circumstance from challenging a decision based on a policy.

[30] In their Notice of Application, the Applicants assert that the application and interpretation of the IRP policies is an ongoing course of conduct that is prejudicial and detrimental to them and other members of the RCMP. The main thrust being that IRP 2017, which does not contain a DMS provision, may not be applied retrospectively to prevent members who purchased their homes during the period when IRP 2009 was stated to be in effect from accessing the DMS.

[31] In their written submissions, the Applicants describe the issue as whether the Treasury Board’s interpretation and application of the policies was unreasonable or procedurally unfair and they state that this application “challenges the Treasury Board’s continuing course of conduct interpreting” IRP 2009 as not applicable to members claims for DMS losses.

[32] There the Applicants assert that because the Treasury Board’s position is that the IRP 2017 applies to members who purchased, but did not sell, their homes prior to April 2017, the Treasury Board “unreasonably interpreted and applied” that policy. And that “[t]here is nothing to indicate that parliament intended that Treasury Board be permitted to interpret and apply the pay and benefits responsibility to have retrospective effect, and accordingly the Employer’s [Treasury Board’s] interpretation and application of the Polices is unreasonable”.

[33] Thus, in their written submissions the Applicants do not assert that the policies are unlawful. That is, except to say that policies can be subject to judicial review, the Applicants do not directly engage with the question of the justiciability of their policy challenge.

[34] When appearing before me, the Applicants took the position that allowing an interpretation of IRP 2017 by the Treasury Board that permits the policy to have retrospective effect is unlawful, and therefore the policy is subject to judicial review. And, that no reasonable interpretation of IRP 2017 would permit an unlawful outcome by way of retrospective elimination of the DMS benefit. In my view, what the Applicants are saying, in effect, is that the interpretation and application of the policies by the Treasury Board is unreasonable. This is not a situation, such as *Ishaq* FC or *Federation of Students* where the constitutionality or validity of the policy is at issue.

[35] To conclude on this point, as held by the Federal Court of Appeal in *Moresby*, because illegality goes to the validity of a policy rather than to its application, an illegal policy can be challenged at any time.

[36] This application cannot succeed as the Applicants have not challenged, or established, the unlawfulness of the policies. This is not a situation such as *Fisher v Canada (Attorney General)*, 2013 FC 1108 [*Fisher*] or *The Canadian Association of the Deaf v. Her Majesty the Queen*, 2006 FC 971, both of which concerned constitutional challenges. Rather, this application attempts to challenge the reasonableness of the Treasury Board's interpretation and application of the

policies – based on an interpretation and application attributed to the Treasury Board – but in the absence of any decisions or actions by the Treasury Board interpreting or applying IRP 2017.

[37] This approach is reflected in the Applicants' submission that there is an "ongoing course of conduct" that would permit judicial review of the Treasury Board interpretation and application of IRP 2017. In my view, the Applicants are conflating an ongoing course of conduct, which typically pertains to issues around the timeliness of an application and/or when more than one decision is at issue, with an ongoing unlawful policy.

[38] Rule 302 of the *Federal Courts Rules*, SOR/98-106 states 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. However, the jurisprudence has also established that the prevailing circumstances may justify an exception to Rule 302 to permit review of more than a single order when an applicant challenges "continuing acts or a course of conduct" (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 164 [*Suzuki*]).

[39] In *Suzuki* Justice Kane conducted a review of the jurisprudence concerning the interaction of s 18.1(2) and Rule 302 which she also summarized, including that:

> [173] … More than one decision may be reviewed in a single application – as an exception to Rule 302 – where it is a continuing act (*Mahmood*, *Truehope*) or, as it was characterized in *Khadr*, a continuing court of conduct. The factors to consider in determining whether there is a continuing act or course of conduct include: whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences,

> whether separate reviews would be a waste of time and effort (*Mahmood, Truehope*).

(also see *Potdar v Canada (Citizenship and Immigration)*, 2019 FC 842 at paras 18 – 19.)

