Date: 20081128

Docket: T-695-07

Citation: 2008 FC 1296

Ottawa, Ontario, November 28, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GASTON ROY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Preliminary

[1] The purpose of an inquiry before an appeal board is to take fully into account all of the facts and contextual realities of the matter in order to determine whether the merit principle has been observed as set out in *Canada (Attorney General) v. Bates*, [1997] 3 F.C. 132, 129 F.T.R. 61:

> [37] Second, to characterize the Rosenbaum decision as "mucking around with the merit principle" leads me to say two things: it depends on your perspective as to whether an appeal decision is interference or correction; and to adopt the idea that the appeal process is not corrective is to narrow its function to the point of making it useless.

> [38] In the context of this case, I find that the purpose of an appeal is to expose and correct errors in the application of standards which have the effect of undermining the principle of selection by merit being that the best qualified and most suitable candidate be appointed. That is, to expose and correct errors is not to attack merit, but rather to protect it as a concept.

[2] Thus, an appeal board must allow the appeal if the irregularities in the selection process are such that the result might have been different (*Stout v. Canada (Public Service Commission, Appeals Branch)* (1983), 51 N.R. 68, 24 A.C.W.S. (2d) 74 (F.C.A.) at para. 3).

II. Legal proceeding

[3] 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 (Commission), dated March 5, 2007, allowing the appeal brought by the respondent, Gaston Roy, under section 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 [repealed, 2003, c. 22, s. 284] (PSEA). (The new PSEA came into force on December 31, 2005.)

III. Facts

[4] On November 10, 2004, the CSC posted a notice of competition for 60 correctional supervisor positions at the CX-03 level, with 12 competition numbers, one for each institution in the Quebec Region.

[5] Under the title “Qualifications and Screening Criteria”, and the subtitle “Experience”, the notice of competition provided that candidates had to have the following experience: “Extensive

experience in the application of a range of correctional operations duties including escorts and inmate case management".

[6] On the closing date of the competition, that is, November 24, 2004, 191 candidates had applied for the position, indicating in their application the competition number or numbers under which they wished to apply.

[7] These applications were assessed as part of a process conducted by the Screening Board and the Selection Board, both of which consisted of members Serge Trouillard, Manon Bisson and André Courtemanche, all of whom had several years' experience with the CSC.

[8] On December 8, 2004, the Screening Board defined the qualifications set out in the notice of competition as follows:

> [TRANSLATION]
> It has been agreed that candidates must demonstrate clearly and precisely that they have the following experience:
>
> Five years' cumulative experience in carrying out correctional operations duties at the CSC and/or in a provincial or territorial correctional service and/or in a community correctional centre. In addition, but included in the period of five years, two years' cumulative experience in a CX-02 and/or PW and/or PO position. (Acting assignments, indeterminate appointments and work terms will be considered.)

[9] Further to this definition of the qualifications, the Screening Board screened out 35 applications, of which 17 were screened out because the candidates did not possess the qualifications indicated in the notice of competition and 18 because the candidates had not clearly

demonstrated that they possessed the qualifications. On December 23, 2004, the candidates not selected at this stage were informed that they had been screened out.

[10] The 156 screened-in candidates were invited to sit the Knowledge Test. After the Knowledge Test and the Abilities and Skills Assessment, 41 candidates were found to be qualified in this process. On July 15, 2005, the applicant notified all of the candidates of the results of the competition, forwarding to them the eligibility lists established.

IV. The impugned decision

[11] After being informed of the results of the competition, Mr. Roy brought an appeal with the Appeal Board. Mr. Roy submitted three allegations, all of which were allowed by the Appeal Board. The third allegation, relevant to the case at bar, was that "[t]he Selection Board improperly assessed the appellant's application and should, therefore, have screened him in" (Decision at paragraph 16).

[12] The Appeal Board allowed Mr. Roy's third allegation on the ground that, instead of focusing on the respondent's experience, the Screening Board had assessed the candidates' experience quantitatively, not qualitatively. The definition of qualifications established by the Screening Board provided that the term "extensive experience" required at least two years' experience as a primary worker (PW) or as a parole officer (PO) or in a CX-02 position. Temporal criteria were applied quantitatively and without a check of whether the candidates actually had the qualifications. The duties in question were generally those of the positions used as a basis.

