Federal Court  Cour fédérale

Date: 20140523

Docket: T-1028-13

Citation: 2014 FC 488

Ottawa, Ontario, May 23, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARCUS BRAUER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Major Marcus Brauer has served in the Canadian Forces (CF) since 1988. Over those 26 years, he has been posted to Sault Ste. Marie, Ottawa, St-Jean-sur-Richelieu, Petawawa, Afghanistan, Borden, Edmonton and Halifax. He and his wife have five children who range in age from 4 to 13. Their last move to Halifax resulted in an $88,000 loss to the family on the sale of their home in a community, Bon Accord, outside Edmonton. That loss was partially offset by a payment of $15,000 under the Canadian Forces Integrated Relocation Program Directive (2009) (CFIRP Directive). Major Brauer contends that the full amount of the family's loss

should be covered under the CFIRP Directive as Bon Accord was a "depressed market area", as specified in section 8.2.13 of the CFIRP Directive, when they had to sell their home because of his transfer to Halifax.

[2] This is Major Brauer's application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a July 17, 2012 decision by the Treasury Board of Canada Secretariat (TBS), which declined to designate Bon Accord as a "depressed market area" and thereby authorize full compensation for the family's financial loss.

[3] For the reasons that follow, the application is granted.

I. BACKGROUND:

[4] The posting to Canadian Forces Base (CFB) Edmonton occurred in 2007 when the applicant was stationed at CFB Borden. It was in conjunction with a promotion to the rank of Major. At the time, the applicant and his wife had three children and she was pregnant. He was concerned about the cost of housing in Edmonton and wrote to his career manager requesting a posting in Ontario or the East Coast:

> I have done an initial assessment of the impact on my family with a posting to EDMONTON and it revealed several issues which would be minimized if a posting closer to home were available. They are as follows:
>
> [...]
>
> d. Cost of housing in EDMONTON, a suitable home will cost no less than $400,000-$450,000 for three children and 2 pets, this is beyond our means and PMQs [private married quarters] are not currently available (long waiting list). This financial strain would add to an already stressful situation.

[5] Major Brauer was advised in response that if he did not move to Alberta he would not be able to keep his rank and would likely be posted to CFB Edmonton regardless. In preparation for the move, he applied for on-base rental accommodations, but there was a two-year waiting list for private married quarters (PMQs). Civilian rentals cost more per month than a mortgage. Major Brauer and his wife considered that buying a home was the only viable option. On June 5, 2007 they bought a modest two-story house in Bon Accord, Alberta for $405,000.

[6] Bon Accord is located 40 kilometres north of Edmonton. Major Brauer's uncontradicted evidence is that "the municipality of Bon Accord has a population of approximately 1,500 and its own municipal town council, mayor and civic services."

[7] In 2010, Major Brauer was relocated to CFB Halifax. On April 26, 2010, the Bon Accord house was listed with a real estate agent for the suggested price of $349,000. This list price was $46,000 less than what the family had paid. On May 4, 2010, the list price was reduced to $329,000. The reason, provided by Major Brauer and his real estate agent, is that the housing market in Bon Accord had dramatically declined since 2008 based on announcements that multi-billion dollar industrial projects in the region were on hold, potentially permanently. The house was eventually sold for $317,000, resulting in an $88,000 loss for Major Brauer and his family. The loss was financially devastating to the family and beyond their capacity to absorb.

[8] On May 10, 2010, Major Brauer sent a request to the CF Director of Compensation and Benefits Administration (DCBA) for Home Equity Assistance (HEA) beyond the generally applicable $15,000 maximum under the CFIRP Directive. In accordance with the CFIRP

Directive (see attached Annex A), Major Brauer included a Bon Accord market analysis prepared by a member of his realtor team, Mr Brad Redekopp, who indicated that the market in Bon Accord had suffered a 23.11% decline due to reasons particular to the area. He noted that while 30 houses had sold in Bon Accord in 2007 and 40 in 2008, only 6 had been sold as of May 2010. The realtor reviewed the local economic factors that had depressed the real estate market in Bon Accord in 2010. These included postponement of local pipeline development and construction of the Suncore and Petro-Canada upgraders, attributed to the global credit crunch, plunging crude oil prices and cost increases.

[9] On June 1, 2010, Major Brauer's request was forwarded to a DCBA Adjudicator. On July 9, 2010, the DCBA Adjudicator denied Major Brauer's request for reimbursement of 100% of his equity loss through HEA. The DCBA Adjudicator noted that "… TBS has advised DCBA that there are/were no designated depressed markets in Canada. As such, the [grievor's] req for 100% HEA loss from Core is denied."

[10] Major Brauer submitted a grievance from this decision to the Director General Canadian Forces Grievance Authority (DGCFGA) on July 13, 2010. He sought a reversal of the DCBA decision arguing in part that he had been provided with a generic denial and that his request had not been assessed by the TBS, as it should have been in accordance with the CFIRP Directive.

[11] In a letter dated September 15, 2010, the initial authority (IA) noted that the Department had no authority to amend the CFIRP Directive or extend a benefit beyond its prescribed

margins, and explained that no locations in Canada had been designated with depressed market status for 2010. The IA also stated:

> Since the member's grievance pertains to a matter prescribed by the Governor in Council in regulations, the subject grievance is hereby returned without further action. The grievor should be advised that a request to amend a policy or a TBS decision should be staffed administratively through his chain of command.

[12] On October 10, 2010, Major Brauer requested adjudication by the final authority (FA), the Chief of the Defence Staff (CDS). The CDS referred the grievance to the CF Grievance Board (Board or CFGB) to issue findings and recommendations. The Board requested further information from the DCBA which indicated on March 11, 2011:

> To pay the benefit we would have to have a document that says that Edmonton is a depressed market. The default position of the policy is that nothing is a depressed market unless TBS so determines. That no such document exists is proof that Edmonton is not a depressed market. We did apply to have Edmonton declared a depressed market, TBS reviewed our request and in view of the fact that the market in Edmonton had declined less than 12% determined that it was not. They chose to advise of this both verbally and in an e-mail. E-mail attached for your review. [Emphasis in original]

[13] As described by the Board:

> The e-mail referred to by DCBA 2-2 is a brief exchange between DCBA and an officer of the TBS dated 21 May 2009 wherein the TBS officer stated that the "Edmonton Area is not considered a depressed housing market area…"
>
> DCBA 2-2 went on to say that, subsequent to the 21 May 2009 e-mail, TBS had advised them verbally that there are no areas in Canada with Depressed Market status. No date was provided for this "verbal" advisory from TBS but it is noted that two years have now passed since the brief e-mail advisory was relayed to DCBA.

[14] The Board found the following:

> The grievor made a substantial submission to DCBA requesting 100 percent reimbursement of his loss from Core funding rather than being limited to the $15,000 limit. His submission included a comprehensive depressed market analysis by his realtor (pp. 1-83). Based on the evidence provided (pp.1-83), I am satisfied that the market analysis clearly establishes that the community of Bon Accord was a depressed market; precisely the type of depressed situation contemplated in the HEA policy. As such, it should have qualified for depressed market status, entitling the grievor to reimbursement of 100 percent of his loss.
>
> [...]
>
> A member of the Board's staff requested a copy of the TBS declaration that the Edmonton area was not a depressed market in 2010 and, in response, the DCBA 2-2 provided a copy of an e-mail from a member of the TBS that states: "The Edmonton area is not considered a depressed housing market area – please note that we do not declare a street or unit as depressed, we declare the area if the marker [*sic*] has dropped below 20%" (p.202). I note that this e-mail, dated 21 May 2009, is simply not up-to-date and cannot be used to justify conditions in 2010. I acknowledge that the DCBA 2-2 also stated: "Subsequent to the aforementioned memorandum, TBS has advised DCBA verbally that there are no areas in Canada with Depressed Market status" (p.201). However, this verbal statement makes no reference as to what year it applies and, in any event, an unattributed verbal statement from TBS staff cannot have any probative value, nor, in my opinion, can a casual e-mail.
>
> [...]
>
> I realize that the word "community" is not defined by the policy, and that the CDS has recognized this and asked DGCB to work with TBS to rectify this deficiency. However, for the purpose of this case, Bon Accord must certainly be said to be a community all its own, with a Mayor and 1500 citizens, all living some 40 kilometres distant from Edmonton. The grievor has presented a convincing case showing how prices had dropped by more than 20 percent. In my view, the DGCB did not follow the TBS policy in this case. There ought to have been a submission to TBS and, given the grievor's circumstances and the enormity of the loss, one would have thought DGCB would have been advocating vigorously on behalf of the grievor.
>
> [...]

> In summation, this grievor claims to be out of pocket over $90,000, a huge sum for any CF member. The devastating impact this loss has had on his family is eloquently and compellingly described in the impact statement written for the CDS by the grievor's wife (pp.116-118). They are on the verge of bankruptcy and the grievor has stated that if his application is ultimately denied, he may no longer be able to remain in the CF despite his clear wish to do so.

[15] The Board determined that the DCBA had failed to act on the case presented by Major Brauer and his realtor, as required by s 8.2.13 of the CFIRP Directive, by submitting it to the TBS for consideration. The Board had previously addressed the HEA in a number of files and made a systemic recommendation to the CDS that he "direct that the HEA policy applicable to CF members […] be re-examined, taking into account modern market conditions, with a view to reducing the impact of losses…" It therefore partially upheld Major Brauer's grievance and recommended amongst other things that his HEA submission be forwarded to the TBS as set out in the CFIRP Directive with the full support of the CF.

[16] The CDS, General Walter Natynczyk, accepted this recommendation. In a letter dated September 19, 2011, General Natynczyk granted partial redress to Major Brauer's grievance. He wrote that he did not have the authority to grant Major Brauer relief from his situation, but would direct DGCB to prepare and transmit his HEA submission to TBS in accordance with the CFIRP Directive for evaluation of depressed market status. He also indicated the following:

> […] I note that DCBA did not forward your submission for TBS evaluation stating that the TBS had advised that there were no locations in Canada designated with depressed market status in 2010. However, I find that you made a very good case for depressed market status and that it appears that your community of Bon Accord, which experienced a decline of 23.11%, presents precisely the type of depressed situation contemplated in the HEA policy. That being said, I also understand that the TBS evaluates depressed market status based on "areas", which in your case is the

Edmonton area. In 2009, TBS determined that the housing market in the Edmonton area had declined by 12%, well short of the 20% decline required for full reimbursement under the HEA program. However, other than a verbal advisory from the TBS that there were no depressed markets in Canada in 2010, there is nothing concrete regarding the market decline for that timeframe. Therefore, based on the case you presented and the requirement of the policy, combined with the lack of clarity regarding the status of the housing market in the Edmonton area in 2010, I find that there is sufficient justification to indicate that your submission should have been forwarded to the TBS for evaluation and I will direct DCBA to do so forthwith. This leads me to the next issue, which concerns the definition of "community" as it applies to the CFIRP policy.

Definition of community. In your representation of 22 March 2011, you emphasize that Bon Accord is not a suburb of Edmonton, in other words, that it is a community in its own right. You explain that it is 40 kilometres away from Edmonton, has its own mayor, charter, taxes and services and in fact, does not use any Edmonton services. However, the TBS considers Bon Accord to be part of the Edmonton area and as the Edmonton area apparently did not meet the 20% criteria for depressed market status at the time in question, the TBS is not prepared to confer such status on any particular location within that area. However, as has been previously noted by both the CFGB and CFGA, although the CFIRP clearly refers to a "community" with regard to the HEA program, the policy does not provide a definition of the term. In fact the TBS' broad application of the term "community" has caused a number of service members in similar situations to yours, to be impacted to an extent that may well never have been envisioned. As indicated in the CFGB findings and recommendations, I am aware of the issue and have asked the DGCB to work with the TBS to rectify this deficiency. Therefore, based on my previous direction regarding the definition of "community," I will not address this issue any further in the context of your grievance but will direct DGCB to use your situation to assist in its negotiations with the TBS as it provides yet another example of a CF member/family placed in an untenable situation with little recourse due to the confusion surrounding the term "community."

[17] By letter dated October 24, 2011 the DCBA requested TBS approval for 100% reimbursement of HEA for Major Brauer in accordance with the CFIRP Directive provisions.

The letter specifically asked for consideration of Bon Accord, Alberta as a depressed market area and stated that this would be "fair, equitable and in line with current CFIRP [Directive] benefits providing that Edmonton is deemed as a depressed market."

II. DECISION UNDER REVIEW:

[18] The TBS took seven months to render a decision on the request submitted by the DCBA. TBS denied the request to have Bon Accord, Alberta designated as a depressed market for 2010 in a letter to the DCBA, dated July 17, 2012, signed by Edith Kehoe, Senior Director, National Joint Council Support and Union Engagement, Compensation and Labour Relations. While Ms Kehoe conveyed the decision in her letter it had been approved by Michelle d'Auray, then Secretary to the Treasury Board, based on an internal memorandum prepared by a Policy Analyst in Ms Kehoe's directorate. Ms d'Auray was the ultimate decision-maker.

[19] Ms Kehoe's letter noted that had the request been granted, the CF would have been authorized to reimburse Major Brauer, "and potentially other similarly affected Canadian Forces members up to 100% of the loss on the same of his home in 2010". The decision letter reads in part:

> The review of Bon Accord for designation as a depressed market has been completed. For the purposes of the review, Bon Accord was considered to be part of the Edmonton metropolitan area. [...]
>
> Although Major Brauer personally lost more than 20% on the sale of his home, the average home cost in the Bon Accord/Edmonton area for all homes only declined by 2.9% between 2007 and 2010. This indicates a market adjustment from an inflated market to a more stable, balanced market and falls far short of the 20% threshold necessary for a market to be designated as depressed as articulated in the CFIRP Directive.

> Analysis of all the data for the period in question, including economic indicators such as the unemployment statistics and housing starts, indicate that the economy in Bon Accord was stable and the housing market was balanced. Accordingly, the Treasury Board Secretariat in its capacity as Program Authority for the integrated relocation program has determined that Bon Accord, Alberta shall not be designated as a depressed market for 2010.

[20] The internal TBS memorandum, dated May 31, 2012, summarizes the request and describes the process for making determinations on requests for depressed market designations. The Internal Memorandum notes that:

> [...] an area is looked at in its entirety and not as a specific neighbourhood. **For example, Scarborough would not be considered in isolation from the Toronto market.**
>
> It should be noted that CF members are subject to relocation akin to "a forced relocation" and **as such are often subjected to absorbing an equity loss** in the disposition of their principal residences at origin.
>
> [Emphasis added]

[21] The internal memorandum analyzed the "Current Status" of Bon Accord and drew the following conclusions, amongst others:

> [...]
>
> The material provided indicates MLS sales in the area are on the increase and that the housing market is balanced. The property in question is a five bedroom older home. The house was purchased in 2007 for $405,000 (average home cost as per Statistics Canada in Bon Accord for 2006 was $179,177). This home sold for $317,000 which is above the average home purchase price of $275,000 for 2010 for Bon Accord. Although this represents a loss of 21.7% from the original purchase price for the home owner, the average home cost for Edmonton from 2007 to 2010 only decreased by 2.9% and the provincial ratio was even lower at 1.4%.

> While the individual lost slightly more than 20%, it is clear from the other factors that this was an exception and the Edmonton area is not a depressed market.

III. ISSUES:

[22] The parties disagree on the standard of review and on the materials that are appropriately part of the record before the Court for consideration on this application. Accordingly, the issues are as follows:

1. What is the applicable standard of review?
2. Which documents may this Court consider on judicial review?
3. Did the TBS err in its decision that Bon Accord was not a depressed market area?

IV. ANALYSIS:

A. *Standard of Review*

[23] The applicant submits that the applicable standard is correctness, while the respondent submits that it is reasonableness. Both parties agree that there does not appear to be any existing jurisprudence on the appropriate standard of review for the TBS decision. This is not a case, therefore, where the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence. The Court "must proceed to an analysis of the factors making it possible to identify the proper standard of review": *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 62. The Supreme Court also noted in *Dunsmuir*, above, at para 64 that "[i]n many cases it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case."

[24] The respondent contends that deference should be afforded a tribunal that is interpreting its own statute or statutes closely connected to its function: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para 81.

[25] Favouring the respondent's position is the fact that the substantive issue before the Court involves a question of mixed fact and law which normally points to deference. The TBS was required to interpret the terms of the CFIRP Directive, to consider the general context of the CFIRP Directive, and apply the facts to the terms of the policy. As such, this is a circumstance where the "legal and factual issues are intertwined with and cannot be readily separated": *Dunsmuir*, above, at para 53. Nor can the interpretation of the statute be said to be an element of central importance to the legal system as a whole: *Dunsmuir*, at paras 55, 60.

[26] Recent jurisprudence concerning "administrative policies governing the employment of the public sector employees" supports the respondent's position that reasonableness is the standard applicable to decisions "which interpret and apply internal procedures and policies": *Khalid v National Research Council of Canada*, 2013 FC 438 [*Khalid*] at paras 36-40; *Canada (Attorney General) v Bearss*, 2010 FC 299 at para 21; *Backx v Canadian Food Inspection Agency*, 2013 FC 139 at paras 18-20. I note, however, that other than *Khalid*, these cases do not arise in circumstances where the relevant policy is or has become part of the employee's terms and conditions of employment as it is in this case.

[27] The Treasury Board, a statutory committee of the Queen's Privy Council for Canada, is responsible for the financial, personnel and administrative management of the Government of

Canada. By virtue of s 35 of the *National Defence Act*, RSC 1985, c N-5 [*NDA*], these functions include the full authority to establish and regulate the pay and allowances of CF members. Pursuant to ss 5 to 13 of the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*] the TBS supports the Treasury Board in this management role. TBS cannot be said to be independent of the employer as would an adjudicative tribunal. Members of the CF are employees of the Crown in right of Canada. The Board serves as management with respect to Crown employees and with the support of the TBS, is the guardian of the Crown's purse.

[28] There is support in the jurisprudence for the applicant's position that deference is not appropriate where the decision maker is not independent of the employer: see for example *Canada (Attorney General) v Assh*, 2006 FCA 358 [*Assh*] at paras 44, 50-51; *Appleby-Ostroff v Canada (Attorney General)*, 2010 FC 479 rev'd on other grounds in 2011 FCA 84, at paras 52, 56. Here, Ms d'Auray was clearly not independent of the employer, the Crown. As the head of the Agency supporting the Board, she was responsible for administration of the policies governing the pay and benefits of CF members. This lack of independence points to a standard of review of correctness.

[29] There is no privative clause pertaining to the TBS's decision in either the *NDA*, or the *FAA*, which also supports the conclusion that the TBS should not be afforded deference on its decision. The purpose of the CFIRP Directive is, amongst other things, to protect CF members from the financial consequences of regular forced relocations. This also supports a finding of minimal deference.

[30] The Court is as well-equipped to determine this question as is the TBS. The decision under review involves the interpretation of the CFIRP Directive, in particular on the question of whether the term "community" applies to Bon Accord or to the entire Edmonton metropolitan area. As stated in *Assh*, above at para 42:

> Here, the question is whether the Court is as well equipped as the administrative decision-maker to decide the questions raised by the application for judicial review. The questions in dispute in this appeal concern the interpretation and application of the relevant aspects of the Conflict of Interest Code.

[31] In this instance, there is no issue of credibility with regard to witness testimony and all the materials before the Court are in the same format as those before the TBS: in writing. I agree with the applicant that on the basis of the record before the Court, as discussed below, the TBS has not demonstrated any particular expertise in the determination of depressed market areas or in the interpretation of the term "community". This is reflected in the sparse analysis and minimal documentation supporting its decision.

[32] The Supreme Court has given direction that where the question is one of the exercise of discretion or policy, deference will usually apply: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] SCJ no 36 at para 50. On that basis, and not without doubt about the matter, I find that the standard of review is reasonableness. In reaching that conclusion, the following statement by the majority of the Supreme Court in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 [*McLean*] at para 38, offers some comfort:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation

> and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable -- no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" *(Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation -- and the administrative decision maker must adopt it.

B. *Which documents may this Court consider on judicial review?*

[33] As a preliminary matter, the respondent submits that the applicant's affidavit and memorandum relies extensively on information that was not before the TBS. This Court has held that it is inappropriate to consider evidence that was not before the decision-maker: *Ochapowace First Nation* v *Canada (Attorney General)*, 2007 FC 920 at paras 9-10, aff'd 2009 FCA 124, leave to appeal to SCC ref'd [2009] SCCA no 262.

[34] In particular, the respondent submits that Exhibits B, E, F, G, I and K to the applicant's affidavit are inadmissible except to the extent that they provide general background information. They should therefore be disregarded by the Court in its consideration of the reasonableness of the impugned decision. These exhibits consist of a document from Royal LePage Relocation Services entitled "Planning Your Move" (Ex B); the Findings and Recommendations of the Vice-Chairperson of the CF Grievance Board dated April 29, 2011 (Ex E); an article from a journal entitled "Perspectives" published by the Grievance Board dated May 2011 (Ex F); the letter of September 19, 2011 conveying the decision of the CDS as final authority on the grievance (Ex G); a letter from the Secretary of the Treasury Board to Mr Robert Chisholm, M.P. dated August 31, 2012 (Ex I); and a letter from the CF and National Defence Ombudsman to the Minister of National Defence dated September 10, 2013 (Ex K).

[35] The sole document that appears to have been before the decision-maker is the internal memorandum accompanied by a transmittal sheet. I note that the respondent has included in its record materials from the file that were not before the decision-maker but were referenced by or, in the case of some hand-written notes, created by the analyst who prepared the memorandum. I consider the analyst's notes to be part of the reasons for the decision and the other materials to be admissible as part of the supporting record.

[36] I agree with the respondent that documents included in the applicant's supporting affidavit that were not before the decision maker or post-date the decision cannot be considered except to the extent that they provide general background information that would assist the Court. In that regard, I considered Exhibits E and G to be helpful as contextual information and disregarded the other documents objected to by the respondent.

C. *Did the TBS err in its decision that Bon Accord was not a depressed market area?*

[37] The applicant submits that the form and substance of the HEA policy supports his position.

[38] Citing several dictionaries, the applicant submits that Bon Accord meets the definition of "community" set out in the policy:

> Black's Law Dictionary (9th ed) (St Paul, Minn: West Publishing Co, 2009), defines "community" as a neighbourhood, vicinity or locality.
>
> The Oxford Canadian Dictionary defines "community" as a specific locality.

> Termium Plus [a reference for the Government of Canada Translation Bureau] defines "community" as, amongst other things, "usually composed of three to five neighbourhoods". A section of a city, primarily a residential area.

[39] In the applicant's view, a CF member reading the CFIRP Directive would reasonably believe that Bon Accord would be the relevant "community" for the purposes of the HEA. If the term "community" is at least ambiguous, he argues, any ambiguity should be construed against the Treasury Board as the drafter of the CFIRP Directive. The Treasury Board could have specified that the entire metropolitan area in relation to bases such as Edmonton would be considered, but it chose not to do so in drafting the policy. The policy does not refer to "area", as is the respondent's interpretation but "community". As found by the CFGB, Bon Accord is "precisely the type of depressed situation contemplated in the HEA policy."

[40] The respondent submits that the terms of the CFIRP Directive support including the town of Bon Accord as part of Edmonton. In particular, the respondent notes, the Directive contains specific limitations:

> 1.3.01 Limitations
>
> The benefits outlined in this policy are all inclusive. It is designed to provide some degree of flexibility while remaining within the intent of the policy. This will allow CF members to make choices based on their specific needs; however, those choices shall not extend benefits or create entitlements.
>
> [...]
>
> 1.3.01 Restrictions
>
> Les indemnités précisées dans la présente politique sont toutes globales. Elles visent à offrir une certaine souplesse tout en respectant le but de la politique. Ainsi, les membres des FC pourront faire des choix en fonction de leurs besoins particuliers.