[40] Here, however, the Applicants do not challenge any decisions applying the IRP policies. Thus, this is not a situation where there is more than one decision at issue and, if so, whether they form a course of conduct.

[41] In any event, the evidence before me as to a continuing course of conduct by the Treasury Board in the application or interpretation of the IRP policies is sparse.

[42] In support of this application, Sergeant Lundeen filed an affidavit sworn on July 8, 2020 [Lundeen Affidavit]. This affidavit describes Sergeant Lundeen's personal circumstances surrounding his transfer to Fort McMurray in 2014 and then to Calgary in 2019. Due to the severe down turn in the Fort McMurray's economy, he sold his home at a loss of $223,000. He was compensated under the IRP 2017 but his actual loss was approximately $200,000. He states that he sent an email to RCMP relocation asking if the DMS provision that was in effect when he purchased his home would be applied for him but that his request was denied.

[43] I note that the subject June 21, 2019 email is attached as an exhibit to the Lundeen Affidavit. In the email, Sergeant Lundeen asks if he is able to make a claim for DMS under IRP 2009. The RCMP response on June 27, 2019 was that DMS was a benefit of the 2009 IRP and that Sargent Lundeen transferred under the IRP 2017 and would only be approved or entitled to

benefits under the current directive. The Lundeen Affidavit states that he filed a grievance on July 19, 2019 for the denial of access to the DMS provision, that it is still in the early resolution stage, that after a year the RCMP grievance system has "offered no results, and no prospect of real assistance". He adds that it is his understanding from speaking with other RCMP members that the RCMP's position is that the IRP 2009 and IRP 2017 are the Treasury Board's responsibility and therefore not grievable within the RCMP system.

[44] I pause here to note that nothing in the Lundeen Affidavit speaks to a course of conduct by the Treasury Board or its interpretation or application of the IRP policies.

[45] Also in the record is the affidavit of Constable Browne sworn on July 13, 2020 [Browne Affidavit]. Constable Browne deposes that he purchased a house in Fort McMurray in 2012 and that he would now like to seek a promotion and transfer but that the estimated loss associated with his home purchase is $300,000. He states that on February 10, 2020 he made a formal request to have the DMS provision apply to the sale of his home but was told that IRP 2009 would not apply and that, in any event, he would not likely be compensated because of the $300,000 cap on residence value. The request and response is not included as an exhibit to his affidavit.

[46] Constable Browne then sets out what he describes as the stories of other RCMP members. He states that "many" members have commenced grievances with respect to the loss of the DMS provision and describes the circumstances of other members.

[47] However, those members have not filed affidavits in support of this application and Constable Browne's narrative of their circumstances is hearsay. Nor do the Applicants point to or rely on any negative grievance decisions of the RCMP or decisions refusing to address such grievances. More significantly, for this aspect of the analysis, the Browne Affidavit does not indicate a course of conduct by Treasury Board.

[48] That said, one of the circumstances described by Constable Brown concerns his understanding of the situation of Corporal Kristine Green and her partner Constable Kyle Green. When appearing before me, the Applicants noted this Court's recent decision in *Green v Attorney General of Canada*, 2021 FC 178 [*Green*] which concerns those RCMP members. In *Green*, Justice Pentney was reviewing a decision letter from the Treasury Board denying the Greens' request for the DMS benefit. That is, unlike this circumstance, there was an actual decision under review, not a claim of a continuing course of conduct.

[49] At issue in *Green* was whether the Treasury Board decision denying the Greens' request for DMS benefits pursuant to article 3.10 of IRP 2009 was reasonable. The Greens transferred before 2017 and therefore the IRP 2009 applied. They argued that Treasury Board erred in conflating the HEAP benefits available to members under section 3.09 with the DMS benefit provided under section 3.10.