[13] According to the Appeal Board, Mr. Roy's curriculum vitae showed that he had worked for the CSC since 1986, that he had been an AC-01 from 1986 to 1990, and that he had done case management between 1988 and 1990. At the time of the competition in 2004, his current classification was at the AC-02 level. He therefore demonstrated that he had a certain amount of experience in case management, but this was not assessed on the ground that Mr. Roy's application contained contradictory information and that his application form indicated that he had been an AC-02 since 1986.

[14] The Appeal Board found that by restricting its assessment to the duration of service in a position on the basis of its specific group and level rather than the extent of the experience acquired, the Screening Board had violated the merit principle (Decision at paragraph 64). Consequently, the contradiction between Mr. Roy's curriculum vitae and his application form as to the number of years during which he worked as an AC-02 was sufficient to state that Mr. Roy did not have the required experience as described in the qualifications. This contradiction was ultimately the reason why the respondent was screened out.

V. The relevant provisions

[15] The principle underlying all appointments in the public service is the merit principle, in accordance with subsection 10(1) of the PSEA:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as	**10.** (1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une

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.	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.

[16] Section 12 of the PSEA allows the Commission to establish standards for selection on the basis of which the candidates will be assessed in relation to the requirements established by the department, which, in the case at bar, is the 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 à 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.

[17] The Commission may review the candidates' qualifications established by the department under section 12.1 of the PSEA:

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.

[18] Section 21 of the PSEA provides a mechanism whereby unsuccessful candidates can appeal against an appointment to an appeal board established by the Commission:

21. (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.	**21.** (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

[19] The applicant is raising four issues:

(1) What is the standard of review applicable to the Appeal Board’s decision?

(2) What is the power to intervene of an appeal board hearing an appeal under section 21 of the PSEA?

(3) What is the burden of proof of an appellant in an appeal brought under section 21 of the PSEA?

(4) Was the Appeal Board justified in allowing Mr. Roy's claim that the Screening Board had improperly assessed his application?

VII. Analysis

(1) What is the standard of review applicable to the Appeal Board's decision?

[20] According to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the process of judicial review involves two steps. First, the reviewing court ascertains whether the case law has already determined the degree of deference to be accorded with regard to a particular category of question.

[21] In this case, the case law has determined the standard of review for questions concerning the selection process in the public service. In its 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 an appeal board's decision on questions relating to the selection process is reasonableness. This standard was refined in a few recent decisions where the Federal Court of Appeal applied the reasonableness standard to questions of mixed fact and law, such as whether an appeal board's conclusions were supported by the 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).

[22] The burden of proof in a proceeding consists of the following elements: the jurisdiction of an appeal board, issues of procedural fairness and natural justice, and the choice and application of the appropriate standard of review by the administrative tribunal based on questions of law (*Clegg*, *McGregor* and *Davies, supra*). The Federal Court of Appeal found that questions exclusively of law must be reviewed on the basis of correctness.

(2) What is the power to intervene of an appeal board hearing an appeal under section 21 of the PSEA?

[23] An appeal board has a different function from a selection board. Its duty does not consist in reassessing the candidates, but holding an inquiry to determine whether the selection was made according to merit:

> [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.))

[24] In *Blagdon v. Canada (Public Service Commission, Appeals Board*), [1976] 1 F.C. 615, [1975] F.C.J. No. 162 (QL), Mr. Justice Arthur L. Thurlow wrote the following:

> [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....

[25] Following *Blagdon*, *supra*, Mr. Justice Marshall Rothstein ruled as follows in *Scarizzi v. Marinaki* (1994), 87 F.T.R. 66, [1994] F.C.J. No. 1881 (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.

An appeal board does not have the right to review the reasonableness of the assessment of a selection board if it is not without merit. Rothstein J. applied this reasoning 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*, *supra*, at para. 8).

[26] Considering that the standard of review to be applied to a decision of an appeal board on questions concerning the selection process is reasonableness and not correctness, an appeal board

that substitutes its opinion for that of a selection board in applying the correctness standard is making an error of law.

