Date: 20090702

Docket: T-962-08

Citation: 2009 FC 684

Ottawa, Ontario, July 2, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JEAN LAVIGNE

Applicant

and

DEPUTY MINISTER OF JUSTICE

and

PUBLIC SERVICE COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] A review of the preamble to the *Public Service Employment Act*, 2003, c. 22, ss. 12 and 13 (PSEA), reveals Parliament's intent and aids in interpreting the concept of abuse of authority. One excerpt from the preamble demonstrates that the manager has broad discretion with regard to staffing:

Preamble **Recognizing that**	**Préambule** **Attendu :**
…	[…]
delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians; and	que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manoeuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;

[2] It is up to managers to establish essential qualifications; it is not for the Tribunal or the Court to determine the necessary essential qualifications for a position or substitute its assessment of candidates' qualifications for that of managers or their sub-delegated officials, the assessment board, in this case. The Tribunal's role is to assess whether there was an abuse of authority in the way in which the assessment board assessed the applications.

[3] Therefore, this Court does not have jurisdiction to determine whether "extensive experience" is adequately described by [TRANSLATION] "approximately 10 years of experience" and whether the applicant has extensive experience according to the essential qualification.

II. Judicial procedure

[4] This is an application for judicial review of a decision dated May 27, 2008, of the vice-chair of the Public Service Staffing Tribunal (Tribunal), dismissing the complaints of abuse of authority by the respondent under paragraph 77(1)(*a*) of the PSEA.

III. Facts

[5] In early August 2006, Henri Bédirian, the director of the Department of Justice Canada's Tax Litigation Directorate in Montréal, decided to fill the Senior Practitioner and Team Leader positions at the LA-2B group and level.

[6] Throughout August 2006, in consultation with Valérie Tardif, Team Leader, and Monique Renaud, Human Resources Advisor, Mr. Bédirian established a statement of merit criteria with the essential qualifications for these positions.

[7] Also in August 2006, while preparing the statement of merit criteria, Mr. Bédirian clarified the meaning of certain essential qualifications, as instructions for those in charge of screening, that is, the preliminary screening of applications on the basis of candidates' resumé cover letters. These clarifications of the essential qualifications are found in a document entitled [TRANSLATION] "Rationale of the Merit Criteria for the Appointment Selection".

[8] On September 18, 2006, the positions of Team Leader (LA-2B 02) (process number 2006-JUS-MTL-DAF-IA-130) and Senior Practitioner (LA-2B 02) (process number 2006-JUS-MTL-

DAF-IA-89) were posted on *Publiservice*. The closing date was October 2, 2006, for both positions, which are with the Department of Justice Canada's Tax Litigation Directorate in Montréal. The *Publiservice* advertisements stated that, to qualify for the two positions, candidates had to demonstrate that they met the essential qualifications.

[9] Through a combination of circumstances, that is, vacations and administrative reasons, these definitions were signed by Mr. Bédirian on or about September 22, 2006. However, the definitions were dated September 8, 2006, in an attempt to reflect approximately the actual moment they were created. This document describes how the essential qualifications stated on *Publiservice* would be used by the assessment board to assess applications for the positions to be staffed.

[10] For most of his 30-year career, Jean Lavigne worked in commercial litigation. He was in private practice from 1978 to 1981. Between 1981 and 1989, he worked for the Government of Quebec, as a litigator for the Ministère de la Justice; as the chief of appeals and legal affairs for the Ministère du Revenu, in Québec; and, lastly, as head of a service of the Direction des appels et oppositions, also at the Ministère du Revenu, in Montréal. Throughout these years, he also oversaw teams of lawyers. He dealt with tax law issues at the time, but they were incidental to his practice. He also appeared only before Quebec courts.

[11] From 1989 to the present, Mr. Lavigne has been a litigator for the Department of Justice Canada, first in the Civil Affairs Section until 2000 and then in the Tax Litigation Directorate, Quebec Regional Office, where he is currently working. He had varied experience in the

Department of Justice Canada and appeared before Quebec courts, the Federal Court and the Federal Court of Appeal of Canada in various areas of law. He was even seconded to the Royal Canadian Mounted Police (RCMP) full time for one year, from 2002 to 2003, and appeared before the adjudication board in charge of enforcing the RCMP Code of Conduct. Since 2003, he has worked on varied tax and employment insurance assessment cases.

[12] On September 18, 2006, Mr. Lavigne received the *Publiservice* advertisements for the Team Leader and Senior Practitioner positions. He submitted two applications on the deadline, October 2, 2006.

[13] The assessment board, made up of Valérie Tardif, Marie-Andrée Legault and Daniel Verdon, assessed Mr. Lavigne's application on October 27, 2006. In light of Mr. Lavigne's resumé, the assessment board concluded that he did not meet one of the essential qualifications. The e-mail informing him on October 31, 2006, that both of his applications had been screened out gave the following reason: [TRANSLATION] "The assessment board concluded that your experience does not meet the following essential merit criterion applied in the screening process: Extensive and recent experience in conducting complex and varied civil litigation before the Tax Court of Canada" (E-mail, October 31, 2006).