[50] Justice Pentney found that the Treasury Board's decision was inadequate because it did not explain the basis for the interpretation that the DMS benefit was subject to the financial eligibility requirement established under the HEAP benefit. Having reviewed the text, context,

and purpose of the provisions in question, he found no basis to support the Treasury Board's interpretation that the $300,000 eligibility cap for HEAP benefits must be applied to deny the Greens' request for the DMS benefit.

[51] The second element in the Treasury Board decision was the assertion that when it decided to retroactively (for one year) eliminate the $300,000 cap on HEAP benefits, it eliminated the cap only for "baseline" benefits set out in article 3.09, and not for the DMS benefit provided under article 3.10 of IRP 2009. The Greens submitted that the reason for this was simple – the $300,000 limit never applied to the DMS benefit. The Greens also noted the incongruity of the Treasury Board's position: according to the Treasury Board, although the policy does not explicitly say so, the DMS section is to be interpreted as though it is a subset of HEAP benefits, and therefore the $300,000 eligibility cap applies to the DMS and the Greens would be denied the benefit. However, when that same $300,000 eligibility cap is retroactively removed from the HEAP, the implied connection is somehow severed – and therefore the Greens are once again denied the benefit. The Greens submitted that this analysis was unreasonable and Justice Pentney agreed:

> [45] The result of the Respondent's approach is that the Applicants are denied a benefit of significant financial importance because of this cap, which would remain in place solely for the purposes of Depressed Market Status benefits. On the Respondent's view of it, the RCMP and Treasury Board decided to eliminate the $300,000 cap because it was excluding too many members from the HEAP benefit, given the rise in housing prices generally. However, when the Treasury Board decided to make this retroactive for one year because it had taken so long to process the submission that resulted in the change, the decision was limited to the HEAP baseline benefit alone and excluded the Depressed Market Status benefit. The practical result of this interpretation is that the Applicants received the smaller retroactive HEAP benefit, but were excluded from the much larger Depressed Market Status benefit because of a

> decision that is not reflected in any official document in the record beyond the declarations in the decision letter and the affidavit of the Treasury Board official who made the decision.
>
> [46] This is also unreasonable. If the decision letter accurately reflects the Treasury Board decision, there is no evidence that this was ever communicated to the RCMP or to its members in advance of the decision in this case. There is no other documentation to confirm that this is, indeed, what the Treasury Board decided. The official who made the decision simply declares it to be so.

[52] Because he found the Treasury Board's interpretation of the IRP 2009 unreasonable, Justice Pentney quashed the decision and sent it back for reconsideration. As part of the Order he directed the Treasury Board to consider the "Applicants' request for the Depressed Market Status benefit without consideration of the $300,000 cap that applied to the HEAP benefit".

[53] *Green* demonstrates that the Treasury Board has made one previous decision unreasonably finding that the $300,000 cap also applies to DMS benefits in the IRP 2009. Here, however, the Applicants are challenging the application and interpretation of IRP 2017 on the basis that the Treasury Board is retroactively interpreting and applying that policy to deprive members of the DMS benefit in IRP 2009, which they assert amounts to a continuing course of conduct.

[54] In support of this position, when appearing before me the Applicants also referred to the affidavit of Leslie Jones, Senior Policy and Program Analyst, Employment Conditions and Labour Relations, Office of the Chief Human Resources Officer at the Treasury Board of Canada Secretariat, affirmed on October 28, 2020 [Jones Affidavit], filed by the Respondent in this application. Specifically, paragraph 12 which states:

> It is my understanding that under the new version of the RCMP relocation policy, the base amount that may be reimbursed to RCMP members who lose money on the sale of a home on posting is increased from $15,000 to $30,000 and the depressed market provision was eliminated. Members authorized to relocate after April 1, 2017 are subject to the new version of the provisions.

[55] The Applicants submit that this is evidence that the Treasury Board has made a decision to eliminate the application of IRP 2009 with respect to members who bought their homes under the IRP 2009 but did not sell them prior to April 1, 2017.They submit that the above affidavit evidence confirms that this is how the policy *will be* applied, amounting to a continuous course of conduct which is subject to judicial review.