[27] As for its jurisdiction, an appeal board should be only concerned with the actions of the Commission in selecting from among the candidates who have the qualifications required by the employer-department the one who is the most meritorious (*Canada (Attorney General) v. Perera* (2000), 189 D.L.R. (4th) 519, 256 N.R. 57 at para. 20, leave to appeal to S.C.C. dismissed, [2000] S.C.C.A. No. 434). An appeal board that decides on the qualifications of candidates exceeds its jurisdiction, and is thereby committing an error of law that is reviewable by this Court on the standard of correctness.

(3) What is the burden of proof of an appellant in an appeal brought under section 21 of the PSEA?

[28] The respondents, as appellants before the Appeal Board, have the burden of demonstrating the merits of the allegations that the merit principle was not honoured in the selection process (*Blagdon*, *supra*, at para. 6; *McGregor*, *supra*, at para. 17; *Girouard v. Canada (Attorney General)*, 2002 FCA 224, [2002] F.C.J. No. 816 (QL), at para. 12). To discharge this burden, the appellant must demonstrate 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*, *supra*, at para. 20)

(4) Was the Appeal Board justified in allowing Mr. Roy's claim that the Screening Board had improperly assessed his application?

[29] The applicant claimed that the Screening Board's decision that Mr. Roy did not demonstrate that he had held the position of AC-02 for a sufficient period to meet the requirements was reasonable. Misapprehending its role and power of intervention, the Appeal Board reassessed Mr. Roy's application and applied its own reasoning to arrive at the result it believed to be correct, which, according to the applicant, is not consistent with the standard that should be applied, that is, reasonableness. The Appeal Board erred in law with regard to the assessment of Mr Roy's application. Thus, according to the applicant, it is this Court's duty to apply the standard of correctness to correct these errors of law.

[30] The Appeal Board found that the competition and its selection process defeated the merit principle because, instead of focusing on Mr. Roy's experience, the Screening Board assessed the experience of candidates quantitatively. The temporal criteria were applied without verifying whether the candidates possessed the qualifications. Consequently, the contradiction between Mr. Roy's curriculum vitae and his application for employment with regard to the number of years he worked as an AC-02 made it impossible to determine whether he possessed the qualifications.

[31] The duty of an appeal board is not to reassess candidates, but to inquire as to whether the selection was made in accordance with the merit principle. In addition, the appellant's burden is met if he or she shows that there is a real possibility or likelihood that the best persons possible were not appointed. In the opinion of this Court, the finding of an appeal board that the appellant demonstrated that there is a real possibility that the selection was not made in accordance with the merit principle is reasonable in view of the facts and the law.

[32] Screening boards and selection boards are "a bureaucratic creation" (*Krawitz v. Canada (Attorney General)* (1994) 86 F.T.R. 47, 51 A.C.W.S. (3d) 2, at para. 19. The PSEA does not mention the creation of these two types of boards, and the *Public Service Employment Regulations, 2000,* SOR/2000-80 (Regulations) mentions only "selection boards". Screening boards are not mentioned in either the PSEA or the Regulations. Screening boards are tools created by the department for the purposes of preparing selection boards to undertake its deliberations. Screening boards apply the qualifications established by the department and may reject candidates who do not meet them.

[33] However, selection boards are tools used by the Commission to ensure that the merit principle is observed given the qualifications established by the department. The department has a Minister of the Crown at its head, who 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 as the authority to select which persons to

employ (*Davies*, *supra* at para. 33). The department, as 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). Consequently, an appeal board has no say with respect to the qualifications that a 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*, *supra*, at para. 20). An appeal board is only concerned with the actions of the Commission in selecting from the candidates who have the qualifications required by the department the one who is the most meritorious.

[34] In the case at bar, the Screening Board and the Selection Board have the same members. However, there is a distinction between the two boards despite their identical compositions. The case law allows a screening board to define the qualifications established by the department in a reasonable manner provided that the addition does not violate the merit principle. In *Bambrough v. Canada (Public Service Commission Appeal Board)*, [1976] 2 F.C. 109, 12 N.R. 553 (F.C.A.), Mr. Justice Gerald Le Dain explained that in certain situations a screening board may elaborate on the established 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….

[35] *In Canada (Attorney General) v. Blashford*, [1991] 2 F.C. 44, 120 N.R. 223 (F.C.A.), Mr. Justice Louis Marceau found that neither the Commission nor the Selection Board had the authority to tamper with the basic qualifications prescribed by the department concerned by adding to them or changing part of them (at para. 5). Marceau J. explained *Bambrough* and set out three points:

> [6] It is true that in *Bambrough v. Public Service Commission*, [1976] 2 F.C. 109, and again more recently in *Boychuck v. The Public Service Commission Appeal Board*, (1982) 42 N.R. 204, 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 LeDain J. in the *Bambrough* case (p. 117 of the report), "the statement of such additional 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. found that the Selection Board, of its own accord and without the department's participation, had decided to define the qualifications established by the department. In doing so, without the department's participation, the Screening Board had exceeded its power.

[36] The concurrence of Mr. Justice Robert Décary in *Blashford* specified the following on these 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 their own department and not on behalf of the Commission when they define criteria that amount to additional qualifications….

[37] In applying these principles to this case, there is no evidence that the Department actively participated in the changes to the qualifications made by the Screening Board. The applicant claims that the members of the Screening Board had many years of experience within the CSC and were familiar with the functions of the position to be staffed and of those held by the candidates. However, the fact that the three members of the Screening Board had been CSC employees for many years was not enough to determine that they had been authorized by the CSC to elaborate on the qualifications for the positions to be staffed. Therefore, there is no “very compelling” evidence to rebut the presumption that the members of the Screening Board had acted on the Commission’s behalf, and not on behalf of their own department, when elaborating on the qualifications.

[38] Referring to the decision of Marceau J. in *Blashford*, this Court is of the opinion that in the case at bar, the Commission and the Screening Board were not authorized to change the qualifications established by the CSC. It should be noted, however, that the conclusion of the Appeal Board did not rely on the Screening Board's authority to change the qualifications established by the Department.

[39] In *Bambrough*, the Federal Court of Appeal found that the Screening Board held an implicit inherent power to act on behalf of the Commission or the department to add qualifications to ensure that they were consistent with the merit principle. However, the qualifications added by a screening board must be reasonable, in view of the position to be staffed, and may not be arbitrary (*Blashford*, *supra*, at para. 6).

[40] One of the qualifications in *Blashford* was set out in the notice of competition: "Considerable secondlevel supervisory experience". To meet this requirement, the Screening Board provided that the candidates had to have two years of such experience within the preceding five years, including one year of continual experience.

[41] In *Blashford*, *supra*, the Court rejected these temporal criteria in view of their unreasonableness. It found that the qualifications announced by the Department were expressed in terms left open to practical and relative appreciation. The Screening Board had then limited 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, supra*, at para. 6). Décary J. concurred with the rejection of the rigid 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, supra*).

[42] In the case at bar, the Screening Board's definition no longer referred to the notions of case management and escorts but instead contained the notions of CX-02, PW and PO, which do not appear in the notice of competition. The applicant claims that the Screening Board relied not only on the job descriptions but also on their knowledge of the duties of the positions of PO, PW and AC-02. This knowledge enabled the Screening Board to determine that the notion of case management, which appeared in the initial qualifications, was implicit in CX-02, PW and PO positions.

[43] However, the Appeal Board found that the applicant's claims were not supported by the evidence. The Appeal Board's decision analyzed in detail several cases where it was not assumed that a candidate with two years' experience as a CX-02, PW or PO had the necessary experience in case management and escorts (Decision at paras. 35-54).

[44] In pointing out that the Court in *Blashford* rejected temporal criteria that did not honour the merit principle given the automatic elimination of experienced candidates, this Court agrees with the reasoning of the Appeal Board, which found that the requirement of two years' experience in

one of the positions mentioned above does not make it possible to deduce that the candidates all had the same experience in case management:

> [34] The Selection Board limited itself to checking the number of years' of a candidate's experience in a CX-02, PW or PO position, rather than the quality of such experience. Similarly, the Board never showed whether it checked if candidates actually possessed the required experience and merely based itself on the general duties of the aforementioned positions....

This Court also agrees with the finding of the Appeal Board that the criterion of five years' experience with the CSC violates the merit principle.

[45] By adding temporal criteria to the qualifications, the Screening Board changed them qualitatively. In the case at bar, the Appeal Board selected and applied the appropriate standard in deciding that the qualifications added by the Screening Board were not reasonable.

[46] Finally, the rejection of Mr. Roy's application because of one detail violates the merit principle. Mr. Roy was rejected at that stage of the competition solely because he indicated in his employment application that he had worked as an AC-02 since 1986, whereas his curriculum vitae stated that he had worked as an AC-01 for the period from 1986 to 1990.

[47] The application of a rigid, formalistic approach for screening purposes with regard to a candidate's experience may lead to qualified candidates being excluded from 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, Madam 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 imposition by

the Screening Board of a "formality" during the screening process should not have the undesirable effect of eliminating candidates who could eventually be hired:

> [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....

[48] The large number of candidates rejected at the screening stage is probably related to the failure to inform them of the importance of elaborating on the positions they held. As the Appeal Board wrote, "I am of the view that the Selection Board could not expect candidates to elaborate in their applications on their experience at the CO-II level (CX-02, PW or PO), when this did not appear as a requirement on the notice of competition" (Decision at para. 48). The initial qualifications set out in the notice of competition required the candidates to demonstrate "extensive experience" in case management and escorts. There is no mention of specific positions, which the Screening Board imposed after the applications were received.

[49] However, the Screening Board could have protected the merit principle even after its elaboration of the qualifications. When the issue of whether the candidates met the qualifications came up, the Screening Board failed to ask the candidates to provide more information.

[50] In the case at bar, there were indications that Mr. Roy possessed the qualifications as listed in the notice of competition and as imposed by the Screening Board. The testimony of Mr. Roy before the Appeal Board revealed that he had been appointed as an AC-02 in 1988, which means that he had 16 years' experience at that level. The Appeal Board found that the appellant "clearly

stated in his CV that he had two years' case management experience, although he did not use the CO-II classification when he referred to this experience. Therefore, with reference to the notice of competition, there appeared to have been case management experience that the Selection Board should have investigated more closely" (Decision at para. 62). In addition, Mr. Trouillard, a member of the Screening Board, admitted in his testimony before the Appeal Board that if "the appellant had not attached his CV to his application he would have been screened in, because on form PSC 3000 he stated that he had been a CO-II since 1986" (Decision at para. 78). Thus, even if the temporal criteria added by the Screening Board were valid, Mr. Roy would have qualified during the screening stage if he had not made the errors cited above in his application documents.

VIII. Conclusion

[51] The purpose of an inquiry before an appeal board is to take fully into account all of the facts and contextual realities of the matter in order to determine whether the merit principle has been observed:

> [37] ...to characterize the Rosenbaum decision as "mucking around with the merit principle" leads me to say two things: it depends on your perspective as to whether an appeal decision is interference or correction; and to adopt the idea that the appeal process is not corrective is to narrow its function to the point of making it useless.
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> [38] In the context of this case, I find that the purpose of an appeal is to expose and correct errors in the application of standards which have the effect of undermining the principle of selection by merit being that the best qualified and most suitable candidate be appointed. That is, to expose and correct errors is not to attack merit, but rather to protect it as a concept.

(*Bates*, *supra*)

[52] The Screening Board did not have the power to add to the qualifications because it was not acting with the authority of the CSC, which has an exclusive power in this regard. Moreover, even if the Screening Board had such a power, the changes were not reasonable because the Screening Board used temporal criteria that violated the merit principle. It goes against the merit principle that Mr. Roy's application was rejected because of one minor detail, especially when the qualifications were specified in detail and without notice; thus, the finding of the Appeal Board that the appellant met his burden in demonstrating that there was a real possibility that the best persons possible were not appointed was reasonably supported by the facts.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed. With costs.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-695-07
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. GASTON ROY
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 4, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	November 28, 2008

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