Federal Court Cour fédérale

**Date: 20160225**

**Docket: T-582-15**

**Citation: 2016 FC 243**

**Toronto, Ontario, February 25, 2016**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**KENT DANIEL GLOWINSKI**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**
**(PUBLIC SERVICE COMMISSION)**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision dated April 9, 2015, by the Director of the Investigations Directorate of the Public Service Commission [PSC], to proceed with an investigation under section 66 of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [PSEA] into an external appointment process conducted by the Department of Aboriginal Affairs and Northern Development Canada [DAANDC], as it was then known.

[2] For the reasons set out below, the application for judicial review is dismissed.

## I. Background

[3] In January 2014, the DAANDC launched external staffing process 14-IAN-EA-BA-HQ-CS-145488 ("the appointment process") to fill three (3) Analyst positions in the Access to Information and Privacy Directorate at the DAANDC.

[4] The Applicant was the Director of the Directorate and hiring manager for the appointment process at the relevant time.

[5] In February 2014, candidates' applications were screened through the initial automated screening process, the Public Service Resourcing System. Some candidates were screened out because they did not meet essential education, experience or language requirements.

[6] Eight (8) of the screened-out candidates were subsequently screened back into the appointment process after a manual review of their applications determined that they met the experience qualifications. Four (4) of the eight (8) candidates were subsequently found to be qualified in the appointment process and were placed in a pool of qualified candidates. These candidates were Mr. D'Aoust-Plouffe, Mr. Wanless, Ms. Wallace and Mr. Young.

[7] Valid from May 27, 2014 until May 27, 2015, the pool of qualified candidates was to be used to appoint candidates to the Analyst positions within DAANDC. The pool of candidates was also available to other government departments, which could appoint candidates to positions

within their organizations. Ms. Wallace was appointed from this pool to a position in another government department. The three (3) other candidates remained in the pool.

[8] A fifth candidate, Mr. Sharma, was also included in the pool of qualified candidates and was proposed for appointment to the position of Analyst PM-4 within the DAANDC once his security clearance was granted. Mr. Sharma had been employed with the DAANDC from November 2013 to April 2014 through the Federal Student Work Experience Program. He was thereafter hired as a casual employee from May 2014 to September 2014 pending his appointment.

[9] On July 16, 2014, a manager in the Human Resources Branch at the DAANDC referred information to the PSC regarding the inclusion of Mr. Sharma in the pool of qualified candidates despite his failure to meet the essential education requirements at the time of his qualification into the pool. On July 31, 2014, on the basis of the information it had received, the PSC concluded that an investigation was warranted. As an affected person, Mr. Sharma was advised of the investigation by letter dated August 5, 2014. On August 22, 2014, Mr. Sharma was removed from the pool of candidates, thus making him ineligible for the proposed appointment.

[10] Following a review of the appointment process, on December 16, 2014, the PSC determined that four (4) other candidates were affected: Ms. Wallace, Mr. D'Aoust-Plouffe, Mr. Young and Mr. Wanless. The four (4) candidates were notified of the investigation by letter on December 22, 2014.

[11] Each time a letter was sent to an affected party in the course of the investigation, letters were also sent to the Applicant and to the Deputy Minister of DAANDC to advise them regarding the course of the investigation.

[12] By letter dated February 9, 2015, the Applicant sent the PSC his representations regarding the suitability of Mr. Sharma and the appropriateness of his inclusion in the qualified pool.

[13] On February 25, 2015, the Applicant wrote another letter to the PSC requesting that it withdraw its investigation regarding Mr. Sharma. He argued that Mr. Sharma's removal from the pool of candidates in August 2014 had the effect of voiding the PSC's jurisdiction as there was no longer an appointment or proposed appointment. The following day, on February 26, 2015, the Applicant sent a third letter to the PSC with fourteen (14) pages of representations on the investigation as it related to the four (4) candidates other than Mr. Sharma. The Applicant requested that the PSC withdraw its investigations relating to Mr. D'Aoust-Plouffe, Mr. Wanless and Mr. Young. He argued in essence that the PSC could only initiate an investigation pursuant to section 66 of the PSEA where there is an actual appointment or proposed appointment at issue. Both Mr. D'Aoust-Plouffe and Mr. Young were not appointed from the pool and Mr. Wanless withdrew from the appointment process. The Applicant also argued that the screening process was reasonable and that there had been no favouritism in relation to any of the candidates.

[14] On April 9, 2015, the Director of the PSC's Investigations Directorate responded by letter to the Applicant's representations. The Director noted that section 66 of PSEA gave the PSC the authority to investigate external appointment processes. She also informed the Applicant that his issues "are premature as the investigator has not completed her investigation to determine if there was an error, an omission or improper conduct, and if so, has not yet determined if it affected the selection of the person appointed or proposed for appointment."

[15] On April 15, 2015, the Applicant filed his Notice of Application for judicial review. The Applicant requests an order dismissing the PSC investigations on the basis that the PSC lacks jurisdiction to commence them or alternatively, because they are now moot. He is also of the view that the application is not premature. Finally, he seeks an order extending the time to file his Notice of Application, if the Court considers it as filed late.

[16] The Respondent argues that the Notice of Application for judicial review is premature as a decision to begin an investigation into an appointment process is no more than an interlocutory step in an administrative investigation process and as such, it is not reviewable under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Alternatively, the Respondent also submits that if the Notice of Application is not premature, it is out of time as it was filed more than eight (8) months after the Applicant was first notified of the investigation. Finally, the Respondent disputes the Applicant's assertion that the PSC lacks jurisdiction to investigate.

## II. Relevant legislation

[17] Section 66 of the PSEA states:

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| 66. The Commission may investigate any external appointment process and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may | 66. La Commission peut mener une enquête sur tout processus de nomination externe; si elle est convaincue que la nomination ou la proposition de nomination n'a pas été fondée sur le mérite ou qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, la Commission peut : |
| (a) revoke the appointment or not make the appointment, as the case may be; and | a) révoquer la nomination ou ne pas faire la nomination, selon le cas; |
| (b) take any corrective action that it considers appropriate. | b) prendre les mesures correctives qu'elle estime indiquées. |

III. Analysis

[18] I agree with the Respondent that the determinative issue in this matter is the prematurity of the application for judicial review.

[19] It is trite law that absent exceptional circumstances, parties dissatisfied with some matter arising in an ongoing administrative process must exhaust their rights and remedies within that administrative process. They can only pursue judicial review when the administrative process is completed or when the administrative process affords no effective remedy. (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at paras 4, 28, 30-32, [2011] 2 FCR 332 [*C.B. Powell*]). The principle of judicial non-interference with ongoing administrative processes has been endorsed by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova*

*Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35 to 38, [2012] SCJ No 10 (QL) [*Halifax*].

[20] Relying on earlier case law (*Fairmont Hotels Inc v Canada (Corporations)*, 2007 FC 95, 308 FTR 163; *Howe v Institute of Chartered Accountants of Ontario*, (1994) 19 OR (3d) 483 (ON CA); and, *Pfeiffer v Canada (Superintendent of Bankruptcy)*, [1996] 3 FCR 584, 116 FTR 173), the Applicant submits that judicial review applications which go to the core jurisdiction of whether or not an investigation should have been started in the first place are an exception to the rule against premature judicial review applications. He argues that the issue of improper exercise of jurisdiction is a "special circumstance" deserving early intervention by the Court.

[21] The determination of whether the presence of a jurisdictional issue constitutes "exceptional circumstances" justifying early intervention by the courts was examined in detail in *C.B. Powell* (paras 39-46). The Federal Court of Appeal stated that very few circumstances qualify as "exceptional" and that the threshold is very high. It noted that in the past, courts interfered with preliminary or interlocutory rulings of administrative bodies by labelling the rulings as "preliminary questions" that went to "jurisdiction". Relying on the decisions of the Supreme Court of Canada in *C.U.P.E. v N.B. Liquor Corporation*, [1979] 2 SCR 227 at page 233, and in *Dunsmuir v New-Brunswic*k, 2008 SCC 9 at para 43, [2008] 1 SCR 19, the Federal Court of Appeal reiterated that "the use of the label "jurisdiction" to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate". The Federal Court of Appeal's rejection of the "preliminary question of jurisdiction" was also upheld by the Supreme Court of Canada in the *Halifax* decision, at para 38.

[22] In the case at hand, the decision of the PSC to investigate the appointment process is not amenable to judicial review since it is not a final decision. It does not affect the Applicant's legal rights, impose legal obligations or cause the Applicant prejudicial effects (*Air Canada v Toronto Port Authority Et Al*, 2011 FCA 347 at paras 29, 42, [2013] 3 FCR 605). The April 9, 2015 letter from the Director of the Investigations Directorate explicitly states that the issues raised by the Applicant are premature as the investigator has not completed her investigation. Once the investigation is complete, the Applicant will then be in a better position to assess whether he wishes to challenge the decision before this Court. The fact that the investigation may still conclude that there was no error, omission or improper conduct in the appointment process demonstrates why this Court cannot grant the review requested by the Applicant. If nothing arises from the investigation, the Applicant will likely not wish to pursue this matter any further and resort to the court would be unnecessary.

[23] The Applicant argues that it "would not be logical or economical for the Commission to continue with potentially *ultra vires* investigations for the next several years when the jurisdiction to commence them in the first place can be decided immediately". He submits that PSC "investigations are intrusive and time-consuming" and that it is "in the interests of justice to avoid unnecessary investigations, if possible". While the Applicant's argument is economically compelling, I do not find it to be determinative since the same argument can be made in most cases raising preliminary jurisdictional challenges. Moreover, the Applicant has not adduced any evidence to support his submission that the investigation will be intrusive and time-consuming.

[24] In my view, the interests of justice would be better served if the Court awaits the outcome of the investigation before intervening. Only then will it have the benefit of a full record upon which it can examine the issues raised by the Applicant, including the PSC's interpretation of section 66 of the PSEA.

[25] I conclude that there are no exceptional circumstances in the present case that would warrant this Court's early intervention. The application for judicial review shall accordingly be dismissed.

[26] In light of the above conclusion, it is not necessary for me to address the other arguments raised by the Respondent, namely that the application for judicial review is moot or out of time.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed with costs to the Respondent in the amount of $2,000.00.

"Sylvie E. Roussel"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-582-15 |
| **STYLE OF CAUSE:** | KENT DANIEL GLOWINSKI<br>v<br>ATTORNEY GENERAL OF CANADA (PUBLIC SERVICE COMMISSION) |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 15, 2015 |
| **JUDGMENT AND REASONS:** | ROUSSEL J. |
| **DATED:** | FEBRUARY 25, 2016 |

**APPEARANCES:**

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| Kent Daniel Glowinski | FOR THE APPLICANT<br>(ON HIS OWN BEHALF) |
| Marie-Josée Montreuil | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| William F. Pentney<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |