Date: 20081128

Docket: T-1496-07

Citation: 2008 FC 1294

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 28, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DENIS ALLARD,
CLAUDE BÉRARD,
DANIEL BOUCHER,
STÉPHANE GERVAIS,
MARIO LAVOIE
and
CHRISTIANE LEVASSEUR

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this

> explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> 56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

(*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.)

[2] 50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.

> 51 There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Law Society of New Brunswick v. Ryan*, above.)

[3] In *Blagdon v. Canada (Public Service Commission, Appeals Board)*, [1976] 1 F.C. 615,

[1976] F.C.J. No. 162 (QL), Arthur L. Thurlow J. wrote:

> [6] On such an appeal – which, it should be noted, is not an appeal from the findings of a Selection Board but rather an appeal against the appointment or proposed appointment of a successful candidate – the essential question for the

> Appeal Board is whether the selection of the successful candidate has been made in accordance with the merit principle . An unsuccessful candidate, appealing against the appointment or proposed appointment of the successful candidate, is entitled to show, if he can, reasons for thinking that the merit principle has not been honoured [...]

[4] In accordance with *Blagdon*, above, Marshall Rothstein J., ruled in *Scarizzi v. Marinaki* (1994), 87 F.T.R. [1999] F.C.J. No. 1884 (QL):

> [6] It is clear that one of the functions of the Appeal Board is to ensure, as far as possible, that Selection Boards adhere to the merit principle in selecting candidates for positions from within the Public Service in accordance with section 10 of the Act. However, it is not empowered to substitute its opinion with respect to a candidate's assessment or examination for that of the Selection Board. Only if a Selection Board forms an opinion that no reasonable person could form, may an Appeal Board interfere with the decision of the Selection Board.

II. Judicial proceeding

[5] This is an application for judicial review of a decision by Line Chandonnet of the Appeal Board of the Investigations Branch of the Public Service Commission (the Commission), dated July 6, 2007, allowing appeals by the respondents under section 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 [repealed, 2003, c. 22, s. 2874] (PSEA) (The new PSEA came into effect on December 31, 2005).

III. Facts

[6] On November 10, 2004, Correctional Service Canada (CSC) posted a competition notice for 60 CX-03-level correctional supervisors, including 12 competition numbers – one for each institution in the Quebec Region.

[7] Under the heading “Qualifications and Screening Criteria” and the sub-heading “Experience”, the competition notice specifies that candidates must have the following experience: [TRANSLATION] “Extensive experience in carrying out duties related to correctional operations, particularly inmate escorts and case management”.

[8] On the deadline for submitting an application, which was November 24, 2004, 191 candidates submitted their applications by stating on their applications for employment the number or numbers for the competitions for which they wanted to apply.

[9] Those applications were assessed as part of a process led by the Screening Board and the Selection Board, also known as the Screening Committee and the Selection Committee, and its members included Serge Trouillard, Manon Bisson, and André Courtemanche, who have several years of experience in CSC.

[10] On December 8, 2004, the Screening Board detailed the qualifications in the competition notice in the following manner:

> [TRANSLATION]
>
> All candidates are expected to clearly and specifically show that they have the following experience:
>
> Five (5) years of experience in performing duties related to correctional operations at CSC and/or a provincial/territorial correctional service and/or in a community residential facility. In addition, within the 5-year period, 2 years of experience in a CX-02 and/or PW and/or PO position. (Acting assignments, indefinite appointments, and internships will be considered.)

[11] Following that explanation of the qualifications, the Screening Board rejected 35 applications, of which 17 applications were rejected because the candidates did not fulfill the qualifications in the competition notice and 18 were rejected because the candidates clearly did not show that they had them. On December 23, 2004, the candidates who were not selected during that stage were notified that their applications were rejected.

[12] The 156 screened candidates were invited to take a Knowledge Examination. Of them, 25 had to pass the Diploma of Vocational Studies (DVS) equivalency test. There were three failures of the equivalency test and three withdrawals from the Knowledge Examination.

[13] The applicant sent a copy of the Statement of Merit Criteria and a list that showed the candidates the documents that acted as the basis for creating the Knowledge Examination. An amended list of those study documents was sent to the candidates on January 10, 2005.

[14] On February 17, 2005, the candidates received a letter of invitation to the Knowledge Examination, for which the date was set for March 14, 2005. Of the 150 candidates who were invited to the Knowledge Examination, 12 candidates were absent, 5 withdrew from the competition, and 58 failed.

[15] On April 27, 2005, the 74 candidates who passed the Knowledge Examination received a letter of invitation to the Abilities and Skills Assessment. The candidates were notified that four of the five capacities that were listed in the Statement of Merit Criteria, of which some were non-compensatory, would be assessed at this stage of the process Those were the following abilities:

ability to communicate effectively in writing, managing staff in a productive and constructive manner, managing various complex situations, and managing various activities while considering financial resources.

[16] On June 1, 2005, CSC informed 30 candidates that they had failed this latest step of the process, from which one applicant withdrew. The following day, the applicant summoned the final 43 applicants to assess their ability to communicate effectively orally, and the following three personal qualifications: results orientation, teamwork, and sensitivity to diversity. As for the other personal suitabilities, they were assessed by taking references. All the candidates passed the assessment of the ability to communicate effectively orally. However, two candidates did not succeed regarding the personal suitabilities. Lastly, 41 candidates therefore qualified as part of that process.

[17] On July 15, 2005, the applicant informed all the candidates of the results of their competition by submitting compiled eligibility lists and the result that they had received for Abilities and Personal Suitabilities.

IV. Impugned decision

[18] After being informed of the results of the competition, the respondents appealed the appointments made or deeming done according to an eligibility list that was made following the competition. They appealed to the Appeal Board of the Investigations Branch of the Public Service Commission of Canada.

[19] The appellants, who are the respondents in this case, submitted 23 allegations. At the start of the appeal hearing, the allegations were grouped into four categories: screening, unfair advantage, assessment of abilities, and assessment of personal suitabilities. On July 6, 2007, the Appeal Board allowed the respondents' appeal, but rejected three of the allegations.

[20] First, the Appeal Board recalled the extent of its powers of intervention in a decision made by a Selection Board, that is, an Appeal Board can only intervene in the event that the Selection Board has an opinion that no reasonable person would have.

Screening

[21] With respect to screening, the Appeal Board allowed the applicants' four allegations. The first allegation was that the Screening Board erred by setting screening criteria that did not include the items that were mentioned in the competition notice and in the Statement of Merit Criteria, those being case management and escorting.

[22] The Appeal Board determined that at the time when it created the definition (December 8, 2004), the Board was acting as a Screening Board and not as a Selection Board. As a screening board, according to the applicant, the selection of the qualifications was done by CSC, who has the power to define them. However, the Appeal Board found that it nevertheless had jurisdiction to review the accuracy of the amendment to the terms of the competition notice and statement of merit criteria by the definition from December 8, 2004. The Appeal Board found that the Selection Board had clearly changed the qualifications that were stated on the competition notice, the effect of which was an expansion in the pool of potential candidates:

> [TRANSLATION]
>
> [37] [...] We no longer find that definition or the concepts of case management or escorting. Moreover, in it, we find the concepts of the CX-02, PW and PO, which are not in any way found in the Competition Notice or the Statement of Merit Criteria. This not only caused the pool of candidates to expand, once the competition was closed, but it also changed the data. If the people holding CX-02, PW or PO positions had known that their classification, on its own, and the number of years that they had held those positions was enough for screening, that surely would have caused the pool of candidates to expand [...]

[23] The Appeal Board also found that the application of temporal criteria was done quantitatively and without any verification being done regarding whether the candidates had the required qualifications. Those were the duties that are generally done in the positions that had acted as the basis:

> [TRANSLATION]
>
> [47] [...] Therefore, we can reasonably find that a PO's experience is not only acquired before the 2-year period, but in addition, the Selection Board's method of proceeding allowed for the rejection of candidates who were more deserving than those who were chosen. It was not reasonable for the Selection Board to proceed as it did.

[24] The Appeal Board also disposed of the second and third allegation for the same reasons: the Selection Board erred by granting inmate case management and escort experience to some candidates who did not deserve it.

[25] With respect to the application by Christiane Levasseur, the Appeal Board found that the Screening Board erred by rejecting her application at this stage. Ms. Levasseur indicated in her job application that she had worked for more than 16 years at the CX-01 and CX-02 levels, but failed to specify the duration of her employment as a CX-02. The Appeal Board determined that the

Screening Board erred by adopting a rigid and mechanical approach when analyzing applications at that stage:

> [TRANSLATION]
>
> [73] [...] the members of the Selection Board limited themselves to the assessment of the duration of time spent at a position according to specific groups and levels, rather than in terms of the depth of experience acquired, limiting the assessment of the 'extensive experience' criterion in a quantitative assessment.

Unfair advantage

[26] There were twelve allegations dealing with an unfair advantage. In summary, the allegations deal with the fact that some of the chosen candidates had extensive experience as acting correctional supervisors, the CX-03 position. In addition, the acting correctional supervisors had benefited from courses that dealt with the same subjects as those assessed during the Knowledge Examination and the Abilities and Skills Assessment. Due to the experience accumulated as acting correctional supervisors and the courses that had been offered to them, those candidates were granted an unfair advantage, preventing the selection from being done in compliance with the merit principle.

[27] The Appeal Board allowed all the allegations concerning unfair advantage because the selection tools had been designed to the advantage of one person who already held a management position in a correctional institution:

> [TRANSLATION]
>
> [118] [...] Upon reading the problem, we can see that a person who has already worked at the position can more easily answer the questions than a person who is completely new to the position or who has no experience with management in a correctional environment. A person who has already held the position will be strongly favoured.

Assessment of abilities

[28] The Appeal Board allowed the claims, in which the Selection Board had not reasonably assessed the abilities of the candidates to communicate effectively orally. The Appeal Board even found that there was no evidence that showed the reason why the candidates were at the same level, having all received almost the same score:

> [TRANSLATION]
>
> [156] The evidence also shows that all the candidates had received a score of 12, and therefore did not increase the passing grade or even receive a score of 16. There was no score between those two scores. However, the Department maintains that certain candidates were stronger than others within the group. Why were these differences not noted? I did not receive any reasonable explanation from the Department in that regard. The Selection Board was not able to show me that it had reasonably assessed each of the candidates according to a consistent standard [...]

Assessment of personal suitabilities

[29] The Appeal Board allowed the allegations in that the Selection Board had not reasonably assessed the candidates' sensitivity to diversity, given that the question that was used to assess the criteria was aimed solely at the candidates' ability to manage staff:

> [TRANSLATION]
>
> [169] There was only a minuscule portion of the response that affected difference (Tell your employees that it is essential to be tolerant to people who have different ideas or approaches. Show that we can learn from everyone) and again, it does not mention having different approaches for cultural or religious reasons, but rather that the new employee comes from Headquarters and has no experience in operations, and limits itself to what others believe to be corporate, theoretical, and disconnected ideas. It did not in any way show me how a person who is able to integrate a new employee from Headquarters into his or her unit is sensitive to diversity as it was defined by the Selection Board.

V. Relevant provisions

[30] The principle that supports all appointments in the public service is that of merit, in compliance with subsection 10(1) of the PSEA:

(1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.	(1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.

[31] Section 12 of the PSEA enables the Commission to set selection standards according to which candidates will be assessed based on the requirements set by the Department, in this case, CSC:

12. (1) For the purpose of determining the basis for selection according to merit under section 10, the Commission may establish standards for selection and assessment as to education, knowledge, experience, language, residence or any other matters that, in the opinion of the Commission, are necessary or desirable having regard to the nature of the duties to be performed and the present and future needs of the Public Service.	**12**. (1) Pour déterminer, conformément à l'article 10, les principes de la sélection au mérite, la Commission peut fixer des normes de sélection et d'évaluation touchant à l'instruction, aux connaissances, à l'expérience, à la langue, au lieu de résidence ou tout autre titre ou qualité nécessaire ou souhaitable à son avis du fait de la nature des fonctions à exécuter et des besoins, actuels et futurs, de la fonction publique.

[32] The Commission can review the candidate qualifications required by the Department under section 12.1 of the Act:

12.1 The Commission may review any qualifications established by a deputy head for appointment to any position or class of positions to ensure that the qualifications afford a basis for selection according to merit.	**12.1** La Commission peut réviser les qualifications établies par un administrateur général pour les nominations à tel poste ou telle catégorie de postes afin de faire en sorte que ces qualifications satisfassent au principe de la sélection au mérite.

[33] Section 21 of the PSEA provides a mechanism that allowed for unsuccessful candidates to appeal to the Appeal Board established by the Commission:

(1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.	(1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

VI. Issues

[34] First, in order to answer the last six basic questions, we need to understand the preliminary context in which the first two are found:

A. What are the standards of review that apply to the Appeal Board's decision?

B. What is the Appeal Board's power for intervention when dealing with an appeal under section 21 of the PSEA?

(1) Did the Appeal Board reverse the burden of proof as part of an appeal made under section 21 of the PSEA?

(2) Did the Appeal Board err by determining that the screening of candidates was not done on the merit principle?

(3) Did the Appeal Board err by determining that some candidates received an unfair advantage?

(4) Did the Appeal Board err by deciding that the Selection Board did not assess the candidates reasonably regarding their ability to communicate effectively orally?

(5) Did the Appeal Board err by determining that the Selection Board did not assess sensitivity to diversity?

(6) Did the poor quality of the recordings of hearings before the Appeal Board constitute a breach of the principles of natural justice?

VII. Analysis

A. What are the standards of review that apply to the Appeal Board's decision?

[35] The decision *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, stated that the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.

[36] In this case, jurisprudence has established the standard of review regarding the category of questions corresponding to the selection process in the public service. In proceeding with the analysis, the Federal Court of Appeal found in *Davies v. Canada (Attorney General)*, 2005 FCA 41, 330 N.R. 283 at paragraph 23, that the appropriate standard of review of the Appeal Board's decision on questions relating to the selection process is reasonableness. That standard of review was specified in a few recent decisions, in which the Federal Court of Appeal applied reasonableness to mixed questions of fact and of law, like knowing whether the Appeal Board's findings were based on evidence (*McGregor v. Canada (Attorney General)*, 2007 FCA 197, 366 N.R. 206 at para 14; *Canada (Attorney General) v. Clegg*, 2008 FCA 189, 168 A.C.W.S. (3d) 109 at para 18).

[37] The questions in law are as follows: knowing with whom the burden rests as part of a proceeding, the jurisdiction of an Appeal Board, the questions of procedural fairness and natural justice, and the choice and application of the appropriate standard by the administrative tribunal. The Federal Court of Appeal found that the questions that are exclusively of law must be reviewed according to correctness (*Clegg*, *McGregor*, and *Davies*, above).

B. What is the Appeal Board's power of intervention when dealing with an appeal under section 21 of the PSEA?

[38] An appeal board performs a different duty than that of a selection board. Its duty is not to assess new candidates, but to conduct an investigation to determine whether the selection was done in compliance with the merit principle:

> [3] [...] The function of the Appeal Board is to hold an inquiry in order to determine whether the Selection Board made its choice in such a way that it was a "selection according to merit". If the Appeal Board concludes that the Selection Board met this requirement, it

> must dismiss the appeal even if it is of the opinion that, had it been responsible for the task entrusted to the Selection Board, the result might have been different If a Selection Board has performed its duty in accordance with the Act and regulations and has made an honest effort to choose the most deserving candidate, then an Appeal Board would be exceeding its authority if it allowed the appeal from the decision of the Selection Board on the grounds that the latter had not availed itself of the means considered by the Appeal Board to be most appropriate for the performance of its duty.

(Ratelle v. Canada (Public Service Commission, Appeals Branch), [1975] F.C.J. No. 910 (QL), 12 N.R. 85 (F.C.A.)

[39] In *Blagdon*, above, Thurlow J. wrote:

> [6] On such an appeal -- which, it should be noted, is not an appeal from the findings of a Selection Board but rather an appeal against the appointment or proposed appointment of a successful candidate -- the essential question for the Appeal Board is whether the selection of the successful candidate has been made in accordance with the merit principle. An unsuccessful candidate, appealing against the appointment or proposed appointment of the successful candidate, is entitled to show, if he can, reasons for thinking that the merit principle has not been honoured, and in that context the applicant, on his appeal, was entitled to show, if he could, that the Selection Board's opinion that he did not have a good safety record was without foundation.

[40] In accordance with *Blagdon*, above, Rothstein J. ruled in *Scarizzi v. Marinaki*, above:

> [6] It is clear that one of the functions of the Appeal Board is to ensure, as far as possible, that Selection Boards adhere to the merit principle in selecting candidates for positions from within the Public Service in accordance with section 10 of the Act. However, it is not empowered to substitute its opinion with respect to a candidate's assessment or examination for that of the Selection Board. Only if a Selection Board forms an opinion that no reasonable person could form, may an Appeal Board interfere with the decision of the Selection Board.

An appeal board is not entitled to substitute a selection board's reasoning with that of its own if that reasoning is not unfounded. Rothstein J. applied that principle to the facts before him: "In my respectful opinion, the Appeal Board, in this case, substituted its opinion as to the appropriateness of

the applicant's answer for that of the Selection Board and, in so doing, erred in law." (*Scarizzi*, above, at para 8).

[41] In determining that the standard of review regarding an Appeal Board decision on questions relating to a selection process would be reasonableness and not correctness, an Appeal Board decision that substitutes a Selection Board's opinion with that of its own by applying correctness has made an error in law.

[42] An appeal board should only be concerned with the actions of the Commission in selecting from among the candidates who have the qualifications required by the employer-department (*Canada (Attorney General) v. Perera* (2000), 189 D.L.R. (4th) 519, 256 N.R. 57 at para 20, leave for appeal to S.C.C. refused, [2000] S.C.C.A. No. 434). When an Appeal Board determines the qualifications for candidates, it oversteps its jurisdiction, thus making an error in law that is reviewable by this Court based on correctness.

(1) Did the Appeal Board reverse the burden of proof as part of an appeal made under section 21 of the PSEA?

[43] Both parties agree that before the Appeal Board, the burden of proof rests with both the respondents, who were then the appellants. It is up to them to demonstrate the merits of their allegations in which the merit principle was tainted by the selection process (*Blagdon*, above, at para 6; McGregor, above, at para 17; *Girouard v. Canada (Attorney General)*, 2002 FCA 224, [2002] F.C.J. No. 816 (QL) at para 12). To discharge that burden, the appellants should show that there is a real possibility or likelihood that the best persons possible were not appointed:

> [15] In order to succeed under section 21 in establishing that the merit principle had been offended, the applicants had to convince the Appeal Board that the method of selection chosen was "such that there could be some doubt as to its fitness to

> determine the merit of candidates" i.e. as to its fitness to determine whether "the best persons possible" were found. An appeal board's main duty being to satisfy itself that the best persons possible were appointed, it goes without saying that an appellant, before even embarking on a challenge to the method of selection chosen, should at least allege (and eventually demonstrate) that there was a real possibility or likelihood that the best persons possible were not appointed.

(*Leckie v. Canada*, [1993] 2 F.C. 473, [1993] F.C.J. No. 320 (QL); also *McGregor*, above at para 20.)

[44] However, the applicant claims that the Appeal Board transferred the [TRANSLATION] "the burden from its shoulders" to the Selection Board (Applicant's Factum at para 56). Because of that, the allegation of reversing the burden of proof, which is an error in law, applies to determining screening questions, unfair advantages, and assessment of abilities.

[45] The question of knowing on whom the burden of proof rests as part of an appeal under section 21 of the PSEA, being a question of law, will be reviewable by this Court in accordance with correctness.

[46] On several occasions, the Appeal Board expressed in its decision that it was satisfied by the evidence: [TRANSLATION] "the evidence submitted by the appellants' representative shows that... " (Decision at para 51), "The evidence showed that... " (Decision at paras 38, 68) or "The evidence shows... " (Decision at paras 56, 81, 86, 106, 119, 156). The Appeal Board gave a detailed summary of the facts alleged by the appellants and the Department's response and reviewed the assessment methods that were applied by the Selection Board by reasoning its decision for each of the allegations. Even if it was not explicit, the appellants satisfied the Appeal Board that the assessment of the candidates by the Selection Board had violated the merit principle.

[47] As specified in *McGregor*, above, J. Edgar Sexton J. wrote:

> [27] [27] For a section 21 appeal to be feasible, the appellant must direct his evidence to the particular elements of the selection process which he believes involved a departure from the merit principle. As the strength of the appellant's case grows, the hiring department will develop what may be referred to as a "tactical burden" to adduce evidence to refute the evidence on which the appellant relies, for fear of an adverse ruling. However, this tactical burden does not arise as a matter of law, but as a matter of common sense. Throughout, the legal and evidential burden of convincing the Appeal Board that the selection board failed to respect the merit principle rests with the appellant.

[48] The Appeal Board did not reverse the burden of proof and the appellants discharged their burden by proving "that there was a real possibility or likelihood that the best persons possible were not appointed" (*Leckie*, above at para 15).

(2) Did the Appeal Board err by determining that the screening of candidates was not done on the merit principle?

[49] The applicant claims that the Appeal Board erred by intervening in the creation of the qualifications done by the Screening Board, which, as an instrument created by the Department, has the sole authority for defining the qualifications for a position in the public service (Applicant's Factum at paras 19-20, 26). In addition, the additional qualifications created by the Screening Board were reasonable and associated with the merit principle. According to the applicant, the Appeal Board erred in law by substituting the Screening Board's opinion with that of its own instead of applying reasonableness.

[50] Although the Appeal Board determined that the Board acted as a Screening Board and not as a Selection Board during the creation of the definitions for the qualifications, the Appeal Board then ruled that the added qualifications were not reasonable and were contrary to the merit principle.

[51] Screening and Selection Boards are "bureaucratic creations" (*Krawitz v. Canada (Attorney General)* (1994), 86 F.T.R. 47, 97 A.C.W.S. (3d) 2 at para 19). The PSEA does not mention the creation of either of those types of boards, while the *Public Service Employment Regulations* (2000) SOR/2000-80 (the Regulations) only mentions "selection boards". Screening Boards are not mentioned in either the PSEA or the Regulations. Screening Boards are instruments created by the Department for the purposes of preparing the Selection Board for its deliberations. Screening boards apply the qualifications required by the Department and can reject the candidates who do not meet them.

[52] However, selection boards are instruments used by the Commission to ensure that the merit principle is respected, with consideration for the required qualifications established by the Department:

> [33] As observed by Jackett C.J. in *Bauer v. Canada (Public Service Commission Appeal Board)*, [1973] F.C. 626 (C.A.), every department in the Canadian government is created by an enabling statute. [1973] C.F. 626 The statute defines the functions to be performed by the department and places a Minister of the Crown at its head. The Minister is vested with the management and direction of the department. Absent any statutory limitation, the Minister has the authority to determine the number and kinds of employees to have in the department as well the authority to select which persons to employ.
>
> [...]
>
> [37] Section 12 empowers the Commission to establish selection standards by which candidates will be assessed as to how well they meet the qualifications determined by the department for that particular position [...]

(*Davies*, above).

The Department, as an employer, is the best judge of its needs; therefore, the definition of a position and the establishment of the qualifications for that position are the sole responsibility of the Department (*Canada (Attorney General) v. Mercer*, 2004 FCA 301, 244 D.L.R. (4th) 382 at para 16). As a result, an appeal board has no say with respect to the qualifications which the Department considers necessary or desirable, since these are a function of management falling within the authority of a minister to manage his or her department under its enabling statute (*Perera*, above at para 20). An appeal board is only concerned with the actions of the Commission in selecting "on merits" from among the candidates who have the qualifications required by the Department.

[53] In this case, the members of the Screening Board and Selection Board are the same. The Appeal Board acknowledged a distinction between the two boards, despite their similar compositions:

> [31] [TRANSLATION]
>
> [...] In fact, for purely technical reasons, since the Board has not yet started to assess applications, at the time when the definition was created, the Board was acting as a Screening Board and not as a Selection Board.

[54] The applicant claims that a Screening Board's inherent powers enable it to redefine the requirements set by the Department in the statement of merit criteria (Applicant's Factum at para 27).

[55] The subtlest jurisprudence allows for a Screening Board to set out the qualifications required by the Department in a reasonable manner, provided that the addition does not contravene the merit principle. In *Bambrough v. Canada (Public Service Commission Appeal Board)*, [1976] 2 F.C. 109, 12 N.R. 553 (F.C.A.), Gerald Le Dain J. explained that in certain situations, a Screening Board can further specify the qualifications:

> [12] [...] But even if it is necessary to treat the formulation of these additional qualifications as the act of the Commission, I do not think it is beyond the implied powers of the Commission to participate to this extent in the elaboration of the qualifications for a position, particularly where, as here, it is done not only with the approval, but the active participation of an officer of the department concerned. There is no issue here of the Commission attempting to usurp or override the departmental authority to establish the qualifications for a position.
>
> [13] The statutory duty of the Commission to appoint qualified persons on the basis of merit to positions within the Public Service must carry with it at least the implied power to participate with the department or other branch of the Public Service concerned in establishing the qualifications for a position. The Commission must have the power to assure that the specified qualifications are those that are called for by the position and that the statement of such qualifications affords a sound basis for a process of selection according to merit...

[56] In *Canada (Attorney General) v. Blashford* [1991] 2 F.C. 44, 120 N.R. 223 (F.C.A.), Louis Marceau J.A. found that neither the Commission nor the Screening Board is enabled to intervene, either by partial addition or amendment, in the establishment of the essential requirements as defined by the affected Department. Marceau J.A. explained *Bambrough* and stated three points:

> [6] It is true that in *Bambrough v. Public Service Commission*, [1976] 2 F.C. 109 (C.A.), and again more recently in *Re Boychuck and Appeal Board Established by the Public Service Commission et al.* (1982), 135 D.L.R. (3d) 385 (F.C.A.), this Court has refused to intervene in cases where elaborations of, or amendments to, basic qualifications (that could be seen as new qualifications) had been introduced after selection had begun. But it was found in those cases: first, that the additional requirements had been made with the active participation of the Department (in both cases by a so-called "screening board" set up apparently to prepare the Selection Board for their deliberations); second, that, as expressed by Le Dain J. in the *Bambrough* case (page 117 of the report), "the statement of such qualifications [had afforded] a sound basis for a process of selection according to

> merit"; and third, that the adding of the further requirements had not had, in practice, the effect of unduly prejudicing the complainants.

As for the case before him, Marceau J.A. found that the Screening Board, on its own behalf and without the Department's participation, had decided to specify the Department's qualifications. Without the Department's participation, the Screening Board was thus found to have overstepped its authority.

[57] In *Blashford*, Robert Décary J.A. concurred and elaborated on those points:

> [25] *Bambrough* has decided, in my view, a) that the qualifications for a position, while generally established by a department before the selection process has begun, may be validly amended by a department after a selection process has begun provided the change is not a device for giving one candidate an unfair advantage over others and is no more than a reasonable elaboration of a requirement suggested by the original statement of qualification; and b) that the Commission may participate in the making of such an amendment provided the decision-maker continues to be the department. [...]
>
> [26] [...] It would be incorrect to infer from Bambrough that the sole presence of a representative of the department concerned on a screening board or on a selection board enables that board to add qualifications to those already established by the department.
>
> [...]
>
> [29] [...] There is no evidence, here, that the representatives of the Department who sat on the Selection Board were in reality acting on behalf of their department at the time they defined the criteria and it would need strong evidence, in my view, to rebut the presumption that members of a selection board established by the Commission are acting on behalf of the Commission and not on behalf of their own department when they define criteria that amount to additional qualifications [...]

[58] By applying those principles to this case, there is no evidence that the Department actively participated in the changes to the qualifications that the Screening Board made. The applicant claims that the Screening Board members have several years of experience in CSC (Applicant's Factum at para 3) and know the duties that are inherent to the position to be staffed and those held

by the candidates (Applicant's Factum at para 37). However, the fact that the three members of the Screening Board have been public employees with CSC for several years was insufficient to establish that they were mandated by CSC to create the qualifications for the positions to be staffed; therefore, there is no "strong" evidence to refute the presumption that the Screening Board members acted on behalf of the Commission, and not on behalf of their own Department, when creating the qualifications.

[59] Referring to the decision by Marceau J.A. in *Blashford*, above, this Court is of the view that in this case, the Commission and the Screening Board were not enabled to change the qualifications that were defined by CSC. However, it must be noted that the Appeal Board's findings did not rely on the Screening Board's ability to change the qualifications required by the Department.

[60] In *Bambrough*, above, the Federal Court of Appeal found that the Screening Board has an implicitly inherent power, which is to act on behalf of the Commission or the Department to add new qualifications in order to ensure that they comply with the merit principle. However, a screening board's added qualifications must be reasonable, considering the position to be staffed, and cannot be tainted by arbitrariness (*Blashford*, above, at para 6).

[61] One of the qualifications in paragraph 10 of *Blashford* was stated in the competition notice: "Considerable second level supervisory experience". To meet this requirement, the Screening Board ensured that candidates had to have two years of experience at the second level over the last five years, including one year of continuous experience.

[62] In *Blashford*, above, the Court rejected those temporal criteria, given their unreasonable character. It determined that the qualifications stated by the Department were expressed in terms left open to practical and relative appreciation. On the contrary, the Screening Board restricted them by introducing temporal criteria that "could obviously not afford a sounder basis for selection according to merit, its sole effect being to render more mechanical and more restrictive the screening process" (*Blashford*, above at para 6). Décary J.A. concurred with the rejection of rigid and temporal criteria: "In introducing rigid temporal criteria which were much more than a mere elaboration of the qualifications established by the Department, the Selection Board usurped or overrode the departmental authority to establish the qualifications for a position" (*Blashford*, above, at para 30).

[63] In this case, in the definition of the Screening Board, we no longer find the concepts of case management and escorting because we now find in it the concepts of CX-02, primary worker (PW), and parole officer (PO), which were not found in the competition notice. The applicant claims that the Screening Board relied not only on the descriptions of the tasks, but also on their knowledge of the duties for the PO, PW, and CX-02 positions (Decision at para 25). That knowledge allowed the Screening Board to find that the concept of case management, which was listed in the initial qualifications, was implicit in the work of CX-02s, PWs, and POs (Decision at para 39).

[64] However, the Appeal Board found that the applicant's claims were not supported by the evidence. The Appeal Board's decision conducted a detailed analysis of several cases in which a candidate with two years of experience like those at the CX-02, PW or PO level had the necessary experience in case management and escorting as required (Decision at paras 39-60).

[65] Recalling that in *Blashford*, the Court rejected the temporal criteria that do not comply with the merit principle, given the automatic elimination of experienced candidates, this Court subscribes to the Appeal Board's reasoning, which had found that the requirement of two years of experience for one of the abovementioned positions did not allow us to deduce that the applicants all had the same experience in case management. In doing so, [TRANSLATION] "the Selection Board therefore substituted the Case Management Experience required by temporal criteria rather than verify whether the candidate in fact had that experience" (Decision at para 42). This Court also subscribes to the Appeal Board's findings on the non-compliance with the merit principle regarding the criteria for five years of experience in CSC.

[66] Because the qualifications were described with temporal criteria, the Screening Board changed them in a qualitatively different manner. In this case, the Appeal Board chose and applied the appropriate standard of review by determining that the qualifications that were added by the Screening Board were not reasonable.

[67] *Bambrough* also mentioned that where the change in the qualifications would broaden the range of potential candidates for a position, the selection process would have to be recommenced to afford an opportunity for the identification of other candidates (at para 16). In *Blashford*, Marceau J.A. expressed that certain candidates were prejudiced by the use of temporal criteria:

> [6] [...] they were automatically eliminated from the competition when their experience could not readily be said not be have been "considerable" enough to be admitted and, indeed, could very well have been, in fact, more valuable and meritorious than that of admitted candidates.

Consequently, the appellants should have shown that some individuals would have been able to apply to the competition, but had not done so due to the fact that they believed that they did not have the qualifications.

[68] At first glance, the Appeal Board's reasoning appears reasonable:

> [TRANSLATION]
>
> [37] [...] If the persons holding CX-02, PW or PO positions had known that their classification, on its own, and the number of years that they had held their positions were sufficient for screening, that would surely have expanded the pool of candidates [...]

[69] In this case, the Appeal Board's finding that additional qualifications expanded the pool of candidates was not supported by the evidence. No submitted evidence showed that at least one potential candidate had been prejudiced by the additional qualifications.

[70] However, it is not necessary for the Court to determine that the Appeal Board's finding was not reasonably supported by the facts. The expansion of the pool of potential candidates by creating qualifications only appears to be a way of showing that the additional qualifications were not created according to the merit principle. The failure to show such a prejudice is not determinative if there is other evidence that the qualifications were not reasonable, as in this case.

[71] In conclusion, the Screening Board acted as a representative of the Commission and not the Department; therefore, it was not allowed to add qualifications required by the Department. In addition, the Appeal Board chose and applied the appropriate standard of review by determining

that the qualifications that were added by the Screening Board were not reasonable. The fact that the respondents did not show that the pool of candidates expanded is not determinative in itself.

[72] With respect to the rejection of Ms. Levasseur's application in the screening stage, the applicant claims that the Appeal Board erred by reviewing the applications that were chosen by the Screening Board instead of determining whether they met the qualifications.

[73] There are two ways to establish that a competition was not conducted in accordance with the merit principle:

> [47] [...]
>
> > One conceivable approach would be to show that the selected candidate could not possibly be the best qualified of the candidates or did not meet the requirements for selection whether in terms of personal qualifications or of eligibility for consideration. Another approach might be to challenge the way the selection was made so as to show that the selection process itself was illegal or, though legal as a process, was not carried out in a manner calculated to identify the most meritorious candidate.

(*McGregor*, above, citing *Attorney General of Canada v. Haig Bozoian*, [1983] 1 F.C. 63 at para 6.)

[74] The Appeal Board opted for the second one by claiming that the selection was not carried out in a manner calculated to identify the most meritorious candidate. The appeal under section 21 of the PSEA is an appeal that an unsuccessful candidate can make against an appointment. The appeal under section 21 of the PSEA is an appeal by an unsuccessful candidate against an appointment. Consequently, the Appeal Board's duty is not to reassess the candidates to protect the rights of the appellant, but to hold an investigation in order to determine whether the selection was made in compliance with the merit principle (*Charest v. Canada (Attorney General)*, [1973] F.C.

1217 (F.C.A.) at para 12; *Blagdon*, above, at para 2; *Girouard*, above, at para 12); therefore, the selection of the received candidates had to respect the merit principle, independent of the individual results obtained by Ms. Levasseur (*McGregor*, above, at para 48).

[75] In this case, the Appeal Board analyzed a few examples in which the received candidates did not have the qualifications in extensive experience with case management and escorting inmates, even if they had met the qualifications that were added by the Screening Board. There is no error in law because it was open to act thus; therefore, the finding that the selection of candidates did not respect the merit principle was reasonably supported by the evidence.

[76] Lastly, the rejection of Ms. Levasseur's application due to a detail was done contrary to the merit principle. She was rejected from that stage of the competition on the sole ground that she had indicated on her job application that she had worked as a CX-01 and CX-02 for more than 16 years. However, she did not clearly indicate how much time she had worked as a CX-02, as required in the qualifications that were added by the Screening Board.

[77] Applying a rigid and formalistic method for screening purposes regarding the experience of a candidate may lead to the exclusion of candidates who were qualified for the competition (*Hassall v. Canada (Attorney General)*(1999), 162 F.T.R. 295, 86 A.C.W.S. (3d) 112 (F.C. T.D.) at para 20); therefore, Justice Danièle Tremblay-Lamer found in *Brookman v. Canada (Attorney General)*, (2000) 184 F.T.R. 47, 97 A.C.W.S. (3d) 926 (F.C. T.D.) that the Screening Board's imposition of a "formality" to the screening process should not have the adverse effect of screening out potential successful candidates:

> [17] [...] Clearly, the administrative convenience of the Selection Board in requiring potential candidates to highlight their individual work history in relation to the experience criteria for the position does not relieve it of its statutory duty to ensure that its assessment of a potential candidate's qualifications was in accordance with merit. [...]

[78] The evidence showed that in fact, she had been working as a CX-02 for a long time and therefore, even if the temporal criteria added by the Screening Board were valid, Ms. Levasseur would have been qualified during screening if she had not made mistakes on her application documents.

[79] Without a doubt, most of the candidates who were rejected during screening were rejected due to a failure to notify the candidates of the importance of specifying their past positions in a detailed manner. The initial qualifications in the competition notice that required the candidates show "extensive experience" in case management and escorting. There was no mention of specific positions, which the Screening Board imposed once the applications were received.

[80] However, the Screening Board could have protected the merit principle even after it created the qualifications. When asked the question about whether the candidates had the qualifications, the Screening Board had failed to ask the candidates to provide more information.

(3) Did the Appeal Board err by determining that some candidates received an unfair advantage?

[81] The Appeal Board made relevant findings of fact. The CO-I and CO-II, which are respectively found under the CX-01 and CX-02 categories, do not have management duties. However, the work of a CO-III, under the CX-03 category, consists of managing a team of CX-01s

and CX-02s (Decision at para 112). The Selection Board based the Knowledge Examination on situations that may arise as part of a CX-03's duties (Decision at para 113). The majority of failing grades came during the Knowledge and Skills examinations (Decision at para 111). Only 12 candidates out of 41 were able to squeeze onto the eligibility list without having either training or experience in a CX-03 position on an acting basis (Decision at para 126); therefore, the majority of candidates (29 out of 41) on the eligibility list gained work experience that was specific to the position by holding an acting position for a good number of years (Decision at para 126). Several candidates who worked in a CX-03 position had been trained in courses that were intended for persons appointed to CX-03 positions (Decision at para 126).

[82] The Appeal Board also described the jurisprudence on the question of unfair advantage. It first cited *Canada (Attorney General) v. Pearce*, [1989] 3 F.C. 272, [1989] F.C.J. No. 316 (F.C.A.)(QL) regarding violation of the principle of selection according to merit in staffing attached to a selection process that gives an unfair advantage to a candidate:

> [15] [...]
>
> [...] It seems to me that other circumstances taken together with an assignment may equally offend the merit principle. The merit principle requires the appointment of the candidate best qualified to fill a position. That is not necessarily the candidate best informed about it.
>
> [16] The Appeal Board did not err in law in concluding that an assignment in combination with a selection process that gave an unfair advantage to the candidate assigned to the position could compromise application of the merit principle. The conclusion that the assignment in combination with the preset questions asked by the Selection Board had that result in the present instance was a finding of fact which cannot be said to have been erroneous as contemplated by section 28 of the *Federal Court Act*.

[83] The Appeal Board cited *McAuliffe v. Canada (Attorney General)* (1997), 128 F.T.R. (1997), 128 F.T.R. 39, [1997] No. 161 (F.C.) (QL) for the question of "[f]amiliarity with the actual duties of a position may provide the candidates in place with an unfair advantage with the risk that a selection process may not result in a selection according to merit." (McAuliffe at para 17).

[84] Lastly, the Appeal Board applied the law to the facts. The Appeal Board found that the Selection Board had based the Knowledge Examination on situations that may arise as part of CX-03 duties, with the goal of thinking about the tasks that CX-03 officers had to complete (Decision at paras 113-120); therefore, according to the Appeal Board, the selection tools developed by the Selection Board had been designed to the advantage of one person who already held a management position in a correctional institution (Decision at para 118). In addition, candidates who had worked as acting CX-03s benefited from exclusive access to skill development training for the CX-03 level, that being the position to be staffed. The person responsible for the examinations checked it by administering the exam to first-year and second-year university students who had no knowledge of the supervising work in question. However, the fact that they were still able to receive a passing grade does not refute the fact that candidates who were already at positions did not have it any easier when writing the examination (Decision at para 122).

[85] The Appeal Board found that a person who has held an acting CX-03 position for a certain period of time may have been able to gain an unfair advantage because that person may have familiarity with the actual duties of the position. That familiarity helped them in the Knowledge Examination: [TRANSLATION] "it therefore seems reasonable to me to deduce that a person holding

an acting CX-03 position at the time of the competition received an unfair advantage over the other candidates who did not have the opportunity to hold such a position" (Decision at para 121).

[86] However, the Court is of the view that the sole fact that there were candidates with acting CX-03 experience is insufficient to find that there was an unfair advantage, thus violating the merit principle. The Appeal Board erred in law by not applying the principles established by *Levac v. Canada (Attorney General)* (1994), 170 N.R. 230, [1994] F.C.J. No. 622 (F.C.A.)(QL). *Levac* emphasized that the sole fact that a candidate's knowledge had been gained during the time when the candidates held the duties of the position to be staffed on an acting basis does not necessarily violate the merit principle in the selection process:

> [10] [...] Once "knowledge (of aviation regulation and air navigation orders and of the standards and procedures relating to personnel licensing) is among the required qualifications set out in the statement of qualifications for the position to be filled", the board certainly had to evaluate that knowledge, and it matters little, for the purposes of that evaluation, that a particular candidate's knowledge may have been acquired while she was performing the duties of the position to be filled, on an acting basis. To argue otherwise would mean that persons acting in a position to be filled would systematically have their knowledge of the position downgraded in order to reduce them to the same level of knowledge (or ignorance) as the other candidates. The merit principle would be seriously compromised, and mediocrity would be assured in the public service, if it were necessary to downgrade the best candidates' score for knowledge solely because they had the opportunity to acquire knowledge in an empirical manner while the other candidates were compelled to acquire that knowledge in a theoretical manner.

[87] Even *Pearce*, above, stated that the staffing in itself is insufficient to violate the merit principle. There should also be "other circumstances", like a selection process that allegedly gave an unfair advantage to a candidate. According to the Appeal Board, the questions on the Knowledge Examination were based on situations that could arise as part of carrying out the duties of a CX-03-level correctional supervisor and also on the description of the tasks that fell to the position to be staffed.

[88] In this case, each of the candidates received the list of references more than two months before the examination was held, such that they were theoretically able, with reasonable diligence, to gain the knowledge required by the statement of merit criteria. The fact that 12 candidates out of 41 who had not held the CX-03 position had still passed the Knowledge Examination is important to note. However, that constitutes a good indication of the possibility of succeeding without having "the opportunity to acquire knowledge in an empirical manner" (*Levac*, above, at para 10).

[89] In addition, the Appeal Board seems to have acknowledged the paradox of assessing the fitness of the candidates for a position, but without assessing them directly:

> [121] [TRANSLATION]
>
> Although it is normal for us to want to assess the tasks of the CX-03 and that to do this, the description of the tasks for this position was used, it appears unfair to favour the candidates who have indeed already held a position for a good number of years by plunging them back into a terminology, environment and context in which they have already worked as a Correctional Supervisor.

[90] The Appeal Board sanctioned the Selection Board for having violated the merit principle: [TRANSLATION] "the Selection Board [...] should have shown greater rigour regarding its selection tools to keep the selection process from giving an advantage to those candidates" (Decision at para 131). The Appeal Board found that "[t]he merit principle requires the appointment of the candidate best qualified to fill a position. That is not necessarily the candidate best informed about it" (*Pearce*, above, at para 15).

[91] According to the Court, it appears that an assessment of the tasks to be performed at the position to be staffed is the sought goal in order to best respect the merit principle. *Laberge v.*

Canada (Attorney General), [1988] 2 F.C. 137, [1987] F.C.J. No. 1043 (F.C.A.) states that we should consider the tasks of the position to be staffed when created the method of assessment:

> [13] [...] When a competition is held to fill a position, the competition must be organized in such a way that the capacity of the candidates to fill the position can be determined. This cannot be done without considering the duties to be performed by the incumbent.
>
> [...]
>
> [15] The merit principle requires that the candidate be selected who, at the time of the competition, is best able to perform all the duties specified in the competition notice. That does not mean that a candidate cannot undergo the normal training period to become familiar with his new duties, which in the case at bar also included a training course given to other people in the same category already occupying the position.

[92] The respondent stated the fact that in *Levac*, above, the Federal Court of Appeal found that it was counter to the merit principle for a candidate in question to be qualified solely because he or she held the position to be staffed on an acting basis:

> [12] [...] Ms. Forget did not qualify on the basis of the written test of the knowledge acquired while she held the position on an acting basis, but solely on the basis of the fact that she had held that position.

But in the facts of *Levac*, the candidate in question did not receive the required score on her Knowledge Examination, but instead succeeded in the process through the addition of points resulting from an additional assessment according to work completed when she had the job on an acting basis. That last situation is different from the case before us because the Selection Board did not give additional points for the sole fact that a candidate worked in a CX-03 position on an acting basis.

[93] The respondent, citing *Doré v. Canada*, [1987] 2 S.C.R. 503, maintains that due to the duration of the assignments, the chosen candidates who held the CX-03 position on an acting basis could potentially receive an unfair advantage. It is important to specify that this allegation was based on an obiter from the Supreme Court of Canada. Lastly, the facts in that decision are quite different. The only issue in *Doré* stems from the assignment of a person who held a position with different duties, expecting that a new position would be classified in relation to those duties, and constituting an appointment to a position that would be subject to appeal within the meaning of section 21 of the PSEA. In this case, there is no question of an appeal regarding the hiring of employees to an acting CX-03 position.

[94] We can also distinguish *McAuliffe*, above, on its facts. The candidates in question succeeded in two processes held by two different boards of inquiry. During the investigation processes, the chosen candidates were hired. They had gained some experience from the fact that for a period of two years, they had held the positions to be staffed. Following the findings of the boards of inquiry as to the obvious defects of the two assessment processes, the Commission decided to choose the candidates who had succeeded in both defective processes, given their skill and their high results.

[95] The Court speculated in *McAuliffe* that familiarity with the actual duties of a position may provide the candidates in place with an unfair advantage:

> [15] In other words, it is not sufficient that the candidates be qualified. They must be the best qualified for the positions. The candidates selected under the original flawed competitions in the instant matter have undoubtedly gained some experience by being on the job for the past two years. That experience may stand to their benefit in a new competition, but it is manifestly unfair to the other candidates for the Commission to give the experienced candidates its blessing on the ground that they have already benefited from a flawed selection system, at the expense of other candidates who might possibly be better qualified.

[96] The Court found that the only solution was for the Commission to proceed with a fresh assessment:

> [19] The only way out, in my view, is for the Commission to undertake a fresh assessment process which will account for, and compare, the qualifications of all available candidates (including those presently occupying the positions) and to insure that the specific flaws clearly identified by the Board of Inquiry are not repeated.

[97] Thus, it was the failure to reassess the candidates that led to the possibility of an unfair advantage due to the experience of the candidates who had already held the positions to be staffed. In this case, as mentioned, an assessment of the qualification of all candidates, even those who had not worked on an acting basis, had been done. Lastly, the Court is not bound by *McAuliffe*, given the very particular circumstances in which the Federal Court of Appeal itself found that it could not find a substantial basis following the implementation of the order that rendered the facts irreversible (*McAuliffe v. Canada (Attorney General)* (1999), 250 N.R. 234, 91 A.C.W.S. (3d) 687.

[98] Lastly, there is no evidence that the candidates who worked as acting CX-03s had obtained their jobs out of preference and in violation of the merit principle.

[99] In conclusion, although there were advantages to holding a position on an acting basis, in this case, since all the candidates had access to the same tools in order to pass the assessment examinations, it cannot be found that there was an unfair advantage.

(4) Did the Appeal Board err by determining that the Selection Board did not assess the candidates reasonably regarding their ability to communicate effectively orally?

[100] The Selection Board systematically gave one of two scores, either a 12 or a 16, to the candidates. It is the view of the Appeal Board that the comments were not consistent with the differences between the candidates who received different scores. The Appeal Board therefore found that the Selection Board did not effectively assess the skills of each of the candidates for their respective oral communication within their duties: [TRANSLATION] "It therefore decided on a random basis that everyone communicated at the same level, without having any proof of it or knowledge" (Decision at para 155). The respondents, citing *Canada (Attorney General) v. Jeethan*, 2006 FC 135, 289 F.T.R. 28, at paragraph 18, also raised the fact that a selection board "must be able to explain to an Appeal Board the reason for its assessment based on the answers given by the appellant".

[101] The evidence showed that the Selection Board held interviews and made comments on each of the candidates who had failed this stage. This was not the case, with no interviews or comments. Unlike the situation in *Jeethan*, in which there was no relevant evidence, in this case, the Selection Board presented its reasons using a correction checklist. As was reproduced in the Decision, each candidate was given a score according to three assessment criteria:

> [143] [...]
>
> 1. Non-verbal behaviour (attitude and body position, gestures, appearance, eye contact, etc.)
>
> 2. Verbal expression is clear, logical and concise.
>
> 3. The rate of speech and choice of words are appropriate for the situation and allow the message to be conveyed properly.

[102] As the Appeal Board wrote:

> [144] [TRANSLATION]

> None of those three criteria includes a score to be awarded. Nothing in the evidence shows that one of those elements was more important or had a higher value than the others. Nothing in the evidence shows how the candidates could distinguish themselves from one another.

[103] Even though it appears that there were some irregularities in the comments and scores, the assessment of the merit of various persons cannot be reduced to a mathematical function (*Blagdon* and *McGregor*, above at paras 50-52). The role of the Court is to assess the reasonable nature of the Appeal Board's finding, in light of the evidence before it. In this case, the Appeal Board's analysis was too severe, thus appearing to have applied correctness. When the Appeal Board compared the comments on a grid, it determined that the terms that were used were not consistent with the received scores. On the other hand, it would not be reasonable to oblige a Selection Board to use terms that are identical to the awarded scores. Each comment appears different, although that difference can sometimes appear subtle. The fact that the scores are grouped in either 12 or 16 and nothing in between was not determinative, given the fact that at the beginning, the scores were between 0 and 5, which was then converted by a multiple of four to meet the requirement of a score to be formulated; therefore, a 3 was converted to 12 and a 4 to 16. In that context, it seems reasonable for the Selection Board to find that the 43 candidates received a score of 3 or 4 out of 5.

(5) Did the Appeal Board err by determining that the Selection Board did not assess sensitivity to diversity?

[104] As part of an interview with each of the candidates, the Selection Board assessed sensitivity to diversity. The question used to assess sensitivity to diversity reads as follows:

> [TRANSLATION]
>
> You are bringing a new employee into your team. He is from Headquarters and has no practical experience in a correctional environment. However, he clearly knows

> the values and the mission of the Correctional Service and does not hesitate the give his opinions, even if they are not shared by all staff. Overall, several of his colleagues consider his opinions to be "corporate", "theoretical" and "disconnected".
>
> Very quickly, staff members leave him aside, make jokes about him and leave "the newbie" to carry on by himself and deal with the "true reality" of institutions. You are discussing with some staff members who believe that the situation does not deserve intervention and that the new employee must prove himself. Moreover, no complaints have been directly made by the new employee, who has not however managed to fit in with the others.

(Applicant's Record at page 640.)

[105] The Selection Board asked the candidates to answer the question: "Given that situation, do you believe it would be necessary to intervene? If so, explain why. If not, explain why."

(Applicant's Record at p. 637).

[106] This list details the response elements that the Selection Board expected to find:

> (a) Examines the problems with consideration for the needs of the team
>
> (b) Examines the problem with consideration for the needs of the individuals involved
>
> (c) Recalls the main principles stated in the organization's mission
>
> (d) Provides concrete solutions for the problem
> (e) Indicates that this type of behaviour can have significant negative repercussions for staff security and the new employee in particular
>
> (f) Tells his or her employees that it is essential to be tolerant to people who have different ideas or approaches. Shows that we can learn from everyone.
>
> (g) Suggests action that is aimed at facilitating the new employee's integration (i.e. coaching, pairing with one or more employees who are more open-minded than the others, etc.)
>
> (h) Other relevant responses.

(Applicant's Record at page 640.)

[107] Lastly, as was reproduced in the Decision, the Selection Board defined diversity:

[TRANSLATION]

[164] [...]

> Understanding the unique character of each person and recognizing differences (colour, mental or physical disabilities, race, ethnic background, sex, sexual orientation, socio-economic status, age, religious and political beliefs, and geographic and regional differences). Acceptance and respect. Exploring differences in a safe, suitable and stimulating environment. Understanding one another and going beyond simple tolerance by accepting and celebrating the richness of the diversity in everyone.

[108] The Appeal Board found that the Selection Board did not assess the candidates' sensitivity to diversity, but instead assessed their ability to manage staff. The Appeal Board opted for staff management as the purpose of the question, rather than the method or context. The Selection Board asked the candidates to show how they would have managed the staff. Candidates must be assessed in terms of all the duties to be performed by the incumbent (*Laberge*, above). The CX-03 position is a correctional supervisor position for which one of the duties is to manage staff. Candidates should have been assessed according to how they would have resolved the disputes between employees by promoting harmony in a team, which is the same goal as sensitivity to diversity.

[109] Among the subjects in a training workshop from November 2003 titled [TRANSLATION] "Dialogue on diversity", one part dealt with the "Positive and receptive environment" (Applicant's Record at p. 626). In that last part, the offered suggested closely resemble the question that was asked during the assessment:

> [TRANSLATION]
>
> The integration of some employees may require special intervention. An action plan may need to be created, for example, for introducing a new employee into a work environment where there are no other members of the same group or even, before a person with a serious disability starts working, to inform his or her supervisors and

> colleagues of the nature of this disability, any necessary arrangements and their repercussions for the work. When the person with the serious disability arrives, ask them if they wish to have a meeting with their colleagues in order to determine how they can be helped.
>
> Meet with new employees frequently over the initial weeks, particularly those who are new hires in the public service, those who come from other organizations, those are part of designated groups and those who have special needs, to ensure that they are being shown how to do their job correctly and ensure that they are adapting well to their work environment.

(Applicant's Record at page 626.)

[110] In addition, the course also suggested the desired responses:

> [TRANSLATION]
>
> Plan to create a mentoring system. Some specialists believe that it is preferable for the employee to have two guides: an experienced person for the strategic aspect and a person with who has one or two years of seniority more than the employee and who can give practical advice according to his or her recent experience.
>
> […]
>
> If some employees have difficulty getting along with others whom they perceive as "different", examine the issue with them to solve the problem.
>
> […]
>
> Ensure that you give equal attention to and propose an appropriate solution for all of the problems raised by the employees.

(Applicant's Record, at pp. 628-29)

[111] No approach was reported for identifying attitudes towards cultural or religious elements; instead, the Selection Board paid attention to management styles resulting from a difference in perspectives. In addition, in a very subtle manner, methods were suggested regarding cultural and religious variables based on the candidates' backgrounds.

[112] Even the excerpts dealing with subjects dedicated to named groups express broad considerations. With respect to women, they are susceptible to systemic psychological discrimination: [TRANSLATION] "not considering their opinion because they have a different perspective" and "a lack of confidence in them" (Applicant's Record, at p. 619).

[113] The respondent specifies that [TRANSLATION] "sensitivity to diversity cannot be inferred" (Respondent's Factum, at para 72). However, the Appeal Board stated that [TRANSLATION] "[t]hey might well be reasonable questions consistent with the requirements of the job and yet not test a particular area of knowledge" (Decision, at para 165, citing *Madracki v. Canada* (1986), 72 N.R. 257, 2 A.C.W.S. (3d) 78 (F.C.A.); therefore, it is not necessary to directly assess all of the candidates' knowledge to examine their abilities to perform all the position's duties:

> [15] [...] When an appeal board has such a complaint before it it must consider whether, in the circumstances, the failure to assess candidates in terms of all the duties of the position to be filled is consistent with the requirements of the merit principle. It may be that the alleged impropriety is only apparent: in many cases a candidate's capacity to perform one duty can be inferred from his capacity to perform another. It may also be that the knowledge required by the performance of certain duties can easily be acquired by someone who has the capacity to perform the other duties of the position. For example, if a candidate had been able to master a complex statute such as the *Income Tax Act*, it can be assumed that he will easily be able to familiarize himself with another more straightforward statute. The merit principle requires that the candidate be selected who, at the time of the competition, is best able to perform all the duties specified in the competition notice. [...]

(*Laberge*, above.)

[114] Sensitivity to diversity is often a very subtle thing. In a checklist for assessment purposes, any behaviour at all can be the subject of this question: "Tell employees that it is essential to be tolerant to people who have different ideas or approaches. Show that we can learn from everyone." However, the other described behaviour may be considered to be important factors in order to make

a team more aware. The fact that the Selection Board wrote a definition for diversity that lists several basic principles resulting from discrimination does not necessarily require a specific reference for the purposes of identifying each category of discrimination.

(6) Did the poor quality of the recordings of hearings before the Appeal Board constitute a breach of the principles of natural justice?

[115] The applicant maintains that if the Court finds that the absence of transcripts for testimonies, due to the poor quality of the mechanical recording, prevents it from showing the merits of its application for judicial review, this would be a breach of the principles of natural justice (Applicant's Factum at para 130).

[116] In this case, the Court does not find the evidence to be incomplete due to the poor recording quality. Both parties provided evidence that was necessary to show the merits of their respective points regarding the case. Therefore, there is no need to find that there is a breach in the principles of natural justice.

[117] Furthermore, even if some recordings are incomplete, the parties established the content of the hearing by other means, such as affidavits and documents (*Pugh v. Canada (Minister of Public Works and Government Services)*, 2006 FC 806, 295 F.T.R. 184, at para 30). In this case, there were several detailed affidavits and documents to establish a rather complete history of the case.

VIII. Conclusion

[118] Following the contexts and reasons discussed above, the six issues have been answered in the following manner:

(1) Contrary to the applicant's claims, the Appeal Board did not reverse the burden of proof and was satisfied by the proof submitted by the respondents.

(2) The screening of candidates was not done based on the merit principle because the Screening Board, as an instrument of the Commission, did not have the power to change the qualifications stated by the Department in the competition notice. In addition, even if the Screening Board had such a power, the changes were not reasonable because the Screening Board used temporal criteria counter to the merit principle. The absence of evidence for an expansion of the pool of candidates due to the additional qualifications does not in any way change the result.

(3) The Appeal Board erred by determining that some candidates received an unfair advantage. Even if there was an advantage, that does not necessarily mean that all advantages are unfair. In this case, the sole fact that there were candidates who had worked as acting supervisors at the CX-03 level for years and who were chosen does not constitute an unfair advantage. The questions asked of the candidates were reasonable and there is no evidence that the candidates who had worked as acting CX-03s had initially obtained their job by preference and in violation of the merit principle.

(4) The Selection Board had assessed the candidates in a reasonable manner as to their ability to communicate effectively orally. The assessment of candidates must not be done mathematically. The evidence showed that the Selection Board made assessments and provided appropriate reasonings. Even though the Appeal Board did not agree with the result, the Selection Board's decisions were reasonable and based on facts.

(5) The Appeal Board also erred by determining that the Selection Board did not assess sensitivity to diversity. The questions asked of the candidates assessed their abilities to

manage staff in situations where differences existed between employees. Some abilities can be inferred by questions. The training courses also confirmed that the concept of sensitivity to diversity is rather broad in order to include skills for handling differences between employees through their methods for acting and behaving.

(6) The poor quality of the recordings of hearings before the Appeal Board does not constitute a breach of the principles of natural justice.

JUDGMENT

THE COURT ORDERS that:

(1) the application for judicial review be partially allowed;

(2) the case be sent back to a differently constituted Appeal Board so that it can decide again in accordance with the reasons given by this Court;

(3) without costs in light of the divided outcome.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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