> Ces choix ne doivent toutefois pas accroître les avantages ou créer des indemnités
>
> [...]

[41] In order to be eligible for 100% of an equity loss on the sale of a home, the home in question must be located in a "depressed market area", which is defined as "a community where the housing market has dropped more than 20%."

[42] For the purposes of the CFIRP Directive, CF members' place of duty is defined at s 1.4 as:

> Place of duty
>
> The place at which a CF member usually performs normal military duties and includes any place in the surrounding geographical area that is determined to be part thereof by the Chief of the Defence Staff or such other officer as shall be designated.
>
> Lieu de service
>
> Endroit où un membre des FC accomplit habituellement ses fonctions militaires ordinaires et qui comprend tout endroit dans les régions géographiques avoisinantes que le Chef d'état-major de la Défense, ou tout autre officier désigné, a déterminé comme faisant partie du lieu en question

[43] In the present case, the respondent submits, the evidence is clear that the applicant's place of duty was CFB Edmonton. In addition, it is argued, there is no evidence that the applicant ever requested or received the approval to reside outside the geographical boundaries of CFB Edmonton. The respondent contends that it was reasonable to consider Bon Accord as being within the geographical boundaries of CFB Edmonton. Therefore any consideration of the housing market as it related to the applicant's military service at his place of duty would

reasonably take this factor into account. Nothing in the definitions of "community" found in the dictionaries would exclude Bon Accord from being found to be part of the greater Edmonton Metropolitan Area, the respondent argues. While the Town of Bon Accord is a very small, satellite town 40 kilometres from a major urban centre, it markets itself on the basis of its close proximity to Edmonton; to Alberta's "Capital Region"; being "minutes" away from Edmonton and being located on the northern boundary of Edmonton.

[44] Moreover, the respondent submits, it is unreasonable to consider only the data from distinct municipalities as evidence of market depression. The applicant's realtor's real estate opinion indicated that only six homes had sold in Bon Accord at the time of writing in 2010. With a sample size this small, any variation in housing price would create a massive fluctuation in the differential average price of a home. It was therefore eminently reasonable for TBS to consider the broader economic conditions and market data in a larger area, the respondent argues.

[45] The respondent submits that when the matter was referred to TBS, the DCBA requested that "Edmonton" be found to be a depressed market area for the purposes of the CFIRP Directive. Thus, the respondent argues, TBS was faced with a direct request from the CF to consider the housing market in the Edmonton area in light of the HEA provisions.

[46] This last argument reflects, I believe, a misunderstanding of the request for approval of the 100% HEA compensation for Major Brauer and is incorrect. The letter from the DCBA is quite brief – just three paragraphs. Bon Accord is referenced in the first paragraph followed by

"Edmonton area" in parenthesis. The second paragraph cites "current CFIRP benefits providing that Edmonton is deemed as a depressed market" but in the context of the situation in late 2011. The third and final paragraph makes it clear that the request is for "consideration of Bon Accord, AB as a depressed market area." The Policy Analyst who prepared the internal memorandum for Ms d'Auray's consideration and decision clearly understood that the request was to consider Bon Accord as a depressed market area, not Edmonton, at least when the analyst began the task.

[47] However, the analyst proceeded to treat Bon Accord as part of Edmonton, much like in the example provided: "Scarborough would not be considered in isolation from the Toronto market." Scarborough is, of course, a borough of the City of Toronto. Its residents pay taxes to the City of Toronto, vote for the Mayor of Toronto and rely on the Toronto bus and subway network to get to and from work and school. While it may be reasonable not to consider Scarborough in isolation from the Toronto market, the same cannot be said of Bon Accord and Edmonton. They are distinct municipalities. The analyst's example reflects a mind-set, in my view, that governed the rest of her analysis. By implication, Bon Accord was treated as just another bedroom suburb of Edmonton. On the evidence submitted by Major Brauer, that was not reasonable.

[48] I think it important to consider what it meant for Major Brauer and his family for him to be posted to CFB Edmonton from CFB Borden, his former place of duty. This was not a transfer to a similar location. The small town of Borden, which contains the base, is located in Simcoe County, Ontario a rural area roughly 100 kilometres north of Toronto. The nearest city is Barrie,

some 20 minutes away by car. In contrast, CFB Edmonton is within the boundaries of a major urban centre.

[49] There is nothing in the record to suggest that the CDS or other designated officer had determined any place in the geographical area surrounding CFB Edmonton to be the place where Major Brauer was to perform his military duties. He was posted to CFB Edmonton but had to live with his family wherever they could find affordable housing.

[50] CFB Edmonton has a limited quantity of residential units (PMQs) available for the CF members posted to the base. I think the Court may take judicial notice of the fact that the Government of Canada has been reducing the stock of such housing across the country for several decades by selling the property on which it is located. CFB Edmonton was no exception. In the circumstances, CF members may have no choice but to look to the private market to find housing for themselves and their families.

[51] Major Brauer's uncontradicted evidence is that there was a two-year waiting list for a PMQ suitable for his family in Edmonton. As a result, Major Brauer was being posted by his employer to a base where the only available options to house his growing family were to find a home to rent in the private market or to buy. His evidence, again uncontradicted, is that the cost of renting a house in Edmonton at that time exceeded the cost of a mortgage on a home in Bon Accord.

[52] The respondent does not contend that the family's decision to buy in Bon Accord in 2007 was misguided or unreasonable. There is a suggestion, however, in the TBS analysis that the family bought a house which was valued above the average selling price for that town. The implication is that Major Brauer gambled on the market remaining stable, or increasing, by buying above the average market values in Bon Accord and lost. TBS considers that he and his family should bear that loss, apart from an allowance of $15,000 under the HEA policy. From the evidence in the record, including photographs and descriptions of the home itself, there is nothing to suggest that the house was anything other than a modest family home suitable for a growing family.

[53] The respondent's record contains what is characterized in its affidavit as the Policy Analyst's "investigative file". This includes three pages of handwritten notes that refer, among other thing, to average home prices in Alberta, Edmonton and Calgary taken from a December 2011 report prepared by Scotia Bank. The relevance of house prices in Calgary, or Alberta in general, is not explained. The notes briefly cite the applicant's submissions and the report from his realtor referring to the decline in house prices in 2010. There is a statement that "Alberta is where the jobs are, taxes are low, and many people immigrate to."

[54] It appears from these handwritten notes that the analyst concluded that there was a correction in the market from a high in 2007 and that the result in 2010 in reference to Edmonton was "a balanced market, not a depressed market." Included in the file are a number of downloaded Internet pages extolling the virtues of living in Edmonton; a copy of a April 2011 report entitled "Town of Bon Accord – Community Profile" downloaded from the town's

website; a page citing a CMHC report indicating that Edmonton house prices would be going up in 2012; an Edmonton Realtor's webpage downloaded on December 30, 2011 citing listings and prices in Edmonton; a page from an unknown and undated source referring to the "Edmonton housing bust" accessed on January 3, 2012; and a comment from an Edmonton real estate blog posted on June 1, 2010 indicating that house prices were expected to rise later in the year.

[55] Aside from the Bon Accord Community Profile, all of this material dealt with the Edmonton housing market. This suggests that the analyst focused her research, such as it was, on house prices in that city. There is no indication in the record as to what the analyst's qualifications were to conduct this research or to provide a thorough and accurate report on the market conditions in Bon Accord, or Edmonton for that matter. It appears that no consideration was given to the differences between Edmonton, a major urban centre with a diversified economy and population of about 1 million and Bon Accord, a small town linked to the oil industry. Nor does the respondent's record reflect that the community Major Brauer and his family belonged to was Bon Accord, not Edmonton.

[56] There appears to have been no attempt by TBS to assess why the housing prices dropped so dramatically in Bon Accord, other than to note that there were only a few homes sold there in 2010. That being the case, why did it happen if not due to local economic factors which did not seriously affect the Edmonton market?

[57] The information assembled in the analyst's investigative file contrasts poorly with the organized, thorough and focused material submitted by Major Brauer, which dealt directly with

the situation in Bon Accord. In my view, TBS relied on irrelevant, post-dated and unsubstantiated information. The impression the Court is left with from the investigative file material and the memorandum is of an after-the-fact justification, not a fair minded evaluation. A case was made to justify the negative conclusion previously delivered. As communicated verbally and by email to the DCBA prior to the submission of Major Brauer's request, TBS had already determined that Edmonton was not a depressed housing market. The decision extended that conclusion to Bon Accord without drawing a distinction between the two communities when TBS was pressed to reconsider its earlier finding, as a result of the Grievance Board and CDS findings.

[58] The fact that the analyst's memorandum passed through the hands of several TBS officials, "exercising their challenge function" as it is described in the respondent's evidence, on its way to Ms d'Auray does not rectify its deficits. There is nothing in the record to suggest that these officials questioned the sources of information relied upon, the quality of the analysis or added anything of value other than their initials to the transmission cover sheet.

[59] The memorandum presents a very positive picture of the economic conditions in Alberta in general and Edmonton in particular. This is in keeping with the analyst's notation quoted above: "Alberta is where the jobs are, taxes are low, and many people immigrate to." That may well be true in general but does not explain what happened in Bon Accord between 2007 and 2010.

[60] The memorandum concludes:

> The material provided indicates MLS sales in the area are on the increase and that the housing market is balanced…Although this [the sale price for the Brauer home] represents a loss of 21.7% from the original purchase price for the home owner, the average home cost for Edmonton from 2007 to 2010 only decreased by 2.9% and the provincial ratio was even lower at 1.4%
>
> While the individual lost slightly more than 20%, it is clear from the other factors that this was an exception and the Edmonton area is not a depressed market.
>
> Recommendation
>
> That Bon Accord, Alberta not be declared as a depressed housing market area for CF personnel subject to relocation.

[61] It is clear from the record that while the recommendation returns to the request to consider Bon Accord for designation, the reasoning behind it relates solely to Edmonton rather than to the small community 40 kilometres to the north. TBS did not need to consider Bon Accord part of the Edmonton area. It chose to do so in order to exclude the town from consideration as a "depressed housing market area" for the purpose of the HEA policy.

[62] As indicated above, the letter which conveyed the decision to the DCBA, appears to reflect a concern that other military personnel assigned to CFB Edmonton, ("and potentially other similarly affected Canadian Forces members") would seek to take advantage of a positive decision in favour of Major Brauer. There is nothing in the record to suggest that there were other CF members similarly affected in Bon Accord. There are references to other CF members in possibly similar situations elsewhere in Canada in the Grievance Board decision and CDS letter. The comment in the TBS letter suggests that the decision was motivated, in part, by

oblique considerations related to potential claims by other CF members and not to the applicant's situation in Bon Accord.

[63] I agree with the applicant that the TBS interpretation of the term "community" is unreasonable. The Supreme Court has confirmed that a purposive approach should be adopted in interpreting statutes: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at paras 21-22:

> **21** Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.
>
> **22** I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

[64] The applicant's situation seems to me to be precisely the type of problem the CFIRP Directive was meant to remedy as indicated in the views expressed by the Grievance Board and

the CDS. As interpreted by TBS, however, "CF members are subject to [...] absorbing an equity loss" upon "relocation akin to a "forced relocation"". This cannot be what the Government of Canada intended for its military personnel.

[65] The TBS interpretation of the term "community" can only be reasonable if it can be established that it does not render the purpose of the CFIRP Directive meaningless by making it inapplicable in all but the most exceptional circumstances. From information provided to the Court by the respondent after the hearing, it appears that TBS has declared only two communities, on one occasion each, to be depressed markets in relation to the CFIRP Directive: Temiskaming, Quebec in 2008 and Port Maitland, Nova Scotia (January 2010-December 2011). The declarations in these two cases contained no finding that the entire housing market had declined by 20% or more. Rather they dealt with the general economic conditions in both communities and the personal circumstances of the individuals concerned. Thus it appears that the standard required in this instance – a decline in the housing market of greater than 20% - was not required in those cases.

[66] The term "community" as defined in the Canadian Oxford Dictionary, Toronto 2001, means first all of the people living in a specific locality. "Communauté" as used in the French version of the policy refers to a "groupe social dont les membres vivent ensemble": Le Nouveau Petit Robert, Paris 2002. In my view, the Brauer's "community/communauté" was clearly Bon Accord and not Edmonton. In interpreting the term, TBS chose to read "community" as "area" and to interpret it as the Greater Edmonton Area for the purposes of its depressed market analysis. No degree of deference justifies that interpretation in the context of this case.

[67] The transfer to Edmonton and subsequent posting to Halifax were operational decisions made by the CF over which Major Brauer had little or no control. He could refuse the posting only at the peril of his career progression and even then may have been required to move or resign from the Forces. In this regard, the choice of a place to live which many other Canadians take for granted was largely at the discretion of his employer. It was reasonable for him to expect that in making the move, he and his family would be protected by the employer's HEA policy. That expectation, as it turned out, was not well-founded. The employer, through its agent, the TBS, expects the family to bear most of the cost of a dramatic down-turn in the market value of their home when they were again posted to a new base. This was clearly not what was intended when the policy was devised by the government. But the effects of its application in this instance on the Brauer family have been devastating.

[68] I find that the TBS decision was unreasonable in the sense that it was not justified and was outside the range of acceptable outcomes defensible in light of the facts and the law.

[69] For these reasons, the application is granted. I consider it appropriate to remit the matter with a direction that on reconsideration, the community to be considered for determination as to whether it was a depressed market area in 2010 is Bon Accord. Considering the history of this matter and the length of time the applicant has been attempting to obtain a remedy, he is awarded his costs on a full indemnity basis.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application is granted;
2. the decision of the Treasury Board Secretariat dated July 17, 2012 is quashed and the matter is remitted to the Secretariat for reconsideration with the direction that the Town of Bon Accord be considered the community for determination whether it was a depressed market in 2010, not Edmonton; and
3. the applicant is awarded his costs on a full indemnity basis.

"Richard G. Mosley"
Judge