

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110208**

**Docket: A-221-10**

**Citation: 2011 FCA 49**

**CORAM: LÉTOURNEAU J.A.  
NADON J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**AL MACKLAI**

**Appellant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

Heard at Ottawa, Ontario, on February 8, 2011.

Judgment delivered from the Bench at Ottawa, Ontario, on February 8, 2011.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**NADON J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Ottawa, Ontario, on February 8, 2011)**

**NADON J.A.**

[1] Before us is an appeal of O'Keefe J.'s Judgment dated May 13, 2010, wherein he held that the decision of the Assistant Director of the Canada Revenue Agency's (the "C.R.A.") Scientific, Research and Experimental Development Program, Mr. Khan, not to make the appellant's promotion retroactive to July 4, 2006, was reasonable. We are all of the view that the appeal cannot succeed.

[2] In arguing that he was entitled to an appointment with pay retroactive to July 4, 2006, the appellant assumes that had there not been an error in the selection process, he would have been appointed in 2006. He says that his appointment in 2009 constitutes an admission of that fact by the C.R.A.

[3] There is absolutely no evidence, in our view, to support this premise, other than the fact that the appellant was appointed in 2009 following a review by an independent third party, who found error in the selection process and recommended that the 2006 appointments be rescinded and that the selection process be conducted *de novo*.

[4] In the event, rather than rescinding the appointments and conducting a new selection process, the C.R.A. decided to appoint the appellant to the AU-04 position which he was seeking.

[5] In our view, taking into account all relevant circumstances, it cannot be said that the appellant would necessarily have been appointed in 2006, since there were 4 candidates, including the appellant, for 3 positions only. No evidence was adduced to satisfy us that any of the 3 other candidates were not qualified or less qualified than the appellant.

[6] Thus, the appellant might or might not have been successful in 2006. On the record before us, there is simply no way for us to reach a conclusion on this point.

[7] Hence, we are satisfied that the appellant's appointment to the AU-04 position in 2009, without retroactive pay to July 4, 2006, cannot be said to be unreasonable, as the Judge correctly found. As a matter of law, a retroactive appointment decision was open to Mr. Khan. However, whether to grant such a remedy was a matter of discretion, reviewable on a standard of reasonableness. The reasonableness of such a decision will depend on the circumstances of the case.

[8] As we see no reason to intervene in the matter before us, the appeal will be dismissed with costs.

"M. Nadon"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-221-10

**STYLE OF CAUSE:** AL MACKLAI v. CANADA  
REVENUE AGENCY

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 8, 2011

**REASONS FOR JUDGMENT OF THE COURT BY:** LÉTOURNEAU, NADON,  
MAINVILLE J.J.A.

**DELIVERED FROM THE BENCH BY:** NADON J.A.

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