[56] The difficulty with the Applicants' position is that, at best, it pertains to an anticipatory, or potential, course of conduct. It does not establish an actual course of conduct or an established practice as demonstrated by decisions or actions of the Treasury Board.

[57] This situation is therefore distinguishable from cases such as *Canadian Broadcasting Corporation v Canada (Attorney General)* 2016 FC 933 [*CBC*]. There the Attorney General argued that the application for judicial review was brought outside the 30 day time period prescribed by s 18.1(2) of the *Federal Courts Act.* Justice Roussel did not agree:

> [26] The CBC is challenging the CMA's continued refusal to provide unredacted copies of court martial decisions subject to a publication ban. The application for judicial review does not arise from a single decision of the CMA. Rather, the CBC requested a number of decisions involving a publication ban at different times, and on each occasion, the CMA informed the CBC that it was required, pursuant to the publication ban, to remove any information that could disclose the identity of the complainant or a witness in the case. In my view, it is the ongoing practice of the

> CMA to redact the court martial decisions subject to a publication ban that is alleged to be unlawful and subject to judicial review.
>
> [27] Moreover, the relief sought by the CBC in its Notice of Application for judicial review also confirms that it is a course of conduct that is at issue: the relief sought includes a declaration that the Privacy Act does not apply to the court records of the courts martial, as well as an order of mandamus for the CMA to provide the CBC with unredacted copies of the requested decisions. While I recognize that the CBC is also seeking an order setting aside the decision of the CMA refusing to release unredacted copies of the fourteen (14) court martial decisions, I do not think this particular relief takes away from the conclusion that it is a course of conduct that is at issue. Fundamentally, the CBC is contesting the CMA's practice of redacting court martial decisions that are subject to a publication ban.

[58] While Justice Roussel was considering the limitation on the time for bringing the application before her, it is clear that in that case there was an established ongoing practice at issue, unlike the matter before me.

[59] In summary, neither the Lundeen or Browne Affidavits demonstrate that the Treasury Board has made a decision or taken actions. The *Green* decision concerned the judicial review of one specific decision by the Treasury Board with respect to the application and interpretation of IRP 2009, and, in any event, concerns a single Treasury Board decision and does not serve to demonstrate an ongoing course of conduct. The Jones Affidavit does not establish an actual course of conduct. There is also no evidence before me of any requests for DMS designation or benefits that were denied by the Treasury Board after *Green* was decided.

[60] Therefore, based on the evidence, I am not persuaded that the Applicants have established a continuing course of conduct that might – and I make no finding in this regard -

amount to a “matter”, pursuant to s 18.1(1) of the *Federal Courts Act*, anchoring the jurisdiction of the Court to hear the application.

[61] In conclusion, in my view the Applicants accurately characterised the substance of their application when they asserted that it was unreasonable for the Treasury Board to interpret IRP 2017 in a manner that they say is contrary to the presumption against retrospectivity. This does not speak to the unlawfulness of the policy. Rather, it speaks to its interpretation and application, which concerns the reasonableness of a challenged decision, or related decisions in the case of a continuing course of conduct. Thus, while the Applicants may raise valid concerns, they are tied to the application and interpretation issues that they raise, not to the lawfulness of the policies.

Issue 2: Is the application premature?

[62] My finding that this application is not a matter falling within the scope of s 18.1(1) of the *Federal Courts Act*, is dispositive of the application. However, even if it were not, the application is also premature for the reasons that follow.

Applicants’ position

[63] The Applicants’ written submissions do not directly engage with this issue. However, they do submit that this application is particularly necessary because s 31(1) of the *RCMP Act*, RSC 1985, c. R-10, which provides for member grievances, has been interpreted to exclude the Treasury Board’s decisions and actions from the administration of the affairs of the RCMP and therefore the grievance procedure. The Applicants state that the RCMP has taken the position

that DMS is a Treasury Board issue and that members do not have standing to grieve through the RCMP grievance process. For this reason, members have now turned to this Court.

Respondent's position

[64] Relying on *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 [*CB Powell*], the Respondent submits that an application can only proceed to the court system once all adequate administrative processes have been exhausted. In that regard, s 3.10 of IRP 2009 sets out the process to be followed if a member is seeking DMS. Had the Applicants submitted a business case for DMS for approval and had the RCMP refused to forward the request to the Treasury Board on the basis that the provision is no longer in effect, then the RCMP decision could have been grieved under the RCMP grievance process. And, ultimately, the Applicants could have sought judicial review of the RCMP's negative grievance decision. Further, if the RCMP member's business cases were forwarded to the Treasury Board but were denied, then the members could bring an application for judicial review with respect to that Treasury Board decision. The Respondent submits that the Applicants are essentially asking the Court to quash decisions that have not yet been made. It would more appropriate for individual members, if their application is denied by the RCMP or the Treasury Board, to first exhaust internal remedies and then seek judicial review with the benefit of a complete record and reasons.

Analysis

[65] In *CB Powell* Justice Stratas held:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the

> administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: …[citations omitted].
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[66] Subsequently, in *Strickland v Canada (Attorney General)*, 2015 SCC 37 the Supreme Court of Canada stated:

> [43] In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." *(Canada (Auditor General)*, at p. 96).

[67] In this case, I am satisfied that there are adequate alternative remedies that the Applicants could pursue.

[68] The Applicants assert that they do not have access to the internal RCMP grievance process and, therefore, they must seek recourse to this Court.

[69] However, the only evidence referred to by the Applicants in support of their assertion that the RCMP have taken the position that the DMS is a Treasury Board issue which members do not have standing to grieve through the internal process, is the affidavit of Michelle Boutin, a vice president for the NPF, sworn on July 9, 2020. This states “Many members have brought grievances relating to the denial of DMS benefits, however I understand that the RCMP has taken the position that the DMS is a Treasury Board issue which members do not have standing to grieve through the internal process”.

[70] The Respondent submits, and I agree, that this is hearsay. Ms. Boutin makes only a general statement and does not identify the basis or source of her understanding or even if she believes it to be true.

[71] Further, Sergeant Lundeen states in his affidavit that he filed a grievance on July 19, 2019, with respect the denial of the DMS benefit. While he also states that the grievance is in the early stages of resolution and after a year had offered no results, he does not state that the grievance was rejected based on a lack of standing or otherwise. Rather, his evidence is that his grievance it is ongoing, albeit slowly. To the extent that he states it is his understanding from speaking with other RCMP members that the RCMP is now taking the position that IRP 2009 and IRP 2017 are the responsibility of the Treasury Board and therefore cannot be grieved within

the RCMP system, this is hearsay. The Applicants do not support this assertion with any affidavit evidence from any RCMP members who are alleged to have had this experience.

[72] This is also the case with the stories of the circumstances of other RCMP members recounted in the Browne Affidavit.

[73] What is not before me is any refusal – in any form – of the RCMP to hear a grievance pertaining to the IRP policies on the basis of a lack of standing by the members, or otherwise.

[74] Based on the evidence before me, I am not persuaded that RCMP members are precluded from utilizing the internal RCMP grievance process, based on a lack of standing or otherwise, to grieve denials of the availability of the DMS.

[75] Further, members can seek judicial review of Treasury Board determinations denying or limiting the availability of the DMS benefit. That is exactly what the applicants did in *Green*. The decision is *Green* demonstrates that RCMP members can seek judicial review of the Treasury Board's interpretation and application of the IRP policies in specific cases.

[76] That said, in *Green* the RCMP members sold their home in August 2017 and waited approximately three years for a decision from the Treasury Board, without explanation for the delay. *Green* also demonstrates that there is merit to the Applicants' submission that the Treasury Board's interpretation is unreasonable, at least regarding importing the eligibility cap from 3.09 into 3.10 when interpreting IRP 2009. Here the Applicants also raise questions as to

the reasonableness of the interpretation of the policies attributed to the Treasury Board to deny members who were transferred and bought homes while IRP 2009 was in effect from accessing the DMS upon their transfer and the sale of their homes after April 1, 2017. They also raise concerns regarding the procedural fairness in the change of policy. In seeking a declaration from the Court regarding the interpretation and application of the relocation policies, the Applicants attempt to avoid what could be lengthy and multiple internal decision making processes and decisions. Their wish to do so is understandable as the IRP policies affect many RCMP members and the availability of the DMS clearly has very significant financial repercussions for members, and their families, relocating from depressed markets.

[77] However, this does not overcome the requirement that applicants must exhaust available internal procedures before seeking redress from the Court. Further, when internal remedies have been exhausted, the Court is in a far better position to determine the reasonableness of the Treasury Board or the RCMP's interpretation and application of the IRP policies as it will have a complete record before it, including the specific underlying facts and the reasons of decision maker.

Conclusion

[78] I have found both that this application is not a "matter" pursuant to s 18.1(1) of the *Federal Courts Act* and that it is premature. As either and both of these preliminary issues are dispositive, I need not address the remaining preliminary issues or the application on its merits.

Costs

[79] When appearing before me the parties advised that they agreed on the appropriate quantum of costs in the amount of $2000. In my view, and considering my discretion pursuant to Rule 400 of the *Federal Courts Rules*, this is a reasonable figure. As the Respondent has been successful, costs in that amount will be awarded in its favour.

JUDGMENT IN T-787-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. The Respondent shall have its costs in the all inclusive, lump sum amount of $2000.

"Cecily Y. Strickland"
Judge

ANNEX A

Integration Relocation Program, Relocation Policy for the Royal Canadian Mounted Police, IRP 2009

General Principles

Section 1

1.01. Effective Date

1. Treasury Board Secretariat of Canada (TBS) has approved the RCMP Integrated Relocation Program (IRP) effective April 1, 2009.

2. Each year on April 1st, the RCMP IRP transitions to a new governing policy year. The IRP that is in effect on the date the Member is registered with the Contracted Relocation Service Provider (CRSP) is applicable for the duration of that relocation.

1.02 Principles

1. The following principles shall guide Members, managers, Relocation Reviewers, and the CRSP in achieving fair, reasonable and modern relocations practices throughout the RCMP:

a) Trust – increase the amount of discretion and latitude for Members, managers, Relocation Reviewers, and the CRSP to act in a fair and reasonable manner.

b) Flexibility – create an environment where decisions respect the duty to accommodate, best respond to Members' needs and interests, and consider operational requirements in the determination of relocations arrangements.

c) Respect – create a sensitive, supportive relocation environment and processes which respect members' needs.

d) Valuing people – recognize Members in a professional manner while supporting members, their families, their health and safety in the relocations contexts.

e) Transparency – ensure consistent, fair and equitable application of the policy and its practices

f) Modern practices – introduce relocation management practices that support the principles and are in keeping with location industry trends and realities; develop and implement an appropriate relocation accountability framework and structure.

1.03. Definitions

11. **Contracted relocation service provider (CRSP)** is defined as a third party service provider engaged by PWGSC and the RCMP to provide specialized services in accordance with the IRP program to the relocating employee as part of their entitlement under the program.

15. **Depressed market** means a community where the housing market has decreased more than 20% since the time of purchase.

39. **Relocation** means the movement of a Member, spouse and/or dependants and HG&E from the principal residence at the old place of duty to the replacement principal residence.

47. **Transfer** means the movement of a Member from one position to another within the RCMP.

Sale of Principal Residence
Section 3

3.01. Purpose

1. The purpose is to assist Members in the sale of a principal residence at the former place of duty when transferred from one place of duty to another.

3.02. Funding Overview
1. The benefits outlined in this Section are funded from the Core, Customized, and Personalized Envelopes as follows:
……

3.09. Home Equity Assistance Program (HEAP)
1. All requests for HEAP must be pre-approved by the DNC/Delegate.

2. A Member who sells his/her residence for less than the original purchase price (at time of initial posting) may be reimbursed the difference (residence value capped at $300,000).

a) *Core Envelope*

i) 80% of qualifying loss up to $15,000

b) *Customized/Personalize Envelopes*

i) Remaining qualifying loss

……

3.10. Depressed Market Status

1. The Member and the realtor must build a business case for depressed market status (20% or higher decline in the real estate market) approval by submitting the following documentation to the CRSP for furtherance to the DNC/delegate for authorization by the Project Authority at Treasury Board Secretariat.

…….

RCMP Relocation Directive, Relocation Directive for the Royal Canadian Mounted Police, RCMP, RD 2017, Effective April 1, 2017

General Principles
Section 1

1.01. Effective Date

1. This Directive takes effect for all transfers issued on or after 1 April 2017.

2. In the Relocation Directive, Immediately following every section:

> a) made under the authority of the TB, there is in parentheses the letter "T"; and
>
> b) made under the authority of the Commissioner, there is in parentheses the letter "C".

1.02 Principles

1. The following principles shall guide all members, managers and relocation personnel in achieving fair, reasonable and modern relocations practices throughout the RCMP:

a) Trust – increase the amount of discretion and latitude for members, managers and relocation personnel to act in a fair and reasonable manner.

b) Flexibility – create an environment where decisions respect the duty to accommodate, best respond to members' needs and interests, and consider operational requirements in the determination of relocations arrangements.

c) Respect – create a sensitive, supportive relocation environment and processes which respect members' needs.

d) Valuing people – recognize members in a professional manner while supporting them, their families, their health and safety in the relocations context.

e) Transparency – ensure consistent, fair and equitable application of the policy and its practices.

f) Modern practices – introduce relocation management practices that support the principles and are in keeping with location industry trends and realities; develop and implement an appropriate relocation accountability framework and structure.

1.03 Purpose and Scope

1. It is the objective of the RCMP to enhance mobility of a member by assisting in the relocation process so that it is carried out:

a) with minimal impact on RCMP operations;

b) with minimal detrimental effects on the Member and his/her family;

c) in an efficient fashion; and

d) at the most reasonable cost to the Crown.

4. The RD and any limitations thereto are published as a policy and not as permissive guidelines. Discretion, be it at the member or departmental level, will be confined to those provisions where discretion is specifically authorized in the RD.

Sale of Principal Residence
Section 4

4.01. Purpose

1. The purpose is to assist members in the sale of a principal residence at the former place of duty when transferred from one place of duty to another. (T)

4.16. Home Equity Assistance **(HEA)**

1. A member who sells his/her residence for less than the original purchase price may be reimbursed 80% of the difference, up to a maximum of $30,000, from the Core Account. (T)

a) HEA in excess of $15,000 may be considered as a taxable benefit by CRA and may be paid less applicable deductions. (C)

2. The amounts in excess of the Core Account qualifying loss may be paid from the Flexible Spending Account. (C)

3. It is the member's responsibility to make all possible effort to prevent the need for HEA. If an equity loss is a direct result of neglectful actions of the member, the claim for HEA may be reduced or rejected by the DNC. (C)

4. Any reduction in the sale price based upon deferred maintenance will not be allowed when calculating HEA. For example: Inspection of residence reveals that furnace must be replaced. If the asking price is reduced in lieu of replacing the furnace, the reduction amount will be excluded from the HEAP. (C)

5. All requests for HEA must be pre-approved by the DNC/Delegate. (C)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-787-20
STYLE OF CAUSE:	KEVIN BROWNE, BRADLEY LUNDEEN AND THE NATIONAL POLICE FEDERATION v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	APRIL 7, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	STRICKLAND J.
DATED:	APRIL 30, 2021

APPEARANCES:

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Laura Young	FOR THE APPLICANTS
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