Federal Court  Cour fédérale

Date: 20181107

Docket: T-153-18

Citation: 2018 FC 1120

Ottawa, Ontario, November 7, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

HASSAN DAYFALLAH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter and summary

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the Public Service Commission of Canada's [Commission] Record of Decision 2017-082-IB [Decision] issued December 19, 2017. The Decision adopted Revised Investigation Report 2016-MOT-00141.25284, which concluded the Applicant committed fraud during a web-based exam he took at home, contrary to section 69 of the *Public Service Employment Act*, SC 2003, c 22 [*PSEA*]. This fraud took place during Appointment Process 15-

MOT-IA-HRS-84651, which resulted in the Applicant being appointed Senior Policy Analyst (EC-5) in Transport Canada's Rail Safety division, a position within the public service of Canada.

[2] The fraud found below arose in the following facts.

[3] During the course of the web-based exam, the Applicant not only sent the exam and relevant instructions by email to a friend and former colleague [Former Colleague] but also emailed the Former Colleague his draft answer, coupled with a request for assistance: the email sending the draft answer reads "first thoughts?" It cannot seriously be disputed that asking for assistance from an outsider on a proposed answer and sharing exam information during the course of a web-based take-home exam contravened the terms under which the exam was conducted, and I have so found.

[4] In addition to this instance of what most would consider a simple case of cheating, the record in this case includes the fact that the Applicant consulted with and shared exam information with the same Former Colleague during the course of three other web-based exams for other appointments within the public service of Canada. These other incidents took place at or around the same time as the exam now in issue.

[5] After Commission Staff conducted an investigation into the Applicant's activities during the course of these multiple take home web-based exams, they sent a Factual Report to the Applicant for comment. After review of the Applicant's comments, Commission staff prepared and sent an Investigation Report and a letter with Proposed Corrective Action to the Applicant for his comments. After reviewing the Applicant's comments on both, a Revised Investigation

Report was prepared and sent to the Commission for decision. The Proposed Corrective Action was that the Commission order the revocation of the Applicant's Rail Safety appointment because of fraud, and that for three years the Applicant notify the Commission of other public service applications or employment.

[6] The Commission accepted the Revised Investigation Report and decided the Applicant committed fraud in the appointment process leading to his Rail Safety EC-5 appointment. As a consequence, the Commission ordered that the appointment be revoked by Transport Canada. Also as recommended, the Commission ordered that the Applicant could not accept any position or work in the public service of Canada for a period of three years, without the Commission's approval. The Commission, as recommended, further ordered that for the next three years, if the Applicant obtained work through casual employment in the public service of Canada without having notified the Commission, the Commission would advise the relevant Deputy Head of his fraud and provide the relevant Deputy Head with copies of the Decision and underlying Revised Investigation Report.

[7] The Commission decided not to exercise its power under section 73 of the *PSEA* to appoint the Applicant to another position in the public service of Canada. The Applicant did not ask to receive a section 73 appointment when he made submissions on the Proposed Corrective Action, nor did he provide any basis on which a section 73 discretion could be exercised in his favour. Notwithstanding, the Applicant challenges the Commission's decision not to exercise its discretion under section 73, alleging he should have had an opportunity to comment on it first. He also submits the three year requirements are excessive.

[8] For the reasons that follow, this application is dismissed.

II. Additional factual background

[9] The Applicant began working in the public service of Canada in 2007 and held various positions after that.

[10] In 2015, he applied to be appointed to the Rail Safety Analyst position at Transport Canada. At that time he was in the public service of Canada in the Department of Fisheries / Canadian Coast Guard.

[11] At or about the same time the Applicant was applying for at least three other positions within the public service of Canada also involving web-based exams taken by the Applicant.

A. *Applicant's exam activities investigated by Commission staff*

[12] Commission staff became concerned that the Applicant, contrary to exam Guidelines, may have consulted with a third-party individual on draft answers and shared exam material by email with his Former Colleague. Therefore, the Investigations Branch of the Commission conducted a review of emails sent between the Applicant and the Former Colleague in relation to five appointment processes in which the Applicant had applied for employment. The Investigator identified three appointment processes, including the Rail Safety EC-5 appointment, warranting further investigation. A fourth appointment process later became subject to investigation.

[13] At this point, the Commission's Investigations Branch sent letters to the Applicant and Transport Canada dated August 18, 2016, saying the Commission would conduct an

investigation pursuant to section 69 of the *PSEA* into whether the Applicant committed fraud in the Rail Safety EC-5 appointment processes.

[14] Thereafter, Commission staff interviewed the Applicant and his Former Colleague. The Applicant was accompanied by his Canadian Association of Professional Employees [CAPE] representative, a Labour Relations Officer. CAPE is the Applicant's union. The Applicant was represented by CAPE at all times.

B. *A Factual Report is prepared and commented upon by the Applicant*

[15] As a result of its investigation and interviews, the Investigation Branch prepared a Factual Report. The Factual Report referred to all four incidents in which the Applicant consulted and shared exam material with his Former Colleague. The Factual Report was sent for comment by Commission staff to the Applicant and Former Colleague. The Applicant sent his comments on June 26, 2017. The Former Colleague did not file a detailed reply, and appears only to have confirmed receipt of the Factual Report. The Factual Report was before the Commission and is in the Certified Tribunal Record.

C. *Investigation Report*

[16] After review of the Applicant's reply, the Investigator prepared a document entitled Investigation Report 2016-MOT-00141.25284, which concluded the Applicant committed fraud in the Rail Safety EC-5 appointment process in that he knowingly consulted and shared exam information with his Former Colleague during the web-based take-home exam, contrary to the

exam Guidelines. The Investigation Report concluded the Applicant did this "to increase his chances of receiving an appointment."

[17] Commission staff sent the Investigation Report for comment to the Applicant and Transport Canada. Commission staff also sent both parties, and CAPE, the Proposed Corrective Action setting out sanctions for fraud to be recommended by Commission staff to the Commission. Commission staff invited comments on both.

[18] The Investigation Report summarized the facts gathered during the investigation as follows:

> **SUMMARY OF FACTS GATHERED DURING THE INVESTIGATION**
>
> *Relationship between Mr. Hassan Dayfallah and [Former Colleague]*
>
> 11. Mr. Dayfallah indicated that he has worked in the public service since 2007. He worked with [Former Colleague] in 2008 at the Department of Fisheries and Oceans Canada (DFO); they also worked together at the Canadian Coast Guard. Mr. Dayfallah considered [Former Colleague] to be a friend, colleague and mentor, though they do not socialize outside the workplace. [Former Colleague] provided Mr. Dayfallah with coaching, career advice and assistance whenever he had a question. Mr. Dayfallah commonly asked [Former Colleague] to proofread his work because he considered [Former Colleague] to have exceptional writing skills.
>
> 12. [Former Colleague] occupies the position of [ ] group and level with DFO. [Former Colleague] met Mr. Dayfallah in 2008, when they worked together as colleagues. He has always been supportive of Mr. Dayfallah. [Former Colleague] has proofread Mr. Dayfallah's briefing notes, in the context of work, and has reviewed the statement of qualifications for appointment processes, at Mr. Dayfallah's request. [Former Colleague] considered Mr.

Dayfallah to be a ‘work friend’ – they did not socialize outside the workplace.

Take-home Exam

13. Mr. Dayfallah explained that he did not read the exam instructions. As a result of his medical condition, Mr. Dayfallah experienced anxiety attacks and nausea. When he received the exam, he just opened it and began to work on it. Mr. Dayfallah explained that he does not think clearly, especially when completing timed exercises or exercises where pressure is involved. As a result of his condition, Mr. Dayfallah focusses on the task at hand; his judgment or lack of attention to detail, in not reading the instructions, was also impacted by his condition. Regarding the invitation email, Mr. Dayfallah only recalled reading the date and time for the exam and the qualifications that would be assessed.

14. Mr. Dayfallah explained that although he was not feeling well on the day of the exam, he decided to write it because he had prepared for it. According to Mr. Dayfallah, he was able to outline a list of rail safety risks and issues and broader vulnerabilities associated with the transportation and critical infrastructure owing to work in his Master’s program and reading the TC website. He also consulted the following website to build his analysis on various issues, trends and operational challenges: [Federal Court note: URL omitted]

15. Mr. Dayfallah indicated that he does not read instructions for take-home exams. He only takes note of the start and end times and the qualifications being assessed. His general understanding of the test instructions was not to plagiarize –not to take someone else’s work and disguise it as your own. In the case of ‘closed-book’ exams, candidates could not seek any kind of assistance. When completing take-home exams at the post-graduate level, students were instructed not to plagiarize, however, they were permitted to seek assistance, discuss it with others and have someone proofread it.

16. On December 7, 2015, at 8:49 a.m., Mr. Dayfallah forwarded the two emails (the invitation email of December 1st and the exam email of December 7th) to [Former Colleague.] The attachments, from both emails, were also sent.

17. At 10:10 a.m. Mr. Dayfallah sent an email to [Former Colleague] with the message "First thoughts?" The Subject was "EC-05 – exam FR EN final.docx". Attached to the email was the briefing note prepared by Mr. Dayfallah.

18. Mr. Dayfallah explained that he was not seeking assistance from [Former Colleague] during the exam period. The phrase "first thoughts?" was Mr. Dayfallah's way of indicating that he wanted to discuss the exam with [Former Colleague] later that day or at a time convenient to [Former Colleague.] Mr. Dayfallah indicated that the briefing note he sent to [Former Colleague] consisted of the main points he wanted to make; he had a good understanding of the issues because they related to his field of study.

19. Mr. Dayfallah indicated that he struggles when writing exams due to his medical condition which has an impact on his ability to read and write in the mornings. As such he wanted to discuss the exam with someone he could trust. Mr. Dayfallah did not tell anyone about his medical condition because he thought it would negatively affect his career.

20. [Former Colleague] indicated that he did not read or respond to Mr. Dayfallah's emails nor did he provide him with any assistance; [Former Colleague] may not have been at his desk or available at the time the emails were sent out.

21. Mr. Dayfallah elaborated on the points in the briefing note and made some changes before submitting his completed exam. He submitted his completed exam near the end of the allotted time because he read his response many times to ensure that there were no grammatical errors. According to Mr. Dayfallah, he had not received any assistance in completing the exam and it represented his own work. It was noted that Mr. Dayfallah submitted his completed exam to TC on December 7, 2015 at 10:33 a.m.

22. On December 7, 2015, at 10:35 a.m., Mr. Dayfallah sent an email to [Former Colleague] indicating "you think it's a pass?" Mr. Dayfallah's completed exam was attached to the email.

23. Although Mr. Dayfallah wanted to discuss the exam with [Former Colleague] after the exam period, it was not possible because of their busy work schedules.

Medical Notes

24. During Mr. Dayfallah's interview for this investigation, he provided a medical note dated October 16, 2016. This note indicated that Mr. Dayfallah was not to participate in written appointment processes in the morning from 8:00 to noon.

25. On February 4, 2017, Mr. Dayfallah emailed two additional medical notes: the first (which covered the period from 2013) was dated January 17, 2017, and it indicated that Mr. Dayfallah continued to work under modified work accommodations in the morning; the second was dated January 24, 2017, and it described Mr. Dayfallah's medical condition and the symptoms associated with it. Mr. Dayfallah indicated that he provided his current employer with these medical certificates.

26. On June 26, 2017 (following the issuance of the Factual Report) Mr. Dayfallah provided a copy of the Public Service Commission's (the Commission) "Candidate Accommodation Questionnaire, Temporary Conditions and other Conditions" which was completed by his physician and dated October 27, 2016. It was noted that the information in the questionnaire reflected the information provided in the medical notes.

[19] The Investigation Report referred to the other three appointment processes in which the Applicant may have committed fraud:

4. Information gathered in the context of investigation file numbers 2016-PSP-00011.24217 and 2016-PSP-00024378[3], indicated that Mr. Dayfallah may have committed fraud in three other appointment processes, including appointment process 15-MOT-IA-HRS-84651, conducted by Transport Canada (TC) to staff the position of Analyst, at the EC-4 group and level. The interviews with Mr. Dayfallah for the three appointment processes were conducted concurrently, on October 25, 2016.

...

41. A reasonable person considering the entire circumstances of this case would view the fact that Mr. Dayfallah emailed the exam and his response, to [the Former Colleague]

> during the exam period, and asked for his thoughts, as being dishonest. As Mr. Dayfallah sought [the Former Colleague's] help during the exam for three other appointment processes, it is more likely than not that he knew his actions were not permitted. In seeking help from [the Former Colleague] Mr. Dayfallah wanted to demonstrate to the assessment board that he meets the essential qualifications for the work to be performed and to improve his chances for an appointment. Mr. Dayfallah was dishonest in his actions and as such, the first essential element of fraud has been met.

D. *Proposed Corrective Action*

[20] As a consequence of the Applicant's fraud in the appointment process, the Investigations Branch set out Proposed Corrective Actions it would recommend to the Commission. As noted, these were sent to the Applicant for comment. The three Proposed Corrective Actions were: 1) that the Applicant's appointment to the Rail Safety EC-5 position at Transport Canada obtained through fraud be revoked; 2) that the Commission order that for three years the Applicant not accept without the Commission's approval, any position or work in the public service of Canada; and 3) the Commission order that if in the same three years the Applicant, without having notified the Commission, obtained work through casual employment in the public service of Canada, the Commission would advise the relevant Deputy Head of the fraud committed by the Applicant and provide the Deputy with copies of its Decision and the underlying Investigation Report.

E. *Applicant's comments on the Investigation Report and Proposed Corrective Action*

[21] The Applicant and Transport Canada were invited to comment on both the Investigation Report and the Proposed Corrective Action. Transport Canada said it was satisfied with both the Investigation Report's conclusions and the Proposed Corrective Action.

[22] The Applicant provided his comments on the Investigation Report and Proposed Corrective Action on October 6, 2017. He said he had not committed fraud because: 1) he alleged he did not intentionally cheat or breach the rules of the appointment process and 2) he did not commit fraud with respect to the exam because neither dishonesty nor deprivation, nor risk of deprivation were established. To the second point, the Applicant explained he did not receive assistance for this exam from the Former Colleague and the exam response was 100% his own, therefore he did not have an advantage during the process. Further, he said the Proposed Corrective Actions were excessive and out of line with previous disciplinary decisions, citing two arbitration precedents, one from the Canada Public Service Labour Relations Board and the other from the Canada Public Service Relations Board.

[23] I note the Applicant no longer denies he breached the second branch of the test for fraud; he admits his actions during the exam constituted deprivation or risk of deprivation. However, the Applicant continues to maintain he did not *intentionally* cheat or breach the rules, thus he submits, he did not commit fraud.

[24] The Applicant also commented on the Proposed Corrective Action. He submitted that if fraud was found, the sanctions proposed were too harsh. However he did not ask the Commission to appoint him to another position under section 73, if it found fraud against him.

F. *Revised Investigation Report and the Commission's Decision*

[25] After considering the Applicant's submissions, the Investigations Branch submitted a Revised Investigation Report dated November 21, 2017, to the Commission for decision. The Investigations Branch also submitted its Proposed Corrective Action to the Commission for decision. There are no material differences between the original Investigation Report and Proposed Corrective Actions, and the Revised Investigation Report and Proposed Corrective Action.

[26] The Respondent filed an affidavit of a senior government official with the Commission, which provided process information at paras 8–9:

> 8. On December 19, 2017, the Commission held a meeting during which time it considered all comments received in the context of all four investigations, including Investigation File #2016-MOT-00141.25285. During this meeting, the Commission considered whether it would use its discretionary authority under section 73 of the PSEA to reappoint the Applicant to another position and decided not to authorize the use of this authority.
>
> 9. On December 19, 2017, the Commission made its final decision accepting the four Investigation Reports and ordering the corrective action set out in the four Records of Decision. The four Investigation Reports and the four Records of Decision were transmitted to the Applicant, with a covering letter dated December 20, 2017 [footnote omitted].

[27] The Revised Investigation Report relied upon by and thus forming part of the Commission's Decision, contained the following analysis:

> ***Dishonesty***
>
> ...
>
> 38. The evidence clearly shows that on December 7, 2015, Mr. Dayfallah sent emails to [the Former Colleague] at 8:49 a.m. and 10:10 a.m., which correspond to the time he was writing the exam, from 8:30 to 10:30 a.m.
>
> 39. In the first email, Mr. Dayfallah forwarded the invitation email and the exam email, which included the instructions and the exam, respectively. In the second email, Mr. Dayfallah attached the response he had prepared and stated "first thoughts?" Mr. Dayfallah's explanation that he intended to discuss the exam with [the Former Colleague] later that day or at a time convenient to [the Former Colleague] was not credible.
>
> 40. Considering that Mr. Dayfallah sent two emails to [the Former Colleague] during the exam period and asked [the Former Colleague] for his "thoughts" regarding his response, it is more likely than not that Mr. Dayfallah was seeking [the Former Colleague's] help in responding to the exam question.
>
> 41. A reasonable person considering the entire circumstances of this case would view the fact that Mr. Dayfallah emailed the exam and his response, to [the Former Colleague] during the exam period, and asked for his thoughts, as being dishonest. As Mr. Dayfallah sought [the Former Colleague's] help during the exam for three other appointment processes, it is more likely than not that he knew his actions were not permitted. In seeking help from [the Former Colleague] Mr. Dayfallah wanted to demonstrate to the assessment board that he meets the essential qualifications for the work to be performed and to improve his chances for an appointment. Mr. Dayfallah was dishonest in his actions and as such, the first essential element of fraud has been met.
>
> ...
>
> **CONCLUSION**
>
> 45. The evidence demonstrates, on a balance of probabilities, that Mr. Dayfallah committed fraud in appointment process 15-MOT-IA-HRS-84651, conducted by Transport Canada, by knowingly consulting with another person, [the Former Colleague], during the

> take-home written exam and sharing information with this individual, which was contrary to the instructions, and this, in order to increase his chances of receiving an appointment.
>
> [Emphasis added.]

[28] The Commission in its Decision accepted the Revised Investigation Report and found the Applicant committed fraud in obtaining the Rail Safety EC-5 position. It revoked the appointment. The Commission also imposed the sanctions set out in the Proposed Corrective Action. The Decision states:

> RECORD OF DECISION 2017-082-IB
>
> Corrective action pursuant to section 69 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) (PSEA), as a result of an investigation conducted under section 69 of the same Act.
>
> The Commission accepts Investigation Report 2016-MOT-00141.25284.
>
> The investigation concluded that Mr. Hassan Dayfallah committed fraud in advertised internal appointment process 15-MOT-IA-HRS-84651, conducted to staff a position of Analyst, at the EC-5 group and level with the Department of Transport, by consulting another person during the take-home written exam and by sharing exam information with this person, which was contrary to the instructions.
>
> The Commission has considered all the comments received. The comments do not contain new information that would warrant a change in the Investigation Report or the corrective action used for consultation.
>
> In accordance with its authority to take corrective action under section 69 of the PSEA, the Commission hereby orders that:
>
> - the appointment of Mr. Dayfallah to the position of Analyst, at the EC-5 group and level, made as a result of advertised internal appointment process 15-MOT-IA-HRS-84651, be revoked. The Department of Transport must complete the documentation required to implement the revocation and confirm to the Oversight and Investigations Sector of the Public Service Commission that it has done so

> within 60 days of the signing of this Record of Decision. Following the revocation of his appointment, Mr. Dayfallah will cease to be employed in the federal public service;
>
> • for a period of three years from the signing of this Record of Decision, Mr. Dayfallah must obtain the Commission's written approval before accepting any position or work within the federal public service. Should Mr. Dayfallah accept a term, acting or indeterminate appointment in the federal public service without having first obtained such an approval, his appointment will be revoked; and
>
> • for a period of three years from the signing of this Record of Decision, should Mr. Dayfallah obtain work through casual employment within the federal public service without first notifying the Commission, a letter will be sent by the Oversight and Investigations Sector of the Public Service Commission to the Deputy Head advising of the fraud committed by Mr. Dayfallah with a copy of Investigation Report 2016-MOT-00141.25284 and this Record of Decision.

[29] The Commission notified the Applicant and Transport Canada of its Decision by separate letters dated December 20, 2017.

[30] The letter to Transport Canada's Deputy Minister contained the following paragraph, which was not present in the Commission's letter to Applicant:

> The Commission has also decided that the appointment authority provided by section 73 of the *Public Service Employment Act* will not be exercised in this case to re-appoint Mr. Dayfallah to another position.

G. *Letter from Transport Canada's Deputy Minister to the Applicant*

[31] In accordance with the Commission's Decision, Transport Canada's Deputy Minister sent the Applicant a letter dated January 15, 2018, revoking his Rail Safety EC-5 appointment.

[32] On January 24, 2018, the Applicant filed a grievance under section 208 of *Federal Public Sector Labour Relations Act*, SC 2003, c 22, section 2 [*FPSLRA*], challenging his "employer's decision to terminate" his employment at Transport Canada. This grievance is pending.

III. Issues

[33] The Applicant submits the following issues:

a) Did the Commission breach procedural fairness when it failed to alert the Applicant to the possibility that it may exercise its authority under s. 73 of the *PSEA*, and when it failed to give the Applicant the opportunity to comment on this possibility?

b) Was the Commission's decision tainted by a reasonable apprehension of bias?

c) Was the Commission's finding that the Applicant committed fraud in the appointment process, and/or its decision to revoke the Applicant's appointment, reasonable?

d) Did the Commission overstep its statutory jurisdiction when it ordered that the Applicant, as a result of the revocation of his appointment, would cease to be an employee in the federal public service?

IV. Standard of review

[34] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 57, 62 the Supreme Court of Canada held a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The standard of review for the Commission's interpretation and application of section 69 of the *PSEA* is reasonableness: *Lemelin v Canada (Attorney General)*, 2018 FC 286 at para 41 [*Lemelin*], per Gagné J. The Federal Court of Appeal has confirmed reasonableness is the standard of review for decisions of a tribunal involving

interpretation of its home statute: *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 30.

[35] Significant deference is owed to the Commission's decisions in light of the "discrete and special nature of the Public Service regime" and the scope of discretion given to the Commission within this regime: *MacAdam v Canada (Attorney General)*, 2014 FC 443 [*MacAdam*], per Mosley J at paras 50 and 77:

> [50] I agree with the parties that the question has been satisfactorily determined by the prior jurisprudence and does not require a standard of review analysis. The interpretation and application of sections 66 and 68 of the PSEA are, among other provisions, at the heart of the Commission's mandate and expertise: *Seck v Canada (Attorney General)*, 2011 FC 1355 [*Seck*] at paras 10-11. As stated in *Hughes v Canada (Attorney General)*, 2009 FC 573 at para 26, the scope of discretion given to the Commission, combined with the "discrete and special" nature of the Public Service regime, and the Commission's expertise within that regime signal that deference is due to decisions of the Commission. Accordingly, the decision is reviewable on the standard of reasonableness.
>
> [77] I agree with the respondent that the Commission must be accorded significant deference in interpreting its home statute: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30, 39. The purpose of the PSEA was to provide a more flexible, values-based system, and this includes the administration of section 66 and the interpretation of "improper conduct". Improper conduct may reasonably be found where unsuitable behaviour related to the appointment process undermines one or more of the PSEA's guiding values. Contrary to the submissions of the applicants, the definition employed by the Commission is not overly subjective, and, on a plain language reading of the legislation, a bad faith intent is not a necessary requirement notwithstanding its incorporation in prior PSC decisions.

[36] These findings accord with the recent determination of the Supreme Court of Canada that reasonableness is presumptively the standard of review of tribunal decisions: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] at para 27:

> [27] This Court has for years attempted to simplify the standard of review analysis in order to "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J.). To this end, there is a well-established presumption that, where an administrative body interprets its home statute, the reasonableness standard applies (*Dunsmuir*, at para. 54; *Alberta Teachers*, at para. 39; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 15; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at paras. 33-34; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, at para. 8).

[37] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> …A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[38] When reviewing for reasonableness, this Court should only interfere if the Tribunal's conclusions fall outside the range of possible and acceptable outcomes that are defensible on the facts and law. Therefore, there may be multiple possible outcomes that meet the *Dunsmuir* standard for reasonableness. In addition, it is well established that on judicial review, courts must

refrain from reweighing and reassessing the evidence considered by the decision maker: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64. In *CHRC*, the Supreme Court of Canada synthesized jurisprudence to explain what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[39] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. That said, I note that in *Bergeron v Canada (Attorney General*, 2015 FCA 160 [*Bergeron*] at para 69, the Federal Court of Appeal said a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69. That said, as outlined below, in the case at bar the outcome is the same no matter which approach is applied.

[40] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> [50] … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[41] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*].

V. Analysis

A. *Did the Commission breach procedural fairness when it failed to alert the Applicant to the possibility that it may exercise its authority under s. 73 of the PSEA, and when it failed to give the Applicant the opportunity to comment on this possibility?*

[42] Section 73 of the *PSEA* grants a discretion to the Commission to appoint a person to another position where the Commission has revoked an appointment under section 69 (as here):

Re-appointment following revocation	**Nomination à un autre poste**
73 Where the appointment of a person is revoked under any of sections 66 to 69, the Commission may appoint that person to another position if the Commission is satisfied that the person meets the essential qualifications referred to in paragraph 30(2)(a).	**73** En cas de révocation de la nomination en vertu de l'un des articles 66 à 69, la Commission peut nommer la personne visée à un poste pour lequel, selon elle, celle-ci possède les qualifications essentielles visées à l'alinéa 30(2)a).
[Emphasis added.]	[Nos soulignés.]

[43] By way of background, section 11 of the *PSEA* authorizes the Public Service Commission of Canada to make appointments to and within the public service of Canada:

Mandate	**Mission**
11 The mandate of the Commission is	**11** La Commission a pour mission:
(a) to appoint, or provide for the appointment of, persons to or from within the public service in accordance with this Act;	a) de nommer ou faire nommer à la fonction publique, conformément à la présente loi, des personnes appartenant ou non à celle-ci;
(b) to conduct investigations and audits in accordance with this Act; and	b) d'effectuer des enquêtes et des vérifications conformément à la présente loi;
(c) to administer the provisions of this Act relating to political activities of employees and deputy heads.	c) d'appliquer les dispositions de la présente loi concernant les activités politiques des fonctionnaires et des administrateurs

généraux.

[44] The Commission is responsible for safeguarding the integrity of the staffing process and the principle of merit in the federal public service as set out in the preamble and subsection 30(1) of the *PSEA*. One of the ways the Commission carries out its oversight capacity is by investigating appointment processes as authorized by subsection 11(b) and section 69 of the *PSEA*. The Commission is empowered to revoke an appointment where fraud has occurred in an appointment process, per section 69:

Fraud	**Fraude**
69 If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, the Commission may	**69** La Commission peut mener une enquête si elle a des motifs de croire qu'il pourrait y avoir eu fraude dans le processus de nomination; si elle est convaincue de l'existence de la fraude, elle peut :
(a) revoke the appointment or not make the appointment, as the case may be; and	a) révoquer la nomination ou ne pas faire la nomination, selon le cas;
(b) take any corrective action that it considers appropriate.	b) prendre les mesures correctives qu'elle estime indiquées.

[45] I agree with the Applicant that this issue raises a question of procedural fairness. Therefore the standard of review is correctness, and no deference is owed. I also agree that procedural fairness rises to a high level where an individual's ability to continue in his or her job is at stake: *Lemelin* at para 43. Courts including the Supreme Court of Canada have confirmed that procedural fairness requires: (1) the Commission inform the individual subject to the

investigation of the substance of the evidence obtained by the investigator and put before the Commission and; (2) the individual be provided the opportunity to respond to this evidence and make all relevant representations in relation thereto.

[46] That said, I am not persuaded the Applicant's submissions have merit. In my respectful view, the Commission satisfied this standard in this case. The Commission through its staff provided the Factual Report to the Applicant and his union for comment; the Applicant availed himself of that opportunity. The Commission then provided its Investigation Report to the Applicant and CAPE for comment; the Applicant made comments.

[47] Critically in this connection and in addition, Commission staff provided the Applicant and CAPE with the Proposed Corrective Action they proposed to recommend to the Commission. Commission staff invited comments on the Proposed Corrective Action; once again the Applicant provided his input and made submissions on corrective action.

[48] I agree with the Respondent that the Applicant had both the "substance of the case" and the "substance of the evidence obtained by the investigator". The suggestion that more is required is not supported by the jurisprudence.

[49] The Respondent also submits - and I agree - that there is nothing in the content or context of section 73 that makes disclosure of its existence necessary to allow the Applicant to appreciate the "substance of the case" or the "substance of the evidence obtained by the investigator", as required. I am given no reason to doubt his professional advisors knew of the potential

availability of a re-appointment order under section 73 in the event the Applicant's appointment was revoked for fraud under section 69.

[50] This September 20, 2017, letter sending the Applicant the Proposed Corrective Action alerted the Applicant that his position might be revoked and that for three years he might have to give notice to the Commission before accepting another position in the public service. In my respectful view, the purpose of sending the Applicant the Proposed Corrective Action was to give notice of the action Commission staff would recommend to the Commission if the Commission found the Applicant committed fraud. It gave the Applicant an opportunity to comment on the proposed consequence and make alternative pleas, assuming fraud was found. Sending him the Proposed Corrective Action served a different purpose from sending him the Investigation Report for comment; in response to the Investigation Report he could and did submit that he did not commit fraud. But in response to the Proposed Corrective Action, he was asked to comment on what should happen to him if the Commission found he did commit fraud. In other words, the Proposed Corrective Action letter was predicated on a finding of fraud, and therefore the Applicant was to respond assuming a finding of fraud. He had many possible responses including saying, as he did, that if fraud was found, the proposed sanctions were excessive. He could also submit that if fraud was found, no sanctions should be imposed, or that different sanctions should be imposed. Likewise, he could say that if fraud was found, he should be re-appointed under section 73 to another position in the public service; section 73 is explicitly worded to be engaged after revocation of an appointment under section 69. These are all alternative pleas predicated on a finding of fraud.

[51] Therefore, and in my respectful view, it was incumbent on the Applicant when responding to the Proposed Correction Action letter, to make alternative submissions in relation to his re-appointment under section 73 if that is what he wanted, just as he made alternative submissions predicated on a finding of fraud to the effect that the sanctions were too harsh. The time to raise section 73 relief was when he responded to the Proposed Corrective Action; that was the logical and proper time to make submissions on re-appointment under section 73 because it is simply another alternative plea to a fraud finding. In addition, making a submission on section 73 at the same time as submissions are made on other consequences of a fraud finding would avoid an undesirable multiplicity of proceedings, contrary to what the Applicant's position fosters.

[52] I also note that the power of appointment under section 73 is discretionary. The Applicant had no right to a re-appointment under section 73. Moreover, there are conditions to a section 73 appointment, namely satisfying the Commission that the person meets the essential qualifications referred to in paragraph 30(2)(a) of the *PSEA*. There is no evidence the Applicant satisfied those conditions. This factor supports the suggestion that it is for the Applicant to apply for an appointment under section 73 when revocation under section 69 is being considered, because the Applicant is in the best position to advise the Commission if section 73 conditions are met, and to what position he or she might be re-appointed assuming his existing appointment is revoked for fraud.

[53] Therefore I have concluded there is no breach of procedural fairness on the section 73 issue. I would note that if the standard of review is that set out in *Bergeron*, namely that a

correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference,'" the result would be the same although more readily arrived at given the discretionary nature of the section 73 authority and *Bergeron's* added deference.

B. *Was the Commission's decision tainted by a reasonable apprehension of bias?*

[54] Reasonable apprehension of bias is also an issue of procedural fairness. Therefore it is reviewable on the correctness standard. No deference is owed. In addition, I agree with the Applicant that one of the most fundamental tenets of procedural fairness is the right to an impartial decision free from a reasonable apprehension of bias.

[55] The test applied for reasonable apprehension of bias is found in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, per de Grandpré J, dissenting at para 394:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. … [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the Commission], whether consciously or unconsciously, would not decide fairly."

[56] The events outlined below took place before Commission staff sent their recommendations to the Commission for its decision in November 2017.

[57] The Applicant had applied for a position with Shared Services Canada [Shared Services] for an EC-6 position in 2015. He was interviewed in August 2017. Shared Services posted a Notice of Consideration for the Applicant's appointment on October 4, 2017. This Notice of Consideration said that Shared Services was going to extend an offer of this position to the Applicant on October 12, 2017 provided no complaints arose.

[58] On October 10, 2017, 1:22 p.m., the Applicant emailed the Commission the Notice of Consideration and asked for written approval to sign the offer of employment. The Commission's Manager of Investigation Support replied the same day at 2:58 p.m., indicating the Commission had yet to order the corrective action, and therefore the Applicant's request for permission was not needed.

[59] Shortly thereafter, the Applicant received a phone call from Shared Services informing him that the offer would not be extended due to Shared Services being informed of the Commission's ongoing investigation.

[60] The next day, the Applicant was advised by Shared Services that his staffing file was put on hold until further notice. The following day, the Applicant sent a letter to Commission staff raising concerns about a privacy breach due to the Commission's disclosure of his personal information. The Commission replied on November 15, 2017 through its Vice President, Oversight and Investigations. The letter reported that Transport Canada notified the Investigations Directorate on October 5, 2017 that a Notice of Consideration was posted concerning the upcoming appointment of an individual named Hassan Dayfallah to an EC-6 position with Shared Services. The letter reported that later the same day, Investigations

Directorate contacted and informed Shared Services that a person of the same name, currently employed by Transport Canada, was subject to four fraud investigations related to appointment processes and that decisions were pending; and suggested Shared Services verify whether its candidate with the same name was in fact the individual under investigation.

[61] The Commission admitted this was an error and apologized for breaching the Applicant's privacy rights:

> The Public Service Commission sincerely apologizes for the breach of your personal information.

[62] The Applicant says this conduct demonstrates the Commission had a closed mind when it deliberately interfered with the separate Shared Services appointment process that was very likely to result in his appointment to its EC-06 position. The Applicant notes he was getting close to being appointed in this new position, and despite having advised the Applicant that he did not need permission to accept a letter of offer, the Commission nonetheless decided to contact Shared Services Canada to advise of its ongoing investigations.

[63] I am unable to agree with the Applicant's position.

[64] Justice Mosley in *Detorakis v Canada (Attorney General)*, 2009 FC 144 at paras 53, 54 correctly noted that allegations of bias are very serious matters. In addition, the party alleging bias must overcome the presumption that a board or tribunal is impartial:

> [53] Allegations of bias are very serious matters. They call into question the integrity of the decision maker. The burden of demonstrating a reasonable apprehension of bias rests with the party arguing for disqualification. Moreover, the inquiry that must

> be conducted is very fact-specific and there can be no "shortcuts" in the reasoning that supports the allegation: *Wewaykum*, above at paras. 59 and 77.
>
> [54] The presumption is that a board or tribunal is impartial. The grounds must be substantial. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough. It is the informed person's perception that counts, not uniformed speculation. Delay in raising an apprehension of bias can be indicative that the grounds lack substance.

[65] The test is what a reasonable and right minded person, applying themselves to the question and obtaining the required information, would have concluded. Would that person - having thought the matter through - conclude it is more likely than not the Commission, whether consciously or unconsciously, would not decide fairly, i.e. that there was a reasonable apprehension of bias.

[66] Here, the Applicant appears to discount and give inadequate or no credit to the facts of the case.

[67] In terms of the underlying facts, the right minded and reasonable person would appreciate that the investigation process was fair and very thorough. In coming to its recommendations and conclusions, Commission staff interviewed both the Applicant and his Former Colleague. The Applicant and his union representative were provided with a letter noting three investigations; subsequently they had an opportunity to and did comment on the Factual Report which dealt with four investigations. Likewise the Commission gave the Applicant and CAPE both the Investigation Report and the Proposed Corrective Action for comment. The Applicant in fact did comment on both the Investigation Report and the Proposed Corrective Action letter. The

Applicant had multiple opportunities to make submissions on the Commission staff's findings and recommendations. The right minded fully informed person would also be aware that the Commission acknowledged and apologized for the privacy breach on November 15, 2017, before the Commission made its final decision. There is no suggestion the apology and admission were insincere or made in bad faith. In my respectful view, a reasonable and right minded person, knowing the underlying facts and both the admission and apology, would not consider it more likely than not that the Commission would decide unfairly.

[68] In summary, given the full context of the matter, I am not persuaded the Applicant has met the burden on him to show, on a balance of probabilities, a reasonable apprehension of bias on the part of the Commission. In my opinion, taken as a whole, a reasonable and informed person, viewing the matter realistically and practically and having thought the matter through, would not think it more likely than not that the Commission would unconsciously or consciously decide the issue unfairly. Therefore I must reject the submission as to apprehension of bias.

[69] I would add that if the standard of review is that in *Bergeron*, namely that a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference'", the result would be the same although more readily arrived at given the discretionary nature of the section 73 authority and *Bergeron's* required deference.

C. *Was the Commission's finding that the Applicant committed fraud in the appointment process, and/or its decision to revoke the Applicant's appointment, reasonable?*

[70] This issue is decided on the reasonableness standard. As outlined above, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47; *Newfoundland Nurses* at para 14. When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute: *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, per Moldaver J at para 33. Reviewing courts must also refrain from reweighing and re-assessing the evidence considered by the decision maker: *Khosa* at para 64.

[71] The Applicant's memorandum summarizes his position:

> 48. As set out below, the Applicant submits that the finding of fraud in this case was unreasonable. More specifically, the Commission's conclusion that the Applicant had the requisite subjective intent to deceive was unreasonable, as was its finding that the Applicant's actions rose to the level of fraud, a quasi-criminal act on the higher end of the severity scale.
>
> 49. In the alternative, if the finding of fraud was reasonable, given the specific factual circumstances of this case, the decision to revoke the Applicant's nomination was not.

[72] I will deal with each aspect separately.

(1) *Reasonableness of finding of subjective intent*

[73] The Commission accepted the findings set out in the Revised Investigation Report, which were as follows:

Dishonesty

30. The instructions to the take-home exam clearly stated "All information concerning this exam including the exam is confidential and should not be shared with others prior or post exam." and "There is to be no communication among candidates during or after this exam – this will ensure the integrity of this exam."

31. The evidence shows that candidates were made aware of these instructions on two occasions. The invitation email of December 1, 2015 contained the instructions and the words "IMPORTANT – see guidelines below", written in bold letters and highlighted in yellow. In the exam email of December 7, 2015, candidates were directed to refer to the guidelines sent to them, earlier, in the invitation.

32. Mr. Dayfallah testified that he did not read the instructions; he does not read instructions for take-home exams. Mr. Dayfallah's understanding of test instructions was not to plagiarize; when completing take-home exams at the post-graduate level, students were permitted to seek assistance, discuss it with others and have someone proofread it.

33. Mr. Dayfallah also testified that when he received the exam, he just opened it and began to work on it. Additionally, his medical condition impacted his judgment or lack of attention to detail in not reading the instructions, on the day of the exam.

34. Although Mr. Dayfallah indicated that his medical condition impacted his ability to read the instructions on the day of the exam, the opportunity to read them prior to the test date was made available to him. Mr. Dayfallah chose to write the exam on December 7, 2015, consequently he had six days to read the instructions sent to him in invitation email of December 1st.

35. Exam instructions are not only an integral part of the testing process, they have a direct link to a candidate's success rate. As such, it is reckless for a candidate not to take the time to carefully read the exam instructions when it is the only way to fully comprehend what is expected of them during the exam.

36. Moreover, tests are a way of measuring an individual's knowledge, abilities, aptitudes and/or skills, etc., to determine if they meet the qualifications for the work to be performed. . [*sic*] As such, it is not reasonable for a candidate to assume that they are

permitted to seek assistance of another individual, especially when writing an exam designed to access individual performance.

37. Although it is possible that Mr. Dayfallah's medical condition could have interfered with his ability to read the exam instructions, Mr. Dayfallah could have requested test accommodations in advance to better cope with his exam-related symptoms. Mr. Dayfallah testified that, despite not feeling well, he decided to write the exam because he had prepared for it. Although the Guidelines for Candidates offered rescheduling/accommodation, Mr. Dayfallah chose not to avail himself of the opportunity to request any test accommodations. It was noted that Mr. Dayfallah obtained medical notes, however, he only sought them after his interview had been scheduled for three investigations and, well after his interview, of April 28, 2016, for the first of the four investigations. It was also noted that Mr. Dayfallah's PSC Candidate Accommodation Questionnaire was completed on October 27, 2016, the day after his second interview.

38. The evidence clearly shows that on December 7, 2015, Mr. Dayfallah sent emails to [the Former Colleague] at 8:49 a.m. and 10:10 a.m., which correspond to the time he was writing the exam, from 8:30 to 10:30 a.m.

39. In the first email, Mr. Dayfallah forwarded the invitation email and the exam email, which included the instructions and the exam, respectively. In the second email, Mr. Dayfallah attached the response he had prepared and stated "first thoughts?" Mr. Dayfallah's explanation that he intended to discuss the exam with [the Former Colleague] later that day or at a time convenient to [the Former Colleague] was not credible.

40. Considering that Mr. Dayfallah sent two emails to [the Former Colleague] during the exam period and asked [the Former Colleague] for his "thoughts" regarding his response, it is more likely than not that Mr. Dayfallah was seeking [the Former Colleague's] help in responding to the exam question.

41. A reasonable person considering the entire circumstances of this case would view the fact that Mr. Dayfallah emailed the exam and his response, to [the Former Colleague] during the exam period, and asked for his thoughts, as being dishonest. As Mr. Dayfallah sought [the Former Colleague's] help during the exam for three other appointment processes, it is more likely than not that he knew his actions were not permitted. In seeking help from [the Former Colleague] Mr. Dayfallah wanted to demonstrate to the assessment board that he meets the essential qualifications for

> the work to be performed and to improve his chances for an appointment. Mr. Dayfallah was dishonest in his actions and as such, the first essential element of fraud has been met.
>
> ...
>
> **CONCLUSION**
>
> 45. The evidence demonstrates, on a balance of probabilities, that Mr. Dayfallah committed fraud in appointment process 15-MOT-IA-HRS-84651, conducted by Transport Canada, by knowingly consulting with another person, [the Former Colleague], during the take-home written exam and sharing information with this individual, which was contrary to the instructions, and this, in order to increase his chances of receiving an appointment.
>
> [Emphasis added.]

[74] In my respectful view, these findings fall within the possible and acceptable range of outcomes that are defensible on the law and facts, as required by *Dunsmuir* at para 47. The Applicant submits otherwise on both counts.

[75] On the law, the key determination of reasonableness involves the definition of fraud. I agree with the Applicant that a finding of fraud must respect the definition of fraud set out in *R v Cuerrier*, [1998] 2 SCR 371, per L'Heureux-Dubé J at para 116:

> [116] … the essential elements of fraud are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation.

[76] Importantly, this definition was adopted for the purposes of section 69 of the *PSEA* by the Federal Court of Appeal in *Seck* at paras 39–41:

> [39] …Fraud thus has two essential elements: (1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation.

> [40] Dishonesty is established where deceit, lies or other fraudulent means are knowingly used in an appointment process. This may include the non-disclosure or concealment of important facts in circumstances where that would be viewed by a reasonable person as dishonest.

[77] The Applicant is also correct that the applicable standard of proof for a finding of fraud under section 69 is the civil standard of balance of probabilities: *Seck* para 38. As previously noted, the Applicant does not dispute that his actions in sending exam information and a draft answer to an outsider [the Former Colleague] for assistance is enough to meet the "deprivation or risk of deprivation" element set out in point (2) of *Seck* at para 39, quoted above.

[78] Therefore, the central issue in this discussion of fraud is "dishonesty" per point (1) in *Seck* at para 39, quoted above. As the Respondent submits, this Court confirmed in *Lemelin* at para 53 that the test for fraud requires proof of both *actus reus* and *mens rea*. With respect to "dishonesty", this means the Commission may only make a finding of fraud where it is satisfied, on a balance of probabilities: 1) an individual committed an act that would be considered dishonest, as viewed by a reasonable person (*actus reus*) and 2) he or she subjectively knew that act was dishonest (*mens rea*). With respect to this latter requirement, the question is not what the Applicant ought to have known, or what was reasonable, but what he actually knew. This requires a consideration of the full factual context.

[79] In my view the Commission's analysis of the legal test is defensible on the law, and in accordance with *Seck*. The Commission at para 28 of its Decision quoted the Federal Court of Appeal's direction in *Seck* (para 40): "Dishonesty is established where deceit, lies or other fraudulent means are knowingly used in an appointment process."

[80] The next issue is the reasonableness of the Commission's finding that the Applicant knew his actions were dishonest. Does it fall within the range of possible acceptable outcomes that are defensible on the law and the facts? In my view, the answer is yes.

[81] I have already set out the Commission's key findings accepted from paragraphs 30 to 41 of the Revised Investigation Report: see para 73 above. Having reviewed the record, each finding is supported by the record, and hence defensible on the facts of this case per *Dunsmuir* at para 47.

[82] In particular the Applicant was given more than ample notice that he was not to share proposed answers or exam information with outsiders. In this connection, Transport Canada sent the Applicant an email on December 1, 2015 that included the following notice making it "**imperative**" [emphasis in original] - the Applicant read the "Guidelines for Candidates":

> **IMPORTANT – See guidelines below**
>
> …
>
> **It is imperative** to carefully read the Guidelines below to ensure your continued inclusion in the process.
>
> ...
>
> [Emphasis in original.]

[83] The "Guidelines for Candidates" stated, among other things, that "all information" concerning the exam, which I take to include his draft answers, was confidential. Moreover, there was a specific prohibition on sharing with other candidates:

> **SECURITY / CONFIDENTIALITY / SUPPORT:**
>
> 1. All information concerning this exam including the exam is confidential and should not be shared with others prior or post exam.
>
> 2. There is to be no communication amongst candidates during or after this exam – this will ensure the integrity of this exam.
>
> [Emphasis in original.]

[84] It was open to the Commission to find the Applicant breached the confidentiality provision both by sharing the exam with his friend, and by sharing his proposed answer and inviting his Former Colleague to give him assistance.

[85] Even if, as urged by Applicant's counsel, the Applicant did not breach the instructions in asking his friend for help, because his friend was not a "candidate," it remains that sharing the exam with his friend breached the confidentiality provisions. Indeed the Applicant admits he breached the first instruction. The Applicant criticizes the Investigation Report in that it allegedly "overstated the Applicant's breach of the instructions." In my view there is little merit in this submission; the Investigation Report, while setting out the 2nd instruction made no specific finding in that regard.

[86] To recall the facts, insofar as his impermissible sharing of exam information, the record contains three emails the Applicant sent to his Former Colleague on the day of the exam, December 7, 2015. The first email was sent during the exam, at 8:49 a.m. in which the Applicant sent his Former Colleague two emails received from Transport Canada: 1) the December 7, 2015, 8:05 a.m. email from Transport Canada sending him the actual take-home exam and 2) the

December 1, 2017 exam invitation email containing candidate guidelines. The Applicant sent a second email with his draft answer to his Former Colleague, also during the exam period, at 10:10 a.m., reading: “first thoughts?” The Applicant submitted his completed exam to Transport Canada at 10:33 a.m. Shortly thereafter the Applicant sent yet a third email to his Former Colleague 10:35 a.m., asking “you think it’s a pass?”

[87] The instruction against sharing “all” exam information with outsiders was sent not once, but twice. As noted, the first occasion was a week before the exam on December 1, 2015. The same instructions were sent on the exam day, December 7, 2015. Both had the same emphasis in identical terms.

[88] In my view, materially the same instructions were sent to the Applicant regarding security and confidentiality in the three other exams taken by the Applicant investigated by the Commission. As set out in the Factual Report at paras 12, 31, 71 and in annexes A, C, E before the Commission (upon which the Applicant provided comments):

> 1) in competition 15-DND-IA-OTTWA-396107, the exam was held October 20, 2015. The instructions on page 1 stated: “Please do not disclose the material of this exam to anyone and do not discuss its content with others. You must complete the exam by yourself without help from anyone else.”
>
> 2) in competition 2016-PSP-IA-PSP-105497, the Exam invitation was sent December 17, 2015, and the exam itself was sent January 8, 2016. Its instructions included: “You may not consult other individuals or seek their assistance” and “Please do not share or discuss the exam questions.” One of the five qualifications assessed included, “Ability to communicate effectively in writing.”
>
> 3) in competition 15-DFO-NCR-CCG-144559, the exam invitation was sent February 1, 2016, and the exam held on February 5, 2016. The following was emphasized: **“Instructions**

> **<u>for the test are attached, please read them carefully.”</u>** The relevant instructions included:
>
> > 10. You are not permitted to use outside assistance, other than internet access, during the test and it is the candidate’s responsibility to ensure that they are isolated for the exam.
> >
> > 11. This examination is confidential. You must not discuss this examination until the results of the competition are issued. … Please see the complete confidentiality agreement at the end of this document.
> >
> > [Emphasis in original.]

[89] Thus the Applicant had multiple warnings in relation to the need for confidentiality and avoidance of sharing exam information with others. The Applicant submits that a multiplicity of warnings is either a) consistent with lack of culpability for fraud or b) neutral on the point. I disagree. They are also consistent with knowledge of dishonest conduct, i.e., fraud. The matter of weighing and assessing the evidence of multiple warnings is for the Commission; the Court respectfully declines the Applicant’s request to reweigh the evidence in this regard.

[90] It is also important that the Commission accepted the specific finding that the Applicant was “not credible”. This arose where the Applicant said that in asking his friend for assistance on a draft answer (“first thoughts?”) he was only intending to discuss the exam answer later that day. The Revised Investigation Report at para 39 concluded: “Mr. Dayfallah’s explanation that he intended to discuss the exam with Mr. [ ] later that day or at a time convenient to Mr. [ ] was not credible.” That finding was open to the Commission given the considerable deference the Commission is owed and the reluctance this Court must show with regard to requests to reweigh and re-assess evidence.

[91] The Applicant submits he did not read the Guidelines, and said he thought the only restriction was that he should not plagiarize his answers. The Applicant submits he had no intention to break the rules. He said he only exercised poor judgment. With respect, it was open to the Commission to reject these explanations; the Commission had his submissions before it along with a report from Commission staff who had interviewed the Applicant and had his comments twice - once on the Factual Report and again on the Investigation Report.

[92] As McLachlin J, as she then was, held in *R v Théroux*, [1993] 2 SCR 5 at 19: "The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence." I agree; I am not persuaded to interfere with the Commission's findings in this respect. The Commission's fact findings are entitled to and I give them the considerable deference they warrant.

[93] There is no merit in the Applicant's assertion that he did not commit fraud because he only wanted "proofreading help." I reach this conclusion because the exam specifically advised the Applicant that an "essential qualification" to be assessed was the "[a]bility to communicate effectively and concisely in writing."

[94] Likewise, there is no merit to the Applicant's assertion that he did not commit fraud because his friend worked in the Department of Fisheries and Oceans and therefore lacked expertise in the substantive content of the exam. And it does not help the Applicant that the Former Colleague did not answer his request to review the draft answer.

[95] The Commission accepted and found what Mr. Dayfallah did was dishonest. No one can seriously dispute that finding. The Commission specifically found on a balance of probabilities

that Mr. Dayfallah "knew his actions were not permitted." This was a reasonable finding made on the correct standard of proof. In my respectful view, these findings, set out in the Revised Investigation Report at para 41, were open to the Commission on the facts and comply with the legal standards applicable in the case of section 69 of the *PSEA*:

> 41. A reasonable person considering the entire circumstances of this case would view the fact that Mr. Dayfallah emailed the exam and his response, to [the Former Colleague] during the exam period, and asked for his thoughts, as being dishonest. As Mr. Dayfallah sought [the Former Colleague's] help during the exam for three other appointment processes, it is more likely than not that he knew his actions were not permitted. In seeking help from [the Former Colleague] Mr. Dayfallah wanted to demonstrate to the assessment board that he meets the essential qualifications for the work to be performed and to improve his chances for an appointment. Mr. Dayfallah was dishonest in his actions and as such, the first essential element of fraud has been met.
>
> [Emphasis added.]

[96] The Applicant in his memorandum also submits: "Without a clear finding that the Applicant subjectively knew that what he did was wrong, we are left with the above-noted pretention by the investigator that he acted "recklessly" by failing to read the instructions for the exam." There is no merit to this argument because, as already noted, the Commission accepted the Applicant "knew his actions were not permitted." The Commission did not rely only on recklessness, it made a specific finding of personal knowledge - "he knew his actions were not permitted".

[97] That said, recklessness would suffice to establish the required intent if section 69 is analogous to a general-intent crime. I make no finding in this regard, but refer to *R v Bernard*,

[1988] 2 SCR 833 at para 61 and Morris Manning, QC & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at paras 4.67–4.68:

> [4.67] While the commission of most offences requires nothing more than the intentional or reckless performance of the *actus reus*, perhaps with some foresight of consequences, certain acts only become criminal when undertaken for a defined purpose or intent. … offences of this type are said to have an "ulterior" intent or purpose, on the grounds that this additional intent is not demonstrated solely by a deliberate performance of the *actus reus*.
>
> [Emphasis added.]

[98] In this respect I note the Applicant submits that fraud under section 69 is in some respects quasi-criminal.

[99] Moreover, a person does not necessarily avoid liability simply by saying 'I did not have the required intent'; if it were otherwise intent might seldom be found. Instead, a trier of fact may find intent based on the inference that people intend the natural and probable consequences of their actions. This is a rule of evidence and a matter of common sense; Cory J for the Supreme Court of Canada put it this way in *R v Seymour*, [1996] 2 SCR 252 at para 19:

> ***Linking the Common Sense Inference***
>
> [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.

> [Emphasis added.]

[100] In my respectful view, the Commission's finding that the Applicant committed fraud in the appointment process leading to his appointment as a Rail Safety Analyst EC-5 falls within the range of possible, acceptable outcomes that are defensible on the facts and the law, as required by *Dunsmuir*.

(2) *The Corrective Measures imposed were unreasonable*

[101] In the alternative, the Applicant submits that, if the finding of fraud is reasonable, given the specific factual circumstances of this case, the decision to revoke the Applicant's nomination was not. The Respondent disagrees. The Applicant says the corrective measures imposed in this case are unreasonable because they are disproportionately harsh. I agree that corrective measures must be "reasonable in light of the circumstances of the case": *Seck* at para 53. The Applicant submits that other lesser corrective actions would have sufficed to address his behaviour and particular risk it posed to future processes.

[102] The Respondent submits the Commission reasonably exercised its broad discretion under *PSEA* section 69 in accordance with its mandate of ensuring integrity of the appointment process in the public service of Canada. The Respondent says there is no merit to the Applicant's complaint that the revocation was disproportionately harsh, because it has no bearing on the issue at hand and does not render the decision unreasonable. The Respondent cites *Canada (Attorney General) v Boogaard*, 2015 FCA 150, per Stratas JA at para 81:

> [81] … judges cannot interfere on the basis of their personal views about the harshness or otherwise of the decision. Instead,

> judges must restrict themselves to this question: bearing in mind the margin of appreciation that the decision-maker must be afforded, is the decision acceptable and defensible on the facts and the law?

[103] In my respectful view, Parliament gave the Commission a mandate to safeguard the integrity of the merit system in the public service of Canada: *Seck* at paras 24 (preamble), 46 (Parliament's intent). By enacting section 69, Parliament gave the Commission an important tool to assist it in carrying out its statutory duty to maintain that integrity by keeping the appointment process free of fraud. The examination process is a central pillar of the appointment system - a system designed to identify candidates of merit. As the Federal Court of Appeal stated in *Seck* at paras 32, 46 and 48:

> [32] The Commission's power to investigate under section 69 of the Act is thus part of a sweeping reform designed to modernize the public service's staffing system, particularly by delegating most staffing decisions to the lowest level possible. However, this reform seeks to maintain and safeguard the fundamental values of the public service, including the commitment to ensuring that appointments in the public service are based on merit and non-partisanship. Section 69 must therefore be understood and interpreted in that context.
>
> ...
>
> [46] Parliament is thus seeking to ensure the integrity of the appointment process in the federal public service. Keeping the appointment process free of fraud is thus a fundamental value that Parliament seeks to safeguard through sections 69 and 133 of the Act. The Commission may therefore investigate and take corrective action when there is fraud in an appointment process whether the fraud led to a fraudulent appointment or not.
>
> ...
>
> [48] In cases of fraud in the appointment process, the Commission may (a) "revoke the appointment or not make the appointment", or (b) "take any corrective action that it considers appropriate". These are administrative measures intended to ensure

> the integrity of the appointment process in the federal public service, not disciplinary measures *per se*. This distinction is important, both for the purpose of delimiting the action that the Commission may take under the section in issue and for the purpose of defining the Commission's duty to deal fairly with the people it investigates.
>
> [Emphasis added.]

[104] It is also important that the Applicant admits his actions compromised the examination process. He did not contest point (2) of *Seck*'s definition of fraud. At paragraph 55 of his memorandum he states: "The Applicant does not contest that the second branch of the test would be met in this case." The second branch was: "that the appointment process could have been compromised by these actions."

[105] Subsection 69(b) of the *PSEA* authorizes the Commission to "take any corrective action that it considers appropriate" once a finding of fraud has been made. I am not persuaded the Commission committed reviewable error in revoking the Applicant's appointment to the Rail Safety EC-5 position. That decision is entitled to considerable deference. The Applicant was given multiple notices - at least two - that sharing exam information was not permitted; if the notices in respect of the other exams he took are added, he had that clear notice on at least five occasions. The record referred to similar conduct by the Applicant in three other appointment processes for public service employment. The Commission determined the Applicant's explanation for asking for outside assistance was "not credible." The Commission specifically found the Applicant knew his actions were not permitted. In the circumstances I am not persuaded the Commission acted unreasonably in revoking the appointment.

[106] In my respectful view the same holds true with respect to the balance of the corrective actions, the effect of which is to either require or encourage the Applicant to seek the Commission's approval before seeking another appointment in the public service. The Commission did not ban the Applicant from making such applications; it only requires the Applicant give notice of such application. And this special condition is only in effect for three years, after which the Commission no longer needs to be notified. It is possible, depending on the nature of his application, that the Commission would give its approval to the Applicant seeking another appointment. I am not persuaded this aspect of the Commission's corrective actions was excessive; rather this aspect of the sanction falls within the range of defensible outcomes on the facts and law.

[107] I accept the Respondent's submission that revocation of an appointment is not about disciplining or punishing an appointee, but rather aims to reinforce the integrity of the appointment process. This, with respect, is the objective of section 69 of the *PSEA* and in my view is a core animating principle of the Commission. Consequently, I am not persuaded that labour law principles such as proportionality and progressive discipline apply in the context of section 69: *MacAdam*, at paras 109, 112; *Seck*, at para 51. Indeed, in *Seck* the Federal Court of Appeal decided this point at paras 48–50:

> *(g) Corrective action under section 69*
>
> [48] In cases of fraud in the appointment process, the Commission may (a) "revoke the appointment or not make the appointment", or (b) "take any corrective action that it considers appropriate". <u>These are administrative measures intended to ensure the integrity of the appointment process in the federal public service, not disciplinary measures per se. This distinction is important, both for the purpose of delimiting the action that the Commission may take under the section in issue</u> and for the

> purpose of defining the Commission's duty to deal fairly with the people it investigates [emphasis added by the Applicant].
>
> [49] The employers of public servants are responsible for the disciplinary action taken against them, and disciplinary action is governed by the Public Service Labour Relations Act. The Commission therefore may not take disciplinary action under section 69 of the Act. At most, it may, as it did in the appellant's case, pass on to the employer any relevant information collected in the course of its investigation. It will be up to the employer to take disciplinary action, if it sees fit to do so. The Commission's role and mandate have to do with the integrity of the appointment process in the public service rather than disciplining delinquent employees.
>
> [50] When the Commission revokes an appointment under section 69, it is not taking disciplinary action, as such an appointment is void ab initio. This is not a dismissal or a lay-off that may be grieved. Nor are the other corrective measures that the Commission may take subject to grievance.
>
> [Emphasis added.]

D. *Did the Commission overstep its statutory jurisdiction when it ordered that the Applicant, as a result of the revocation of his appointment, would cease to be an employee in the federal public service?*

[108] The Applicant says the standard of review on this issue is correctness because it is a jurisdictional issue. He relies on *Seck*, and in particular para 17 where the Federal Court of Appeal held: "questions concerning the jurisdictional lines between the administrative agencies in question … call for the application of the correctness standard." With respect, I am obliged to follow the Supreme Court of Canada's recent decision in *CHRC*, which held at para 27:

> [27] This Court has for years attempted to simplify the standard of review analysis in order to "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J.). To this end, there is a well-established presumption that, where an

> administrative body interprets its home statute, the reasonableness standard applies (*Dunsmuir*, at para. 54; *Alberta Teachers*, at para. 39; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 15; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at paras. 33-34; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, at para. 8).
>
> [Emphasis added.]

[109] Therefore in my respectful view, the standard of review for this issue is reasonableness.

[110] The Applicant puts his argument as follows. In its Decision, the Commission not only ordered that the appointment of the Applicant to the position he held at the time of the decision be revoked, but it also purported to direct that, following this revocation, the Applicant would "cease to be employed in the federal public service":

> ... the appointment of Mr. Dayfallah to the position of Analyst, at the Ec-5 group and level, made as a result of advertised internal appointment process 15-MOT-IA-HRS-84651, be revoked. The Department of Transport must complete the documentation required to implement the revocation and confirm to the Oversight and Investigations Sector of the Public Service Commission that it has done so within 60 days of the signing on this Record of Decision. Following the revocation of his appointment, Mr. Dayfallah will cease to be employed in the federal public service.
>
> [Emphasis added.]

[111] The Applicant submits that while the Commission has the authority under section 69 of the *PSEA* to order the revocation of an appointment if it is satisfied fraud occurred during the appointment process, the Commission does not have the authority to dictate what might be the impact of this revocation in terms of the employer-employee relationship between the employee

in question and his employer. In other words, the Commission did not have the authority to terminate the Applicant's employment, which is what, the Applicant submits, the Commission attempted to do here.

[112] The Respondent says the Commission only ordered three corrective actions: the revocation of the Applicant's appointment to the EC-5 position, and two time-limited conditions related to potential future federal public service employment - nothing more.

[113] The Respondent agrees that the Commission does not have the power to "provide for the termination of the contractual and legal employment relationship between the Applicant and the Treasury Board." This in my view flows from *Financial Administration Act*, RSC 1985, c F-11 sections 12(1)(c), (d), and (e) which provide:

Powers of deputy heads in core public administration	**Pouvoirs des administrateurs généraux de l'administration publique centrale**
12 (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,	**12** (1) Sous réserve des alinéas 11.1(1)f) et g), chaque administrateur général peut, à l'égard du secteur de l'administration publique centrale dont il est responsable:
…	…
(c) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial	c) établir des normes de discipline et prescrire des mesures disciplinaires, y compris le licenciement, la suspension, la rétrogradation à un poste situé dans une

penalties;	échelle de traitement comportant un plafond inférieur et les sanctions pécuniaires;
(d) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;	d) prévoir le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur de toute personne employée dans la fonction publique dans les cas où il est d'avis que son rendement est insuffisant;
(e) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct; and	e) prévoir, pour des raisons autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur d'une personne employée dans la fonction publique;
[Emphasis added.]	[Nos soulignés.]

[114] In my respectful view the Deputy Minister terminated the Applicant's employment relationship by his letter to the Applicant dated January 15, 2018. In that letter the Deputy, as instructed by the Commission, revoked the Rail Safety EC-5 appointment. The Deputy went on

to say: “As a result you will cease to be employed in the federal public service.” I cannot construe that other than as a termination.

[115] The Commission’s Decision states in part: “Following the revocation of his appointment, Mr. Dayfallah will cease to be employed in the federal public service.” But as agreed by the parties, the Commission had no power to terminate the contractual and legal employment relationship between the Applicant and his employer. Therefore the Commission’s Decision was not a termination and the Applicant is not correct in calling it a termination or an attempted termination. The Applicant’s employment relationship was terminated by the Deputy Minister. In this circumstance I am unable to find that the Commission terminated the position because it neither could nor did.

[116] The Applicant has grieved the Deputy’s decision as is his right under the *Federal Public Sector Labour Relations Act*. The Applicant’s grievance is pending. I am not persuaded there is merit to the Applicant’s submission that the Commission’s comment prejudiced the Applicant by “potentially affecting the recourse available to [him] to challenge his termination.”

[117] There being no decision to terminate, I am unable to find unreasonableness. Nor am I able to find any procedural unfairness.

VI. Conclusion

[118] This case raised issues of procedural fairness and reasonableness. In my view there is no merit in the Applicant’s submissions that he was treated with procedural unfairness. What took

place was fair in the circumstances. Looking at those aspects of the Decision that are reviewed on the reasonableness standard taken as an organic whole, I have come to the conclusion that the Decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law per *Dunsmuir*. Since the Decision is both procedurally fair and reasonable, this application for judicial review must be dismissed.

VII. Costs

[119] The parties agreed the unsuccessful party should pay costs to the successful party in the all-inclusive amount of $2,500.00 including disbursements and taxes. In my view this amount is reasonable; therefore, I will make such an order in favour of the Respondent.

JUDGMENT in T-153-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The Applicant shall pay the Respondent costs fixed in the all-inclusive amount of $2,500.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-153-18
STYLE OF CAUSE:	HASSAN DAYFALLAH v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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