[14] Mr. Lavigne e-mailed Mr. Tardif, who sent him a document with the essential qualifications from the *Publiservice* advertisements in the left column and the selection criteria, which were not included in the advertisements, in the right column. This was the first time Mr. Lavigne saw the

information in the right column. It is useful to reproduce the portion of the document that is relevant to the complaints:

[TRANSLATION]

Document posted on *Publiservice*	Assessment board's selection criteria
Extensive and recent experience in conducting complex and varied civil litigation before the Tax Court of Canada.	"Extensive and recent experience" means approximately 10 years of experience in conducting cases of average complexity involving the various provisions of the *Income Tax Act* and the *Employment Insurance Act*, including at least two years of experience acquired during the last two years.
Very good experience in conducting litigation before the Federal Court of Appeal.	"Very good experience" means that the lawyer is familiar with the conduct of such cases, having had the opportunity during his or her years of experience to prepare briefs and argue employment insurance or contribution cases on appeal before the Federal Court of Appeal.

[15] Despite his misgivings, Mr. Lavigne agreed to have an informal discussion on December 15, 2006, with the assessment board and Ms. Renaud. Since Mr. Lavigne did not present new evidence demonstrating that he had [TRANSLATION] "approximately 10 years of experience in conducting cases of average complexity involving the various provisions of the *Income Tax Act*" or that a mistake had been made in the assessment of his applications, the assessment board reaffirmed its rejection of his applications.

[16] A pool of candidates who qualified for both appointment processes was established. The assessment board subsequently made appointments from the pool.

IV. Decision under review

[17] After being informed of the results of the competition and following the appointments, Mr. Lavigne filed seven complaints with the Tribunal on the basis that the assessment board had abused its authority in eliminating him from the competition.

[18] The Tribunal dismissed one of the seven complaints on the basis that it did not have jurisdiction to consider a complaint relating to an acting appointment of less than four months (*Lavigne v. Canada (Deputy Minister of Justice)*, 2007 PSST 45). The Tribunal consolidated the six complaints with respect to the decision.

[19] The Tribunal decided beforehand to proceed without holding an oral hearing. Mr. Lavigne claimed that, in doing so, the Tribunal breached the rules of natural justice by depriving him of the right to call witnesses and cross-examine the government's witnesses. Relying on the provisions of the PSEA and the fact that the Tribunal had enough information on file to decide the issues raised, the Tribunal rejected this submission of Mr. Lavigne.

[20] Mr. Lavigne submits that Mr. Bédirian improperly sub-delegated his delegation authority by authorizing the assessment board to apply selection criteria that were not included in the *Publiservice* advertisement. The board then used these selection criteria to eliminate Mr. Lavigne from the appointment processes.

[21] The Tribunal concluded that it was Mr. Bédirian and not the assessment board who prepared and approved the selection criteria. As manager, Mr. Bédirian had the authority to establish and define the essential qualifications. The selection criteria are clarifications of the essential qualifications. Therefore, Mr. Bédirian did not sub-delegate his duty to establish the merit criteria to the assessment board.

[22] Mr. Lavigne alleged that Mr. Bédirian abused his authority by dating the document [TRANSLATION] "Rationale of the Merit Criteria for the Appointment Selection" September 8, 2006, rather than the date on which he had signed it, September 22, 2006. Mr. Lavigne accused Mr. Bédirian and Ms. Renaud of having made misrepresentations that effectively added to the required essential qualifications; therefore, in Mr. Lavigne's opinion, this document was a forgery that should not have been used because of the additions made to the merit criteria already published in the *Publiservice* advertisement.

[23] Le Tribunal found that Mr. Bédirian's conduct was not a practice that should be followed: "His action admittedly falls short of the transparency expected in the public service, and certainly in the staffing system under the PSEA" (Decision at page 11). However, the Tribunal concluded that the inaccuracy of the date did not vitiate the entire process:

> [52] However, notwithstanding the complainant's allegation, the Tribunal cannot ignore this document simply because it was signed on September 22. The Tribunal finds that it is admissible and also finds that it was signed on September 22, that is, a few days after the merit criteria were posted on *Publiservice*. The candidates were, however, assessed after that date as the closing date for these appointment processes was October 2. The complainant failed to demonstrate how the signing of this document on September 22 in and of itself constituted an abuse of authority.

> [53] The Tribunal has examined all the circumstances of the complaint and cannot conclude that dating this document September 8 rather than September 22, the date on which the document was prepared rather than the date on which it was signed, is an abuse of authority.
>
> [54] Furthermore, whether the date is September 8 or 22, 2006, the fact remains that Mr. Bédirian was the author of the document and that he, as the sub-delegated manager, has the authority to establish the merit criteria and select candidates for the positions to be staffed. The entire process is not vitiated, as the complainant submits, merely because the date of the document is not accurate.

[24] Mr. Lavigne submitted that it was not necessary to define "extensive experience" as being about 10 years of experience and that his three years' experience was sufficient to meet the requirement. The Tribunal noted that it was not its role to assess whether Mr. Lavigne's three years' experience met the requirements of the positions to be staffed. The Tribunal explained that a manager, such as Mr. Bédirian, has the discretion to establish the qualifications for a position to be staffed and to choose the candidate who would be qualified to fill that position.

[25] Lastly, the Tribunal found that it was not mandatory to inform candidates of the selection criteria prior to candidates' submitting their applications, although it would have been preferable. The assessment board did not abuse its authority by eliminating Mr. Lavigne on the basis of selection criteria not included in the *Publiservice* advertisement.

V. Issues

[26] (1) Did the assessment board abuse its authority in rejecting Mr. Lavigne's applications on the basis of selection criteria that were not advertised?

(2) Did the Tribunal err in failing to acknowledge the values of fairness, respect and transparency set out in the preamble to the PSEA?

(3) Did the Tribunal err in imposing on the applicant an obligation to make inquiries prior to filing his applications, after the *Publiservice* advertisements were posted on September 18, 2006?

(4) Did the Tribunal err in conducting a paper hearing?

VI. Analysis

Mandate of the Tribunal

[27] The mandate of the Public Service Tribunal is defined at subsection 88(2) of the PSEA:

88. (1) …	**88.** (1) [...]
Mandate	Mission
(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.	(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles.

[28] Mr. Lavigne's complaint was considered under paragraph 77(1)(*a*) of the PSEA:

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not	77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci

appointed or proposed for appointment by reason of	une plainte selon laquelle elle n’a pas été nommée ou fait l’objet d’une proposition de nomination pour l’une ou l’autre des raisons suivantes:
(*a*) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);	*a*) abus de pouvoir de la part de la Commission ou de l’administrateur général dans l’exercice de leurs attributions respectives au titre du paragraphe 30(2);

[29] Subsection 30(2) of the PSEA provides the following:

30. (2) An appointment is made on the basis of merit when	**30.** (2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies:
(*a*) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and	*a*) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l’administrateur général pour le travail à accomplir;
(*b*) the Commission has regard to	*b*) la Commission prend en compte:
(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,	(i) toute qualification supplémentaire que l’administrateur général considère comme un atout pour le travail à accomplir ou pour l’administration, pour le présent ou l’avenir,
(ii) any current or	(ii) toute exigence

future operational requirements of the organization that may be identified by the deputy head, and	opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,
(iii) any current or future needs of the organization that may be identified by the deputy head.	(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

Standard of review

[30] Mr. Lavigne raises a number of issues that can all be subject to the reasonableness standard.

[31] The standard of review for the Tribunal's decisions concerning the procedures and approach to hearing the complaints is reasonableness. These are questions of mixed fact and law.

[32] The standard of review for the Tribunal's decisions that the assessment board acted wrongfully and abused its authority is reasonableness. These are questions of mixed fact and law, falling within the Tribunal's area of expertise.

[33] To identify the applicable standard of review, the Court must first ascertain whether the jurisprudence has already determined the standard of review applicable to this type of question. To date, the Court has not been required to rule on the issue (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 62).

[34] As the standard has not been established, the Court must proceed to a contextual analysis of the factors making it possible to identify the proper standard of review, including the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal (*Dunsmuir*, above, at paragraphs 62 and 64).

Privative clauses

[35] The PSEA contains the following privatives clauses:

102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.	**102.** (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre tribunal.
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint	(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action du Tribunal en ce qui touche une plainte.

[36] Without being a determinative factor in the standard of review, these clauses demonstrate Parliament's intent that a measure of deference be accorded to questions falling within the experience and expertise of the Tribunal. The rule of law requires that the constitutional role of superior courts be preserved to ensure that administrative bodies do not exceed their jurisdiction (*Dunsmuir*, above, at paragraph 52).

Purpose of the Tribunal

[37] The Tribunal must consider complaints filed by individuals who were not appointed or proposed for appointment by reason of an abuse of authority by the Public Service Commission (Commission) or the deputy head in the exercise of its or his or her authority under subsection 30(2) of the PSEA. Subsection 30(2) provides that an appointment is made on the basis of merit when, among other things, the Commission is satisfied that the person to be appointed meets the essential qualifications to perform the work. Taken together, these provisions require that the Tribunal ascertain whether the deputy head abused his or her authority in establishing the qualifications for, or requirements or needs of, the work to be performed or whether the Commission abused its authority in assessing the applicant on the basis of the merit criteria (subsections 30(2), 77(1) and 88(2) of the PSEA).

[38] If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate. However, the Tribunal may not order the Commission or deputy head to make an appointment or to conduct a new appointment process (sections 81 and 82 of the PSEA).

[39] Tribunal members are appointed by the Governor in Council. To be appointed, they must have knowledge of or experience in employment matters in the public sector (subsections 88(1) and (3) of the PSEA).

[40] A complaint shall be determined by a single member of the Tribunal, who shall proceed as informally and expeditiously as possible. The Tribunal has the power to summon and enforce the attendance of witnesses and compel them to give evidence on oath in the same manner and to the same extent as a superior court of record (sections 98 and 99 of the PSEA).

[41] In short, the Tribunal considers complaints of abuse of authority in internal appointment processes and may order any corrective action that it considers necessary. Its expertise lies in employment practices in the public sector, in recognizing wrongdoing and consequently imposing remedies. In these areas of expertise, the Tribunal's decisions are entitled to a degree of deference.

[42] Tribunal members may be called upon to interpret legislation or analyze case law in the course of their proceedings, but they are not necessarily lawyers. No deference is owed to their decisions on such issues.

Nature of the questions

[43] Whether the Tribunal correctly interpreted the term "abuse of authority" is a pure question of law involving the jurisdiction of the Tribunal. The Tribunal lacks jurisdiction to allow a complaint or grant a remedy if the subject under review does not amount in law to an abuse of authority.

[44] Administrative bodies must be correct in their determinations of true questions of jurisdiction or *vires*, questions of whether a tribunal has the authority to make the inquiry before it.

The standard of correctness must be maintained to promote just decisions and avoid inconsistent and unauthorized application of law (*Dunsmuir*, above, at paragraphs 50 and 59).

[45] The meaning of “abuse of authority” is just such a question of jurisdiction. Before considering the facts of a complaint, the Tribunal must understand the meaning of an “abuse of authority” in order to ask the right questions, conduct relevant inquiries and assess the conduct using a recognized legal standard. If the Tribunal does not correctly answer this question, it may exceed its jurisdiction.

[46] The meaning of “abuse of authority” is also a question of general law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the Tribunal. Even though the meaning of this term is well known in other contexts, as shown by the Tribunal Member’s use of enactments and decisions of other courts and tribunals, the Tribunal must correctly interpret the term in the context of the PSEA.

[47] Consequently, this factor clearly indicates that the standard of correctness applies when determining, as a matter of law, the meaning of “abuse of authority”.

[48] That said, the Tribunal’s decisions that the assessment board acted wrongfully and therefore abused its authority are questions of mixed fact and law, which are normally assessed against the standard of reasonableness.

[49] The Tribunal's decisions concerning its procedures are also questions of mixed fact and law. Among other things, the PSEA expressly allows the Tribunal to decide a complaint without holding an oral hearing. This right or authority is therefore clear, but, in exercising it, the Tribunal must consider the particular facts of each case. These questions should be subject to the reasonableness standard (sections 98 and 99 of the PSEA).

Tribunal's area of expertise

[50] To reiterate, the Tribunal members are experts in public sector employment, and not in the interpretation of legislation and the analysis of case law. These legal questions call for uniform and consistent answers, which is part of the mandate of courts of law.

Conclusion respecting the standard of review

[51] For the above reasons, all of the issues in dispute are subject to the standard of reasonableness.

(1) Did the assessment board abuse its authority in rejecting Mr. Lavigne's applications on the basis of selection criteria that were not advertised?

[52] Mr. Lavigne's principal argument is that the manager, Mr. Bédirian, and the assessment board abused their authority against him in assessing the essential qualification regarding extensive experience. He alleges that Mr. Bédirian abused his authority in the establishment of the selection criteria used by the assessment board to exclude him from the appointment process. He also alleged

that the assessment board abused its authority in its assessment of the essential qualifications pertaining to his application. To resolve these questions, it is necessary to first define “abuse of authority”. It is then necessary to analyze whether the actions of Mr. Bédirian and the assessment board constitute an abuse of authority.

(a) Definition of abuse of authority

[53] Abuse of authority is not defined in the PSEA. However, this term is essential to understanding the obligation of the Public Service Commission (Commission) under the PSEA, and the existence of abuse of authority warrants this Court’s intervention; therefore, the prohibition against abuse of authority is, nonetheless, a value that the PSEA strives to protect. The preamble expresses this intent by emphasizing the obligation of the public service to act with fairness, transparency and respect in its employment practices (Preamble to the PSEA).

[54] Paragraph 77(1)(*a*) of the PSEA provides for a mechanism allowing unsuccessful internal candidates to appeal an appointment to the Tribunal, following a finding of abuse of authority:

Grounds of complaint	**Motifs des plaintes**
77. (1**)** When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal’s regulations — make a complaint to the	**77. (**1**)** Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d’un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal,

Tribunal that he or she was not appointed or proposed for appointment by reason of	présenter à celui-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :
(*a*) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)	*a*) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

[55] Section 30 of the PSEA provides that appointments are based on the principle of merit when the person to be appointed meets the essential qualifications as established by the deputy head, who, in this case, is the deputy minister and his delegated managers:

Appointment on basis of merit	**Principes**
30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.	**30. (1)** Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.
Meaning of merit	**Définition du mérite**
(2) An appointment is made on the basis of merit when	(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :
(*a*) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official	*a*) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles —

language proficiency; and	établies par l'administrateur général pour le travail à accomplir;
(*b*) the Commission has regard to	*b*) la Commission prend en compte :
(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,	(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,
(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and	(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,
(iii) any current or future needs of the organization that may be identified by the deputy head.	(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

[56] When read as a whole, these provisions show that there is a connection between the abuse of authority and the Commission's responsibility to appoint a person who meets the essential qualifications; however, this connection is not clearly established, and an analysis of the PSEA is necessary to understand the obligations of the manager and the assessment board.

[57] A review of the preamble to the PSEA reveals Parliament's intention and aids in interpreting the concept of abuse of authority. One excerpt from the preamble demonstrates that the manager has broad discretion with regard to staffing:

Preamble **Recognizing that**	**Préambule** **Attendu :**
. . .	[…]
delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians; and	que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manoeuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;

[58] There is no such thing as absolute authority in administrative decisions. Justice Ivan Cleveland Rand of the Supreme Court of Canada underscored this principle in *Roncarelli v. Duplessis*, [1959] R.C.S. 121, 16 D.L.R. (2d) 689 at page 140:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

[59] Discretion in the exercise of power is held in check by the guiding principles of the PSEA, described as follows in the preamble:

Preamble **Recognizing that**	**Préambule** **Attendu :**
. . .	[…]
the Government of Canada is committed to a public service that embodies linguistic duality and that is characterized by fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues;	que le gouvernement du Canada souscrit au principe d'une fonction publique qui incarne la dualité linguistique et qui se distingue par ses pratiques d'emploi équitables et transparentes, le respect de ses employés, sa volonté réelle de dialogue et ses mécanismes de recours destinés à résoudre les questions touchant les nominations,

[60] In addition, subsection 2(4) of the PSEA provides some hints as to the definition of abuse of authority:

References to abuse of authority (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.	**Abus de pouvoir** (4) Il est entendu que, pour l'application de la présente loi, on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme personnel

[61] Therefore, a complaint of abuse of authority will be deemed founded where bad faith or personal favouritism was established. The principle of bad faith requires an element of intent.

[62] Abuse of authority requires more than error or omission, or even improper conduct.

(b) Did the manager abuse his authority in issuing selection criteria that were not advertised?

[63] Under paragraph 30(2)(*b*) of the PSEA, ". . . the Commission has regard to (i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future, (ii) any current or future operational requirements of the organization that may be identified by the deputy head, and (iii) any current or future needs of the organization that may be identified by the deputy head".

[64] These interpretations are confirmed by section 36 of the PSEA, which provides the Commission with discretion as to the assessment methods available to assess candidates:

Assessment methods	**Méthode d'évaluation**
36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(*a*) and subparagraph 30(2)(*b*)(i).	**36.** La Commission peut avoir recours à toute méthode d'évaluation — notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)*a*) et au sous-alinéa 30(2)*b*)(i).

[65] In this case, Mr. Lavigne alleged that the manager's discretion to determine and define the essential qualifications cannot extend to a discretion to not advertise those definitions. He alleged that Mr. Bédirian made substantial changes to the information presented in the *Publiservice* advertisements and, in so doing, unjustly caused him to be eliminated from the appointment process where otherwise he could have been accepted.

[66] Despite these allegations, it was within Mr. Bédirian's authority to create selection criteria, even though they were never published and were not finalized until after the advertisements were posted for the position. Paragraph 1.5 of the Commission's Guidance Series on assessment, selection and appointment describes the first assessment stage, namely the screening stage:

1.5 Screening	**1.5 Présélection**
. . . An initial screening process is often one of the early stages of this elimination process, before proceeding to a further assessment of the qualifications and applying any merit criteria. Screening usually involves an initial determination of the eligibility of applicants based on information provided in an application or available on file to determine which persons will be further considered.	[...] Un processus initial de présélection est souvent une des premières étapes de ce processus d'élimination de candidatures, avant de procéder à une évaluation exhaustive des qualifications et d'appliquer les critères de mérite. La présélection comprend habituellement une première décision quant à l'admissibilité des candidats et candidates fondée sur les renseignements fournis dans leur demande d'emploi ou disponibles dans le dossier afin d'identifier les candidats et candidates qui passeront à l'étape suivante.
It is important that any criteria that will be used for screening purposes be clearly identified in <u>advertisements</u> and information about inventories so that potential applicants can determine whether they are interested, and so that they are aware of what information they must provide in their application or inventory entry to demonstrate whether they	Il est important que tous les critères de mérite qui seront utilisés à des fins de présélection soient précisés de façon claire dans les <u>annonces</u> et les renseignements à propos des répertoires afin que les candidates et candidats éventuels puissent déterminer si le poste les intéresse et afin qu'ils ou elles connaissent les renseignements à inscrire sur

meet these criteria.	leur demande d’emploi ou leur fiche d’inscription à un répertoire dans le but de démontrer s’ils ou elles répondent à ces critères.
A person’s qualifications may be assessed on a meets/does not meet basis against the criteria that the manager has identified for screening purposes, such as education, experience and occupational certification.	Les qualifications d’une personne sont évaluées selon le mode de notation « satisfait» ou « ne satisfait pas » en fonction des critères établis par le ou la gestionnaires aux fins de présélection, comme les études, l’expérience et l’accréditation professionnelle.

[67] These propositions are well founded, especially when one considers that in this instance, the purpose of the selection criteria is to clarify the essential qualifications and aid the assessment board in its assessment of the applications.

[68] To avoid the appearance of unfairness, definitions must be established before the review of the job applications of the persons being considered for appointment. In the case at bar, the Tribunal found that the selection criteria were finalized, on September 8, 2006, even though the document was not signed until September 22, 2006. The e-mails submitted in the evidence support this conclusion. In any event, the selection criteria were established before the selection committee began using them to assess the applications. There is no evidence that the assessment board or Mr. Bédirian used the selection criteria for a suspect reason or that the selection criteria were designed to improperly exclude Mr. Lavigne. Mr. Bédirian was well within his authority in establishing the essential qualifications and the selection criteria.

(c) Did the assessment board abuse its authority in screening out Mr. Lavigne's applications on the basis that he does not have [TRANSLATION] "approximately 10 years" of experience?

[69] The selection criteria were already advertised such that the candidates could be given advance notice of the essential qualifications. The evidence showed that the assessment board assessed all of the candidates in the same way, according to the same selection criteria. The fact that Mr. Lavigne was not aware of the selection criteria did not prejudice any candidate.

[70] The creation of essential qualifications is entrusted to the manager; it is not for the Tribunal or the Court to establish the essential qualifications required for a position or to substitute its assessment of the candidates' qualifications for that of the manager or his or her sub-delegates, the assessment board in this case. The Tribunal's role consisted of examining whether there had been abuse of authority in the way in which the assessment board reviewed the applications.

[71] Therefore, this Court is without jurisdiction to answer the question of whether [TRANSLATION] "extensive . . . experience" is properly described by [TRANSLATION] "approximately 10 years of experience" and whether Mr. Lavigne has extensive experience according to the essential qualification.

[72] At the same time, the Court does have jurisdiction to decide whether the Tribunal committed more than an error, omission or improper conduct in making its decision. The question of whether an applicant did or did not have the required experience for the position to be staffed must essentially to be answered based on one or more facts (*De Micco v. Canada (Attorney General)*

(1996), 113 F.T.R. 182, 62 A.C.W.S. (3d) 1125 at para. 7). Under paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to succeed, Mr. Lavigne had to establish that the Tribunal based its decision "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". In this case, it is clear that the Tribunal's decision affirming the assessment board's decision that Mr. Lavigne did not meet the essential qualification of extensive experience was reasonably supported by the facts.

[73] Mr. Lavigne argued before the Tribunal that his experience of over 30 years of practice dedicated to commercial litigation, including three years of pleading before the Tax Court of Canada, is extensive experience according to the ordinary meaning of the words "extensive experience". In his submission to the Tribunal (Complainant Jean Lavigne's Arguments at p. 6), which, however, was not before the assessment board when it assessed his applications, Mr. Lavigne attempted to demonstrate that he has the required extensive experience:

> [TRANSLATION]
>
> How can it be explained that the experience originally sought had to have been gained "before the Tax Court of Canada" (left column), when no reference to the "Tax Court of Canada" is subsequently made (right column)? Does this mean that the four (4) years the Complainant spent at Revenu Québec should indeed be taken into consideration, by virtue of the fact that many of the provisions of the Taxation Act are drafted using language similar to the provisions of the Income Tax Act and are often interpreted in a similar manner, using the same precedents? Does it also mean that the two (2) or so years the Complainant spent managing a service of the Direction des oppositions at Revenu Québec should also be taken into consideration? For a mathematical total of nine (9) years, in addition to the six (6) years the Complainant spent co-heading four (4) class action cases in the matter of "tax shelters" within the meaning of the Income Tax Act. For a grand total of fifteen (15) years!

[74] In this case, the manager, Mr. Bédirian, is entitled to require [TRANSLATION] “approximately 10 years” of specific experience in handling cases at the Tax Court of Canada. Managers have good reasons to fill the vacant positions with the persons who are competent to meet the specific requirements of the duties of employment. Managers are not required to use similar essential qualifications for positions at the same level; they are merely required to establish the qualifications for the work to be performed. Mr. Bédirian defined the qualifications that he needed; therefore, under the PSEA, he may favour some requirements over others.

[75] In this case, although Mr. Lavigne had a long career in commercial litigation, he only practiced for three years in the field at issue in this staffing process, namely conducting litigation before the Tax Court of Canada. Although the Tax Court of Canada was not mentioned in the selection criteria, it is understood that the selection criteria are defined in relation to the essential qualifications, which require the experience expressly stated. At times, employers need a generalist; at other times, the situation demands a specialist with in-depth knowledge developed over many years. The manager chose the latter.

[76] Mr. Lavigne also alleged that the assessment board acted unfairly towards him because it did qualify two candidates who each have eight (8) years of experience in tax litigation of average complexity. According to Mr. Lavigne, eight years is not [TRANSLATION] “10 years” and, therefore, the assessment board acted in a capricious manner.

[77] The French word “environ” (approximately) is important in this context. While we may agree that the word “approximately” lacks a certain precision and may be considered to be vague, this flexibility may well serve the needs of the appointment process.

[78] In *Anderson v. Canada (Customs and Revenue Agency)*, 2003 FCT 667, 234 F.T.R. 227, which was decided under the former PSEA but remains applicable in this case, the word “approximately” was used in the advertisement for the position to qualify the period of experience required. Justice Eleanor Dawson explained that the decision-maker cannot ignore the quantitative requirement even though there is some flexibility:

> [69] While the term “approximately” used in the job posting provides the decision-maker with some discretion to include persons whose experience may have taken place just outside the specified time boundaries, it does not allow the decision-maker to ignore the requirement for recent and significant experience. The decision-maker is not allowed to look instead at candidate’s total years of service, or to see how a candidate could otherwise compensate for the lack of full-time performance of collections duties for approximately two consecutive years within approximately the last three years.
>
> [70] Further, while in some cases it may be unclear as to where the boundaries of the discretion of a selection board lie, I am satisfied that it was not unreasonable for Mr. Charles to conclude at the Individual Feedback session that the discretion of the selection board did not extend to reducing by half the recent experience requirement. The selection board would, in effect, have done this if it accepted as recent collections experience Mr. Anderson’s experience obtained in the 13 months from April 2000 to May 2001.

[79] In the case at bar, it was open to the Tribunal to find that three (3) years did not fulfill the requirement of [TRANSLATION] “approximately 10 years” of experience, but that eight (8) years did. A candidate assessment checklist was submitted in the evidence before the Tribunal. This checklist showed that two of the thirteen (13) candidates were screened out for not having approximately 10 years of experience. One of them was Mr. Lavigne, who had three (3) years of experience, and the

other eliminated candidate had 2.5 years of experience. One candidate was screened out for not meeting the second essential qualification. In the end, nine candidates were selected at the screening stage. Among the selected candidates, ten (10) had between 12 and 20 years of experience, and two had eight (8) years of experience.

[80] Considering that most of the candidates had more than [TRANSLATION] “10 years of experience”, the assessment board acted in a reasonable manner, consistent with the room it had to manoeuvre, in deciding that the two candidates with eight years of experience met the essential qualifications. The assessment board did not have the authority to reduce the requirement of extensive experience, which the manager defined as [TRANSLATION] “approximately 10 years of experience”. Had the assessment board selected the two candidates with three years of experience or less, it would have disregarded the requirement for extensive experience established by the manager.

(d) Finding on the first issue

[81] The meaning of “abuse of authority” requires that there be more than mere errors, omissions or improper conduct. Mr. Bédirian has considerable discretion to issue the selection criteria without publishing them. The selection criteria were created to help the assessment board identify the applications that met the essential qualifications. The applicant has the burden of presenting the evidence and making convincing arguments, on a balance of probabilities, to succeed. Mr. Lavigne did not submit evidence that shows that the selection criteria were used in a manner indicating that Mr. Bédirian abused his authority within the meaning of the PSEA.

[82] Although it is preferable to provide all of the details on positions to be staffed, the advertisements were clear enough in specifying that extensive experience in conducting litigation before the Tax Court of Canada is an essential qualification. The facts support that it was reasonable for the assessment board to find that Mr. Lavigne did not meet that essential qualification.

[83] Mr. Lavigne refused to accept the fact that he lacks the essential qualification regarding extensive experience in conducting complex and varied civil litigation before the Tax Court of Canada. In spite of the explanations given in the selection criteria, the informal discussion held with the assessment board members and the information provided by the assessment board, Mr. Lavigne persists in believing that his 30 years of experience in commercial litigation are equivalent and that the appointment process is aimed at excluding him.

[84] Despite Mr. Lavigne's frustration, he did not produce any evidence that would allow the Court to find a complaint of abuse of authority to be well founded.

(2) Did the Tribunal err in failing to acknowledge the values of fairness, respect and transparency set out in the preamble to the PSEA?

[85] Mr. Lavigne argued that the Tribunal failed to follow through on the obligation imposed by Parliament in the preamble to the PSEA: that is, according to him, to implement and conduct the internal appointment process in accordance with the values of transparency, fairness and respect.

[86] It must be noted that the new PSEA gave managers more discretion to choose, not only the most qualified person, as did the former PSEA, but the person who is the best fit for the position to be staffed. Under the former PSEA, an appointment process could be challenged if the most qualified person or persons were not chosen. The former system no longer exits. Parliament has recognized that it is not necessarily the person who meets the requirements for a position who is necessarily the best fit for the position to be staffed, but rather specified, at paragraph 30(2)(*b*) of the PSEA, other bases for assessment, namely additional qualifications considered to be an asset for the work to be performed, that is, the current or future needs and operational requirements. To give effect to this provision, it must be interpreted as giving the manager more latitude to choose the candidate having the best combination of attributes desired for the position to be staffed.

[87] Transparency is safeguarded by the prohibition against abuse of authority, and nothing prevents an unsuccessful candidate from lodging a complaint concerning abuse of authority by a manager or the assessment board.

(3) Did the Tribunal err in imposing on the applicant an obligation to make inquiries prior to filing his applications, after the *Publiservice* advertisements were posted on September 18, 2006?

[88] The Tribunal decided that the manager did not abuse his authority in issuing the selection criteria and publishing them after the *Publiservice* advertisements had been posted. After having made that decision on the basis of the principles explained above, the Tribunal added that Mr. Lavigne had the opportunity to ask for more information:

> [84] The Tribunal notes that the *Publiservice* posting included the contact information for Ms. Renaud, the Human Resources Advisor, who could be contacted

> for general information. There was nothing preventing the complainant from contacting her to obtain additional information about what constituted extensive and recent experience for these positions.

[89] In this case, the Tribunal did not impose any obligation by means of this paragraph. Rather, the Tribunal reiterated the Commission's existing policy as stated in the Guide to Implementing the Advertising in the Appointment Process Policy, Section VI. Policy Requirements:

Deputy Heads must provide further information upon request	**Les administrateurs généraux et les administratrices générales doivent fournir d'autres renseignements sur demande**
In support of the guiding values of fairness, transparency, access and representativeness, further information could include:	À l'appui des valeurs directrices que sont la justice, la transparence, l'accessibilité et la représentativité, l'information additionnelle pourrait comprendre :
• the requirement to have the merit criteria available upon request, so that persons can understand the requirements of the job and have the necessary information regarding the criteria against which they will be assessed. This allows the person to make a decision whether to self-screen or pursue the appointment opportunity; and	• l'exigence que les critères de mérite soient fournis sur demande, de sorte que les candidats et les candidates puissent comprendre les exigences de l'emploi et savoir sur quoi portera l'évaluation. Cela permet aux personnes de prendre une décision, à savoir, poser leur candidature ou pas;
• the name of the person or organization to whom questions about the appointment process may be directed, which helps potential applicants seek more information to make a	• le nom de la personne ou de l'organisation à qui faire part de toute question concernant le processus de nomination, ce qui peut aider les candidates et

decision, discuss access and/or accommodation requirements, seek feedback after elimination from the process and seek information on the complaint process.	candidats éventuels à obtenir plus d'information pour prendre une décision, discuter des exigences en matière d'accès ou des mesures d'adaptation, demander de la rétroaction lorsque leur candidature n'a pas été retenue et de l'information sur le processus de plainte.

[90] This policy requirement aims for more information about the selection criteria to be provided on request so that the candidates can understand the requirements of the job and have the necessary information regarding the criteria against which they will be assessed. The language of the paragraph quoted from the decision, particularly the word "notes", indicates that the Tribunal took note of the fact that the selection criteria are not hidden and that there was no bad faith or lack of transparency. Furthermore, reading the decision as a whole, it is clear that the Tribunal did not base its decision regarding abuse of authority on the paragraph quoted. Nothing in that paragraph imposes an obligation to make prior inquiries for further information after the posting of the advertisements.

(4) Did the Tribunal err in conducting a paper hearing?

[91] The PSEA provisions are clear and deal with this issue. In the section on the powers of the Tribunal, subsection 99(3) of the PSEA clearly states that the Tribunal has the discretion to decide a complaint without holding an oral hearing:

Decision without oral hearing	**Décision sans audience**
99.	**99.**
. . .	[…]
(3) The Tribunal may decide a complaint without holding an oral hearing.	(3) Le Tribunal peut statuer sur une plainte sans tenir d'audience.

[92] For subsection 99(3) to have any meaning, it must be interpreted as confirming that the Tribunal is not obligated to hold hearings in all cases. The other provisions of the PSEA support the ordinary meaning of this provision. For example, subsection 98(1) of the PSEA highlights the value of efficiency in dispute resolution:

Hearing by single member	**Instruction par un membre unique**
98. (1) A complaint shall be determined by a single member of the Tribunal, who shall proceed as informally and expeditiously as possible.	**98.** (1) Les plaintes sont instruites par un membre agissant seul qui procède, dans la mesure du possible, sans formalisme et avec célérité.
. . .	[…]

[93] Furthermore, the Tribunal has considerable discretion to accept evidence:

Powers of Tribunal	**Pouvoirs**
99. (1) The Tribunal has, in relation to a complaint, the power to	**99.** (1) Le Tribunal peut, pour l'instruction d'une plainte :
. . .	[…]
(*d*) accept any evidence, whether admissible in a court of law or not;	d) accepter des éléments de preuve, qu'ils soient admissibles ou non en justice;
. . .	[…]

[94] In the circumstances of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada found that there was no obligation to hold a hearing or an interview before the decision was issued. In its decision, the Tribunal quoted the earlier decision concerning the same complainant, *Lavigne*, below, in which the same argument by Mr. Lavigne was dismissed:

> [15] . . . Generally speaking, deciding a motion or complaint on the merits based on the written documentation is more efficient, reduces the waiting time for a decision and makes better use of the Tribunal's limited resources. The Tribunal is responsible for deciding whether to hold an oral hearing, and the Tribunal makes an informed decision on the basis of all the circumstances of a case. The parties are still given an opportunity to be heard, albeit in writing.

[95] In *Lavigne*, above, the Tribunal acknowledged that there are instances when the Tribunal cannot decide an issue without holding an oral hearing:

> [21] . . . witnesses need to be heard because credibility is at issue and oral evidence is necessary. . . . In other instances, the evidence must be heard because the facts are too complicated or are being challenged, or the evidence seems contradictory. . . .

[96] In the case now before me, the Tribunal found that despite the fact that an oral hearing was not held, Mr. Lavigne had every opportunity to be heard:

> [26] When the Tribunal chose to decide these complaints without an oral hearing, it had a considerable amount of information on file, such as the complaint, the complainant's allegations, which amount to several pages, and the respondent's reply. As well, the parties exchanged an impressive number of documents (about 90), including numerous e-mails, of which the Tribunal requested and received copies. There was admittedly duplication, but the Tribunal nevertheless had an accurate idea of the reason for the complaint, together with the positions of the parties, and had all the information needed to proceed without an oral hearing.
>
> [27] The complainant submits that he could have called witnesses and cross-examined the respondent's witnesses. He provided examples of potential testimony. However, the Tribunal finds that it is not necessary to hear witnesses in order to decide the complaints since the main issue is the application of the merit criterion rationale used to eliminate the complainant from the appointment processes.

[97] The Tribunal gave Mr. Lavigne every opportunity to submit his written arguments and set out the facts that, in his opinion, showed an abuse of authority with regard to the fact that he was not proposed for appointment. Furthermore, the facts underlying the motion are not challenged. This is not a case requiring oral evidence or arguments. Given that the right to be heard is a right to have an opportunity to state one's factual issues and arguments, this Court is of the opinion that the Tribunal had enough information to make its decision without holding an oral hearing. Based on the particular facts of this case, the Tribunal did not err in exercising its discretion regarding whether or not to hold an oral hearing.

VII. Conclusion

[98] The Tribunal did not err in law in its decision.

[99] For all of these reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed, but without costs (given that the legislation is relatively recent).

"Michel M.J. Shore"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jean Lavigne	FOR THE APPLICANT
Martin Desmeules	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

JEAN LAVIGNE Westmount, Quebec	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS