Federal Court  Cour fédérale

Date: 20140512

Dockets: T-1620-12
T-1673-12
T-1682-12

Citation: 2014 FC 443

Ottawa, Ontario, May 12, 2014

PRESENT: The Honourable Mr. Justice Mosley

Docket: T-1620-12

BETWEEN:

KEVIN MACADAM

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1673-12

AND BETWEEN:

KENT ESTABROOKS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1682-12

AND BETWEEN:

PATRICK DORSEY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] These are applications for judicial review, under s 18.1 of the *Federal Courts Act* RSC, c F-7, of Public Service Commission (PSC or Commission) decision #2012-085-IB dated August 8, 2012.

[2] The decision followed an investigation pursuant to sections 66 and 68 of the *Public Service Employment Act*, SC 2003, c 22 (the PSEA) into the appointment of Kevin MacAdam, under process number 10-ACO-EA-HO-68, to the position of Director General, Operations – PEI (DG Operations) at the EX-2 group and level, by the Atlantic Canada Opportunities Agency (ACOA).

[3] The Commission found that the behaviour of Patrick Dorsey, Kent Estabrooks, Paul LeBlanc and Monique Collette in the appointment process constituted improper conduct that affected the selection of Mr MacAdam for appointment to the position.

[4] The three applications were initiated separately but consolidated and heard together on consent. Messrs MacAdam and Estabrooks seek an order quashing the Commission's decision, remitting the matter to the Commission for redetermination, and costs. Alternatively, Mr MacAdam seeks a direction that the Commission appoint him to another position pursuant to s 73 of the PSEA, and costs. Mr Dorsey seeks an order quashing the Commission's decision and costs. The respondent seeks an order dismissing the applications and costs.

[5] For the reasons that follow, the applications are dismissed.

I. **BACKGROUND:**

[6] The following facts are drawn from the record and, in particular, from the Amended Investigation Report prepared by the Commission. While inferences drawn from these facts by the Commission were disputed by the applicants, the facts themselves were not seriously contested.

[7] ACOA is a Canadian federal government agency responsible for funding economic development in the Atlantic provinces. It is based in Moncton, New Brunswick and has regional offices in Fredericton, New Brunswick, Charlottetown, PEI, Halifax, Nova Scotia and St. John's, Newfoundland and Labrador. Appointments to positions within ACOA are made in accordance

with the PSEA. The authority to carry out staffing under the PSEA is delegated from the President of the Public Service Commission to the President of ACOA. The President of ACOA is responsible for decisions made regarding appointments to and within the organization.

[8] The DG Operations is the "second in command" position in ACOA's PEI office, and was established by consolidating the responsibilities of two former positions: DG, Enterprise Development and Policy, the former "second in command" position, at the EX-02 level, and DG, Community Economic Development, at the EX-01 level. ACOA's three other regional offices have had a similar position since 2006. Between 2006 and 2011, five internally advertised processes were used to fill these positions. These advertisements were the same as the one used in the case at bar, apart from the fact that they were all internally advertised processes.

[9] The applicant, Kevin MacAdam, was a researcher and speech writer for the Leader of the Official Opposition (Progressive Conservative Party) in Prince Edward Island following graduation from university. Between 1996 and 2006, he was a Cabinet minister in the PEI government. In 2000, he was an unsuccessful Conservative candidate in the federal election. From February 2006 to January 2010, Mr MacAdam occupied a political staff position in the office of the Honourable Peter MacKay, then Minister of Foreign Affairs and of ACOA. From January 2010 to February 2011, when Mr MacAdam was appointed to the DG Operations position, Mr MacAdam was the Deputy Chief of Staff to the Honourable Keith Ashfield, then Minister for the Atlantic Gateway, Minister of National Revenue and Minister of ACOA.

[10] Monique Collette was a career public servant and President of ACOA from 2003 to 2010. Mme Collette was, therefore, responsible for staffing of executive level positions at the time the appointment process at question in these proceedings was initiated. However, she had delegated much of the staffing responsibility to Paul LeBlanc, then Associate Deputy Minister of ACOA.

[11] Mr LeBlanc became President of ACOA on November 15, 2010 following Mme Collette's retirement and, in that capacity, signed the letter of offer to Mr MacAdam. From a discussion with Mr MacAdam, Mr LeBlanc had known of Mr MacAdam's interest in a position with ACOA for about a year prior to the start of the appointment process. They had discussed anticipated vacancies in ACOA in the region and in Ottawa. Mr LeBlanc had shared that information with Mme Collette. Mr MacAdam had asked Mr LeBlanc about the technicalities of joining the public service as a political staffer and sought advice. Mr MacAdam was not aware before these discussions, according to Mr LeBlanc, that an entitlement to priority consideration of former minister's staff for appointment to positions in the public service no longer existed.

[12] When first interviewed, Mr MacAdam denied having had these discussions with Mr LeBlanc or anyone else within ACOA. He stated that he first knew of the opening for the DG Operations position when he saw it advertised in November 2010. He said he had no inkling the opportunity might be forthcoming and had not received any advance notice to look for the job posting. He qualified those remarks following release of the initial report prepared by the investigators to acknowledge that he had made general inquiries about life in the public service.

[13] The applicant, Patrick Dorsey, was the ACOA Vice-President-PEI at the time of the appointment process and had held that position since January 2007. He is described in the complaint that led to the PSC investigation as "a long time Conservative organizer and communications director to former PEI Premier Pat Binns". In that role he would have known Mr MacAdam, then a Minister in the Binns government. They subsequently had further contacts through their respective roles in relation to ACOA and contact at political events. In 2010 Mr Dorsey was also chair of the Regional Federal Council for PEI, a forum for the exchange of information between federal departments and agencies, and chair of the national meetings of regional councils.

[14] Wayne Hooper served as special advisor to Mr Dorsey and has acted in the position as DG – Operations while Mr MacAdam has been on language training. Mr Hooper was a friend of Mr MacAdam's and from the same community on the Island. He had served as Deputy Minister to Mr MacAdam in the PEI Progressive Conservative government. The appointments of Messrs Dorsey and Hooper to ACOA were the subject of separate PSC investigations. Mr Hooper was acting Vice-President in the PEI ACOA office at the time that Mr MacAdam discussed his interest in the position with Mr LeBlanc because Mr Dorsey was on language training. Messrs LeBlanc and Hooper discussed proceeding with a competition to staff the position.

[15] The applicant, Kent Estabrooks, was the Director General of Human Resources, ACOA at the time of the appointment. He replaced Charlene Sullivan in that position while she was away on a one year assignment from September 2010. Mr Estabrooks' functional reporting

relationship at ACOA PEI was to Mr Dorsey but his direct superior in the agency was Denise Frenette, Vice-President Finance and Corporate Services.

[16] Lorraine Léger served as Director, Staffing and Human Resources Programs for ACOA and was the operational HR advisor during the appointment process.

A. *Creation of the DG Operations position*

[17] In July 2010, Ms Sullivan, the DG Human Resources at that time, advised Mr Dorsey that in her opinion, there would not, subject to Mme Collette's discretion as President, be any support for a bilingual non-imperative staffing action given financial pressures on the agency and the costs involved in second language training if the successful candidate did not have the required level of language proficiency. In August 2010 she advised Mme Léger of Mr Dorsey's intent to staff the DG Operations position and of her recommendation that it be staffed internally. Following a teleconference with Mr Dorsey, Ms Sullivan advised him that he could proceed with staffing the position on a bilingual imperative or non-imperative basis.

[18] Brian Schmeisser who had been at ACOA for 22 years, was DG, Community Economic Development and Infrastructure at the EX-2 level until August 2010. At that time, Mr Schmeisser accepted an interchange assignment to the Province of PEI, a process which, according to Mr Schmeisser, had been initiated and encouraged by Mr Dorsey. ACOA officials agreed to pay 50% of his salary if the assignment was accepted. Following Mr Schmeisser's departure, the DG Operations position was created absorbing his responsibilities. According to Mr Schmeisser, he had expressed interest in the position to Mr Dorsey on a number of occasions,

but Mr Dorsey had indicated that he did not meet the language requirements. Ms Sullivan acknowledged, when interviewed, that Mr Schmeisser's departure was a factor in staffing of the DG Operations position. Without it, she did not know that it would have gone ahead as the organizational structure for a small branch like that in PEI would not have supported another DG at the EX-2 level.

[19] When initially interviewed by the PSC investigators, Mr Dorsey stated that no other options such as an Interchange Canada assignment or an internal process were considered for staffing the position. He did not recall any discussions with HR personnel about his decision to use an external advertised process. No attempts were made to test whether an internal pool of bilingual candidates could be established. Mr Dorsey stated that he had a general sense of the potential candidates including Mr MacAdam and had discussed Mr MacAdam's interest with Mr LeBlanc. He did not send information about the position to his Federal Regional Council network. He wished to complete the process before he himself went on an additional period of French language training in February 2011.

[20] On October 27, 2010, Mme Léger advised Mr Estabrooks, who by then had replaced Ms Sullivan, that a rationale for non-imperative staffing was needed. She originally tried to send this information using her BlackBerry's PIN feature, which allows for device to device message transmission, by-passing the internal departmental email servers. Mme Léger had only used this feature once before to protect the confidentiality of certain information. The following day, October 28, 2010, in an email, Mme Léger asked Mr Dorsey to speak to Mr Estabrooks about his plans for the position.

[21] Mr Estabrooks reported to Denise Frenette, Vice President, Finance and Corporate Services, on the conversation that followed within an hour of Mme Frenette's contact with Mr Dorsey. In his email message Mr Estabrooks wrote:

> … I explained about the three conditions we had discussed and Pat [Dorsey] wasn't aware of the condition related to "vacating the job"… With that in mind I recommended he go external… He said he preferred to go internal, but that he understood the dynamics/issue and he'd be okay with that; I explained that based on the standard criteria in the SMC's for DG Ops I've seen, external processes can be reasonably tight in terms of requirements, which mitigates the volume of applications and helps with the rationale for non-imperative.

[22] Mr Dorsey was asked by the PSC investigators about Mr Estabrooks' references to "dynamics/issue", Mr Dorsey's preference for an internal process, and the condition related to "vacating the job". According to Mr Dorsey, the "dynamics/issue" comment referred to the timeframe and ability to attract good candidates. He said that his preference for an internal process was due to the workload that an external process could generate. He stated that he did not know what the condition of "vacating the job" meant. He did not recall discussing any particular candidate with Mr Estabrooks, nor the eligibility of ministers' staff.

[23] When shown this email during the investigation Mme Frenette initially stated that it was a situation of giving Mr MacAdam access to the process. He had expressed interest in the position. The factor that changed the decision from using an internal process to an external process was the fact that Mr MacAdam still had his job in the Minister's office. Mr Estabrooks had explained this to her. She later qualified her statements by saying she did not know this to be a fact but assumed it was the case. She was certain that Mr Estabrooks had discussed the implications of s. 35.2 of the PSEA with Mr Dorsey.

[24] S. 35.2 of the PSEA was enacted in 2006 as part of the *Federal Accountability Act*, 1st Sess, 39th Parl, 2006, cl 10. The intent was to eliminate preferential hiring for ministers' political staff. Previously, ministerial staff were entitled to bypass the normal public service competitive hiring process and be appointed to positions in the public service with priority over others. The intent of the amendment in 2006 was to reduce the potential for politicizing the public service. As declared at the time, this previous entitlement "undermined both the non-partisan nature of the public service and its adherence to the merit principle": http://www.tbs-sct.gc.ca/faa-lfi/fs-fi/16/06fs-fi-eng.asp. The amendment allowed persons who had been employed for three years with a minister to apply for internal public service competitions for a period of one year after the end of their employment. To be eligible to apply for these internally advertised positions, they had to first resign or "vacate" their political job, as described by Mr Estabrooks in the email to Mme Frenette.

[25] Mr Estabrooks acknowledged that he researched this provision when he was made aware that a person in the minister's office was interested in the position. He did not know at the time that it was Mr MacAdam. His research was prompted by a question from Mr Dorsey.

[26] On October 28, 2010 Mr Dorsey signed a Human Resource Action Request to initiate an external advertised appointment process with a bilingual non-imperative language requirement. A day later, he sent a memorandum to Mme Colette seeking approval to staff the DG Operations position on a non-imperative basis. He wrote:

> The intent is to advertise as broadly as possible through a national external advertised process, which is expected to yield some very qualified candidates. However it is anticipated that many applicants will be unilingual or have only a functional (B) level

> proficiency in French. It is important to provide those individuals with the opportunity to have access to this position.

[27] On November 2, 2010 ACOA advertised the position on the PSC's website: jobs.gc.ca. The position was listed as being located in PEI and as having an indeterminate (permanent) tenure. The language requirements were listed as bilingual non-imperative, meaning that the candidate selected for appointment would be eligible for language training in the event they did not meet the specified level of proficiency (CBC) at the time of appointment.

B. *The appointment process*

[28] The deadline for receipt of applications was fixed at November 15, 2010. By that date, 73 applications were received but 48 were automatically screened out by the PSC's automated resourcing system. That left 25 applications that were referred to ACOA. Of those, 14 were screened out by Mme Léger and the remainder referred to Mr Dorsey for further review. He determined that 6 individuals met the screening requirements and they were invited for an interview. Two withdrew from the process, leaving four, including Mr MacAdam, to be interviewed by the assessment board.

[29] The board was comprised of Mr Dorsey, Paul Mills, VP, ACOA-Newfoundland and Labrador, and Melissa McEachern, a Deputy Minister from the PEI provincial government. Mme Léger was in attendance to provide guidance and take notes. On December 15, 2010 the assessment board determined that only one of the four candidates interviewed met all of the essential qualifications, that being Mr MacAdam. Following reference checks over the next few days conducted by an external consultant, Mr MacAdam was sent a letter offering him the DG

Operations position which he accepted on January 4, 2011. This predated confirmation of his educational credentials which occurred a few days later. The effective date of appointment was February 7, 2011. Mr MacAdam thereupon began language training.

[30] At the hearing of this application in January 2014, counsel advised that Mr MacAdam hoped to be in a position to pass the required language tests in the near future. It appears that he was on language training in the National Capital Region continuously from January 2011.

C. *The complaint*

[31] In a letter dated February 4, 2011, Brian Murphy, Chair of the Liberal Party of Canada, Atlantic Caucus, advised the PSC of his concern over the political affiliation of the directors and managerial personnel of the ACOA regional offices that had been appointed by the Conservative Government. Mr Murphy referred to the hiring of Messrs Dorsey, MacAdam and Hooper. Mr Murphy urged the PSC to consider the possibility of overruling some of the nominations which, he said, were partisan and becoming the norm at ACOA.

D. *The investigation*

[32] By letter dated March 18, 2011, the PSC Investigation Directorate (the Investigation Directorate) advised Mr MacAdam of Mr Murphy's letter and allegations. The letter informed Mr MacAdam that pursuant to s 66 of the PSEA, the Investigation Directorate would investigate the possibility of irregularities concerning the appointment process which might have an impact on the merit principle, or that there was an error, an omission or improper conduct that affected

the selection of the person appointed. Pursuant to s 68 of the PSEA, the Directorate would investigate the possibility that the appointment was not free from political influence.

[33] Interviews were conducted in 2011. On April 11, 2012, those who had been interviewed were provided with an initial factual report which summarized the relevant information gathered during the course of the investigation. They were asked to provide any comments or submissions on that collected information, which some chose to do.

[34] In a letter dated July 12, 2012, those interviewed were informed that the investigation was complete. They were provided with a copy of the Investigation Report which set out the facts as found by the investigators, their analysis, and conclusions. The recipients were asked to provide comments and submissions on the Investigation Report and the proposed corrective actions, which, again, some chose to do.

[35] The Investigation Report concluded that Mr MacAdam met the essential qualifications of the DG Operations position and that there was no political interference in his appointment. However, the report found that the behaviour of Patrick Dorsey, Kent Estabrooks, Paul LeBlanc and Monique Collette in the staffing process constituted improper conduct that affected the selection of Mr MacAdam.

[36] Among other things, the investigators concluded that Mr Dorsey's assertion that the external process was chosen to address his concern about attracting a sufficient pool of candidates was not credible. As noted above, Mr Estabrooks had researched the conditions for

political staff applying to internal appointment processes on Mr Dorsey's request. He recommended an external process to Dorsey on the basis of this research. Mr MacAdam's eligibility to be considered in the appointment process was, therefore, a key factor in Mr Dorsey's decision to use an external process, the investigators concluded.

[37] Mr Dorsey's initial preference for an internal process had been documented by Mr Estabrooks in the email sent October 28, 2010. The investigators inferred that Mr Dorsey's acceptance of Mr Estabrooks' recommendation indicated that his decision was based on Mr MacAdam's personal circumstances.

[38] Mme Léger had told the investigators that rumours were circulating within ACOA around the time the process was advertised to the effect that the job was for a particular individual. She recalled hearing Mr MacAdam's name being mentioned.

[39] Mr MacAdam had little competition for the position amongst the candidates interviewed. The investigators noted that while Mr Dorsey was not obligated to share information on the job opportunity with anyone, he acknowledged that he did not share the information with his Federal Council network, an obvious source of potential candidates, or the PEI regional council.

[40] Thus, the investigators concluded, on the balance of probabilities, key decisions in the appointment process were based on Mr MacAdam's language abilities and position as a Minister's staff member - which they found to be unsuitable behaviour. These key decisions

affected Mr MacAdam's appointment since he would not have been eligible to apply had they not been made.

[41] Mr Dorsey was the key decision-maker in the process of creating and filling the DG Operations position. He was instrumental in Mr Schmeisser's external assignment, which allowed for the creation of the new position. Mr Dorsey's decision to advertise externally was based on Mr MacAdam's ineligibility if they advertised internally, the investigators found. Further, Mr Dorsey's recommendation to staff the position on a bilingual non-imperative basis was not based on past experiences, past processes or attempts to fill positions with similar attributes. His decisions and recommendations were focused on Mr MacAdam's eligibility. This approach was not in keeping with an expectation for fair and transparent decision making in an appointment process, the investigators concluded.

[42] Mr Estabrooks' behaviour was found to constitute improper conduct that affected Mr MacAdam's appointment. Mr Estabrooks knew that someone at the Minister's office was interested in applying for the position, though he may not have known that it was Mr MacAdam. He researched the conditions in which minister's staff can apply to internal appointment processes before recommending that an external process be used to ensure that the person at the Minister's office could apply. The investigators concluded that Mr Estabrooks' statements demonstrated that he was comfortable recommending an external process on the basis of the circumstances of one individual, that the focus of his recommendation was ensuring the eligibility of the individual at the Minister's office, and that he participated in making decisions tailored to Mr MacAdam's circumstances.

[43] Mme Collette and Mr LeBlanc's actions in authorizing this process were also found to constitute improper behaviour that affected Mr MacAdam's appointment to the DG Operations position.

[44] The final decision was issued by the Commission on August 10, 2012.

II. **DECISION UNDER REVIEW**

[45] The Commission ordered that the Investigation Report be amended to delete a paragraph and a sentence and to relocate a second paragraph. Apart from those changes, the Commission accepted the Investigation Report. It recognized that there was no improper conduct on the part of the appointee, Mr MacAdam. However, improper conduct was found within the appointment process bringing its integrity into question. In accordance with its authority to take corrective action under s 66 of the PSEA, the Commission ordered that:

> MacAdam's appointment to the position of Director General, Operations – PEI, at the EX-2 group and level, be revoked;
>
> Dorsey and Estabrooks complete two courses on leadership and ethics at the Canada School of Public Service, within six months of the Decision;
>
> The President, ACOA not delegate or sub-delegate appointment and appointment related authorities to Dorsey or Estabrooks for a period of three years beginning on the date of the signing of the Decision; and
>
> Dorsey not exercise any duties related to staffing for a period of three years beginning on the date of the signing of the Decision.

[46] On September 18, 2012, the Commission ordered that the implementation of the order in the Record of Decision be suspended pending the outcome of this judicial review application.

III. **ISSUES:**

[47] Having considered the issues proposed by the parties, I conclude that they are as follows:

1. Was the Commission's decision finding improper conduct in the appointment of Mr MacAdam reasonable?

2. Were the corrective actions ordered against Messrs MacAdam, Estabrooks and Dorsey reasonable?

IV. **APPLICABLE LEGISLATION:**

[48] The relevant provisions of the PSEA are found in the Preamble, section 35.2 respecting the mobility of ministers' staff members and in Part 5, sections 66 and 68.

Public Service Employment Act, SC 2003, c 22.	*Loi sur l'emploi dans la fonction publique*, LC 2003, c 22.
Preamble	Préambule
Recognizing that	Attendu :
[…]	[…]
Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded;	qu'il demeure avantageux pour le Canada de pouvoir compter sur une fonction publique non partisane et axée sur le mérite et que ces valeurs doivent être protégées de façon indépendante;

[…]	[…]
authority to make appointments to and within the public service has been vested in the Public Service Commission, which can delegate this authority to deputy heads;	que le pouvoir de faire des nominations à la fonction publique et au sein de celle-ci est conféré à la Commission de la fonction publique et que ce pouvoir peut être délégué aux administrateurs généraux;
those to whom this appointment authority is delegated must exercise it within a framework that ensures that they are accountable for its proper use to the Commission, which in turn is accountable to Parliament;	que ceux qui sont investis du pouvoir délégué de dotation doivent l'exercer dans un cadre exigeant qu'ils en rendent compte à la Commission, laquelle, à son tour, en rend compte au Parlement;
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;
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,
[…]	[…]

Mobility — ministers' staffs

35.2 A person who has been employed for at least three years in the office of a minister or of a person holding the recognized position of Leader of the Opposition in the Senate or Leader of the Opposition in the House of Commons, or in any of those offices successively,

- *a*) may, during a period of one year after they cease to be so employed, participate in an advertised appointment process for which the organizational criterion established under section 34 entitles all employees to be considered, as long as they meet the other criteria, if any, established under that section; and

- (*b*) has the right to make a complaint under section 77.

Mobilité — personnel du ministre

35.2 La personne qui a été, pendant au moins trois ans, employée dans le cabinet d'un ministre ou du titulaire des charges de leader de l'Opposition au Sénat ou de chef de l'Opposition à la Chambre des communes, ou employée successivement dans deux ou trois de ces cabinets :

- *a*) peut participer, pendant une période d'un an à partir de la date de sa cessation d'emploi, à tout processus de nomination annoncé pour lequel le critère organisationnel fixé en vertu de l'article 34 vise tous les fonctionnaires, pourvu qu'elle satisfasse aux autres critères fixés, le cas échéant, en vertu de cet article;

- *b*) a le droit de présenter une plainte en vertu de l'article 77.

PART 5

INVESTIGATIONS AND COMPLAINTS RELATING TO APPOINTMENTS

Investigation of Appointments by Commission

External appointments

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

(a) revoke the appointment or not make the appointment, as the case may be; and

(b) take any corrective action that it considers appropriate.

[…]

Political influence

68. If it has reason to believe that an appointment or proposed appointment was not free from political influence, the Commission may investigate the

PARTIE 5

ENQUÊTES ET PLAINTES RELATIVES AUX NOMINATIONS

Enquêtes de la Commission sur les nominations

Nominations externes

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) révoquer la nomination ou ne pas faire la nomination, selon le cas;

b) prendre les mesures correctives qu'elle estime indiquées.

[…]

Nomination fondée sur des motifs d'ordre politique

68. La Commission peut mener une enquête si elle a des raisons de croire que la nomination ou proposition de nomination

appointment process and, if it is satisfied that the appointment or proposed appointment was not free from political influence, the Commission may	pourrait avoir résulté de l'exercice d'une influence politique; si elle est convaincue que la nomination ou proposition de nomination ne s'est pas faite indépendamment de toute influence politique, elle peut :
(*a*) revoke the appointment or not make the appointment, as the case may be; and	*a*) révoquer la nomination ou ne pas faire la nomination, selon le cas;
(*b*) take any corrective action that it considers appropriate.	*b*) prendre les mesures correctives qu'elle estime indiquées.

V. **STANDARD OF REVIEW:**

[49] The parties are agreed that the standard of review applicable to the Commission's decision is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 43-64; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland and Labrador Nurses*] at paras 12-14, 18.

[50] I agree with the parties that the question has been satisfactorily determined by the prior jurisprudence and does not require a standard of review analysis. The interpretation and application of sections 66 and 68 of the PSEA are, among other provisions, at the heart of the Commission's mandate and expertise: *Seck v Canada (Attorney General)*, 2011 FC 1355 [*Seck*] at paras 10-11. As stated in *Hughes v Canada (Attorney General)*, 2009 FC 573 at para 26, the

scope of discretion given to the Commission, combined with the "discrete and special" nature of the Public Service regime, and the Commission's expertise within that regime signal that deference is due to decisions of the Commission. Accordingly, the decision is reviewable on the standard of reasonableness.

[51] According to the instructions provided by the Supreme Court in *Dunsmuir*, above, at para 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. **ARGUMENTS AND ANALYSIS:**

A. *Was the Commission's decision finding improper conduct in the appointment of Mr MacAdam reasonable?*

(1) Mr MacAdam's arguments

[52] Mr MacAdam contends that the Commission wrongly determined that improper conduct influenced his selection, contrary to the evidence that Mr Dorsey, Mr Estabrooks, Mr LeBlanc and Mme Collette acted with no improper intent. The Commission had previously found that it

was necessary to consider the intent behind the actions taken in assessing whether there had been improper conduct in the selection process: Public Service Commission – Investigation Report Summary 2008 – Founded – Correctional Service of Canada (http://www.psc-cfp.gc.ca).

[53] In this instance, Mr MacAdam argues, the evidence demonstrated that ACOA managers sought to advertise the position as broadly as possible through a national external process to ensure wide access. This is supported in particular, he says, by Mr Dorsey's evidence that recruiting bilingual candidates in PEI was challenging. It is also reflected in ACOA's Human Resources Plan for 2010-2012 (the HR Plan) for that period, which reflects previous difficulties recruiting experienced candidates. The steps taken by Mr Dorsey, Mr Estabrooks, Mr LeBlanc and Mme Collette were consistent with a shared understanding of this factor. Any knowledge they may have had that he was likely to apply did not constitute improper conduct as he was an example of the type of candidate they sought to attract.

[54] Mr MacAdam submits that the establishment of essential criteria and assessment of qualifications was within Mr Dorsey's authority as the staffing manager as this Court has previously recognized: *Lavigne v Canada (Deputy Minister of Justice)*, 2009 FC 684 at paras 1-3, 70. In the result, he was the only qualified candidate who met all of the essential qualifications as determined by the staffing manager with the consensus of the two other members of the three-person selections panel.

[55] The Commission erred, Mr MacAdam submits, in concluding that the decision to post the DG, Operations position as bilingual non-imperative was due to Mr MacAdam's insufficient

French proficiency and that the use of the external process was intended to give him access to the appointment process. There is no evidence, he contends, that the responsible managers were aware of his language proficiency or, rather, lack thereof at the time.

[56] Further, the Commission unreasonably concluded, without any supporting evidence, Mr MacAdam submits, that his personal circumstances required an external posting. Mr MacAdam was entitled to participate in an internal process for one year after he had ceased to be employed in a Minister's office. There was no evidence, he argues, that he was not prepared to resign his position in order to be eligible to apply. There is also no evidence, he says, as to whether Mr Dorsey, Mr Estabrooks, Mr LeBlanc or Mme Collette presumed, as a result of his interest, that he would not likely do so.

[57] In general, Mr MacAdam argues, the Commission relied on conjecture, assumptions, rumours and second-hand information relayed by individuals not directly involved in the staffing process to make findings of fact that cannot be supported by the evidence.

(2) Mr Dorsey's Arguments

[58] Mr Dorsey submits that the Commission erred in its interpretation of the term "improper conduct". The term is not defined in the PSEA. The Commission described it as "…unsuitable behaviour, whether by action or inaction… in relation to an appointment process". In Mr Dorsey's view, a contextual and purposive analysis makes it clear that Parliament did not intend "improper conduct" to be a purely subjective assessment of "suitable behaviour" by the Commission. It was intended to capture conduct that was not necessarily wrong in law, but

nonetheless contrary to the rules and guidelines established by the Commission pursuant to section 29(3) of the PSEA. Conduct contrary to these policies is improper. Here, there was no breach of the policies and, hence, no improper conduct.

Commission policies	Lignes directrices
29(3) The Commission may establish policies respecting the manner of making and revoking appointments and taking corrective action.	29(3) La Commission peut établir des lignes directrices sur la façon de faire et de révoquer les nominations et de prendre des mesures correctives.

[59] The Commission failed to consider, Mr Dorsey submits, the evidence that attracting candidates to PEI was a concern for ACOA and that senior positions had previously been staffed through external processes on a bilingual non-imperative basis. His own appointment was a case in point. Neither the PSEA nor its policies required that the position be staffed on a bilingual imperative basis. PEI is not a region designated as bilingual for language-of-work purposes, such as New Brunswick. Moreover, there were existing pools of candidates for the DG positions in the other Atlantic provinces. That was not the case for the position in PEI. Thus it was important to have the widest possible area of selection. Excluding Mr MacAdam, who had expressed an interest in joining the public service, would not have been reasonable. A political background should not exclude someone from consideration.

[60] The appointment process chosen by ACOA was one of many "options" available to it under the PSEA. While the Commission may have taken a different approach, Parliament has seen fit to authorize the delegation of appointment authority to persons other than the Commission and to set the threshold for subsequent intervention by the Commission at

impropriety – not mere disagreement or unsuitability. It was unreasonable and improper for the Commission to assess the recommendation by Mr Dorsey on the basis of what it considered to be suitable in the circumstances.

[61] Mr Dorsey submits that the remedial authority of the Commission in section 66 of the PSEA is conditional upon a finding of "improper conduct that affected the selection of the person appointed". This is reflected in the Guideline on Corrective Action and Revocation published by the Commission, which provides that in order to be actionable, the defect must affect the person selected for appointment (http://www.psc-cfp.gc.ca/plcy-pltq/guides/revocation/guid-orie-eng.htm).

[62] The Commission found that the recommendation made by Mr Dorsey was "unsuitable behaviour in an appointment process" and, consequently, "improper conduct that affected the selection of [Mr MacAdam] for appointment". Missing from the Commission's analysis, Mr Dorsey argues, is the necessary connection between the allegedly "improper behaviour" and the selection of Mr MacAdam. Mr MacAdam was found to be qualified by a properly constituted selection board and had he not participated, no candidate would have qualified.

(3) Mr Estabrooks' arguments

[63] Mr Estabrooks submits that the Commission's determination that he had engaged in improper conduct is premised upon a single finding: that his recommendation of an external selection process was based on his knowledge of an interested outside candidate. The determination was unreasonable, he submits, because he was merely an advisor in the process.

Using his knowledge and judgment, he recommended that the responsible manager (Mr Dorsey) exercise his discretion by choosing an external process, and reasonably concluded that an external process fulfilled the objectives of the PSEA in staffing this position.

[64] In his case, Mr Estabrooks submits, the Commission failed to consider two areas of highly relevant evidence in reaching its conclusion. First, he contends, the Commission ignored the evidence that it was routine ACOA practice to consider the presence of potential candidates when selecting an internal versus external process. Second, the Commission failed to consider that, once the actual process occurred, none of the internal candidates met the essential qualifications, confirming that an external process was necessary to yield a qualified candidate for the position. This result confirmed that Mr Estabrooks' recommendation of an external process was not improper, and was consistent with the principle that the area of selection must be sufficient to provide a reasonable pool of candidates.

[65] Further, Mr Estabrooks submits, it was unreasonable for the Commission to rely on the fact that other ACOA DG Operations positions had been filled using an internal process as there were many other examples of external processes used to staff similar positions in Atlantic Canada.

(4) Respondent's arguments

[66] The respondent submits that the Commission's determination of improper conduct was reasonable. The term "improper conduct" must be interpreted according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the PSEA as a whole: *Seck v*

Canada (Attorney General), 2012 FCA 314 at paras 21-22 [*Seck, FCA*]. The context in which it is employed in this instance includes behaviours that run contrary to the guiding values prescribed by the PSEA and PSC policies.

[67] The PSEA and the PSC Appointment Policy (the Appointment Policy) are designed to ensure integrity in the appointment process in the public service, and to foster the public's confidence in the staffing decisions that are made. The current PSEA replaced the old complex and slow rules-based approach with a values-based approach, and requires that managers be guided by and respect the values of the PSEA at each stage of an appointment process. These values are highlighted in the preamble of the PSEA. Appointment decisions must be guided by the values of fairness, transparency, representativeness and access.

[68] The PSC's interpretation of "improper conduct" as meaning "unsuitable behaviour whether by action or inaction in relation to an appointment process" was inspired by the guiding values of the PSEA, the respondent submits. Personal favouritism or concealment of true motives for decisions made during an appointment process will constitute improper conduct if they undermine one or more of the PSEA values. The old rules-based definition linked solely to whether a PSC policy requirement has been breached is too rigid and would frustrate Parliament's intent.

[69] The French version of "improper conduct" in section 66 is "conduite irrégulière". Neither the French nor the English terms require any bad faith intention, the respondent argues. Further

the PSC's interpretation is consistent with the ordinary meaning of the words and accords with dictionary definitions:

> *Black's Law Dictionary* defines "improper" as "1 Incorrect; unsuitable or irregular. 2 Fraudulent or otherwise wrongful";
>
> *Black's Law Dictionary* online defines "improper conduct" as "The behaviour that a reasonable person would not do";
>
> *The Canadian Oxford Dictionary* defines "improper" as "1(a) Unseemly; indecent; (b) not in accordance with accepted rules of behaviour. 2 Wrong or incorrect. 3 Dishonest, irregular (improper business practices).

[70] The respondent submits that if intent is required, improper conduct was established by the failure to provide transparent written documentation or rationales for the choice of process (external, bilingual non-imperative); that this was non-compliant with policy; and that there was a deliberate intent by senior ACOA officials to create and design this appointment to specifically allow Mr MacAdam to apply and participate so that he could be appointed to the position. Messrs Dorsey and Estabrooks concealed the real reason why an advertised external process was chosen, and why the position was staffed on a bilingual non-imperative basis.

[71] No transparent rationale was provided for recommending a bilingual non-imperative appointment process and no pool for bilingual candidates had been tested by first advertising the position with a bilingual imperative, the respondent argues.

[72] The concealment of the real motive for making these choices, the respondent submits, breached the PSC policy requirement in relation to the value of transparency, and supports a

finding of improper conduct. Furthermore, the fairness of the appointment process was tainted by the fact that key decisions were made on the basis of ensuring that Mr MacAdam could apply.

[73] The respondent submits that Mr MacAdam's language profile was known to the officials at ACOA on the basis of his previous and long-standing interactions with them, and notes, in particular, that Mr Dorsey stated in a memo to Mme Collette that "it is anticipated that many applicants will be unilingual or have only a functional (B) level proficiency in French". According to the Treasury Board's Directive on the Staffing of Bilingual Positions, "when non-imperative staffing is proposed, managers must provide a justification in writing". Mr Dorsey failed to provide an adequate or transparent justification in recommending that the process be bilingual non-imperative, the respondent contends.

[74] Contrary to Mr MacAdam's assertion that ACOA's HR Plan provided justification for the decision to staff the DG Operations position on a bilingual non-imperative basis, Mr Dorsey never referred to it and specifically stated when interviewed that it had no bearing on EX level appointments. Further, none of the applicants referred to the HR Plan in their commentary and submissions provided in response to the Investigation Report, the respondent notes.

[75] In the respondent's submission, the context of the appointment process for the DG Operations position includes the following facts set out in the investigation report:

- Mr Schmeisser was assigned to the provincial government at the initiative of Mr Dorsey, after which he consolidated Mr Schmeisser's duties into the new DG Operations position. Mr Dorsey told Mr Schmeisser he needed a change;

- The appointment process was made external, as opposed to the internal appointment process used in the other three Atlantic provinces to staff the same position;

- Planning this appointment process began while Mr Hooper, a childhood friend of Mr MacAdam, was acting Vice-President of the ACOA in PEI, though Human Resource responsibilities were still handled by Mr Dorsey;

- Mme Léger stated that the appointment process was moving fast and that rumours existed to the effect that the job was for Mr MacAdam;

- Ms Sullivan advised in an email that she would recommend the position be advertised internally rather than externally;

- Mme Frenette confirmed that "conditions relating to vacation the job" related to the mobility of Minister's staff – they could only have access to internal advertisements if they left the Minister's office; Mme Frenette stated that Mr MacAdam's employment with the Minister's office was the factor that prompted the change in the process from internal to external;

- Mr Estabrooks stated that the interest of an individual from the Minister's office was a significant factor in his recommendation to use an external process;

- Mr Estabrooks stated that Mr Dorsey wanted to provide the individual from the Minister's office with an opportunity to compete;

- Mme Frenette stated that Mr Estabrooks had informed her that the requirement for a Minister's staff-member, Mr MacAdam, to vacate his job was the reason for making the process external;

- Mme Frenette testified that she was certain Mr Estabrooks discussed the requirements of the PSEA with Mr Dorsey to determine how a Minister's staff-member, Mr MacAdam, could be given access to the process, which is why Mr Estabrooks researched the conditions in section 35.2 of the PSEA*;*

- Mme Collette said that the decision to use an external appointment process rested with Mr Dorsey;

- Mme Léger advised Mr Estabrooks that a rationale for non-imperative staffing needed to address attempts that were made to staff the position on a bilingual imperative basis; Mr Dorsey acknowledged that no such attempts were made;

- Mr MacAdam's interest in the DG Operations position was known to key ACOA employees and was known to Mr LeBlanc at least a year before the position was posted. Mr LeBlanc, Mme Léger, Mme Frenette, Mme Collette, Michael Zinck (Director of the Ministerial Liaison Office), and Mr Hooper knew that Mr MacAdam was interested in the DG Operations position before it was posted.

[76] Ensuring that Mr MacAdam could participate in the appointment process was a key factor in the decision to use an external process, the respondent submits. The fact that this justification was concealed undermines the value of transparency, violates the Appointment Policy, and was therefore reasonably found to constitute improper conduct as per section 66 of the PSEA.

(5) Analysis

[77] I agree with the respondent that the Commission must be accorded significant deference in interpreting its home statute: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30, 39. The purpose of the PSEA was to provide a more flexible, values-based system, and this includes the administration of section 66 and the interpretation of "improper conduct". Improper conduct may reasonably be found where unsuitable behaviour related to the appointment process undermines one or more of the PSEA's guiding values. Contrary to the submissions of the applicants, the definition employed by the Commission is not overly subjective, and, on a plain language reading of the legislation, a bad faith intent is not a necessary requirement notwithstanding its incorporation in prior PSC decisions.

[78] Under the applicable policies related to appointments, a fair process requires that staffing decisions are made objectively and free from political influence or personal favouritism. This was, among other things, one of the objectives of the 2006 *Accountability Act*. In this instance, there was no indication of political influence in the appointment process by ministers or their staff. I agree with the respondent, however, that the Commission's finding that the process was tainted by improper conduct was reasonable on the evidence.

[79] All that I need to determine in these proceedings is whether the Commission's decision is intelligible, justified and transparent and falls within the range of acceptable outcomes defensible on the facts and the law: *Dunsmuir*, above, at para 47. I have no difficulty in arriving at that conclusion.

[80] From my reading of the record, the evidence amply demonstrated the exercise of personal favouritism by Mr Dorsey to assist a former associate in PEI provincial politics find a soft landing back home in a secure and senior public service position. Mr MacAdam was the beneficiary of that favour. Mr Estabrooks was neither an instigator nor a prime mover of this process, but he facilitated Mr Dorsey's efforts to smooth the way for Mr MacAdam to obtain the position without first having to resign from his job in the Minister's office.

[81] It was reasonable for the Commission investigators to conclude from the evidence that ACOA officials, including Mr Dorsey, were aware of Mr MacAdam's interest in obtaining an indeterminate public service position despite his testimony to the contrary. This was confirmed by Mr LeBlanc, Mme Collette and other senior officials within ACOA that were interviewed.

Collectively, they were aware of Mr MacAdam's interest in a position within ACOA and in moving back to PEI. Mme Collette and Mr LeBlanc were aware of it even before they were informed of this by Minister Ashfield, as a courtesy, during one of their regular meetings with the Minister in the fall of 2010.

[82] Mr MacAdam's role as Deputy Chief of Staff in the Minister's office included ACOA affairs. He used an ACOA email address and worked closely with the President and other senior officials. According to the evidence of Minister Ashfield's Chief of Staff, Fred Nott, the person who replaced Mr MacAdam when he was appointed to the ACOA position was hired in the summer of 2010, in spite of there not being a vacancy, because she had related experience at the Chief of Staff level and was bilingual. Mr. Nott's evidence also indicates that there was pressure on the staffing levels in the office due to the merger of personnel when Minister Ashfield assumed responsibility for the portfolio. One inference that may be drawn is that it then became more pressing for Mr MacAdam to find another job. The evidence is that Mr MacAdam was, in any event, interested in finding more stable and secure employment, preferably back home on the Island.

[83] Discussions had been underway from the summer of 2010 to create and staff a DG Operations position. The organization chart for the PEI Branch would not accommodate two DG positions at the EX-2 level. That was resolved when Mr Schmeisser, who had expressed an interest in the position, was encouraged by Mr Dorsey to take a secondment to a position with the PEI Government with financial support (50% of his salary) from ACOA. Steps were then taken to staff the DG Operations position.

[84] Mr Dorsey's assertion that he had based his decision to use an external appointment process because of his concern for attracting a sufficient pool of candidates was found to be not credible by the investigators. This finding was reasonably open to the investigators. They noted that Mr Dorsey's initial preference for using an internal process but agreement to go external when informed of the results of research into the eligibility of ministerial staff to apply for the competition was contemporaneously documented in Mr Estabrooks' email to Mme Frenette of October 28, 2010.

[85] I agree with the respondent that Mr MacAdam's assertion that he would have resigned his position to participate in an internal appointment process is a self-serving statement deserving little or no weight. There is no evidence that any ACOA officials were under the impression that he would resign in order to take part in the competition. Rather, the evidence indicates that the ACOA officials acted to protect his employment status by ensuring that he did not have to first resign in order to qualify. Mr MacAdam did not at first inform his Minister of his application because he would be without a job if it did not work out.

[86] Among the key pieces of evidence cited by the respondent in its argument is an email from Mme Léger to Mr Estabrooks dated October 27, 2010. The subject line says "Tried to PIN but would not send". As noted above, this is a reference to the PIN-to-PIN messaging component of the Blackberry smart phones available on standing offer to federal government departments and agencies. It allows one Blackberry user to send a message to another that by-passes the departmental networks. No explanation was provided for the puzzling question of why Mme Léger would want to transmit a message to Mr Estabrooks in this manner concerning a

staffing process. While the investigators did not resolve this question, one inference that could be drawn is that Mme Léger did not want the message to be preserved in the network data banks. However, it was ultimately sent through the network and retrieved by the investigators.

[87] In the message, Mme Léger refers to a prior conversation between herself and Mr Estabrooks and then writes:

> One of the key elements I should have noted when we spoke is the whole element of what is the pool of potential candidates who meet?
>
> A process of this kind at this level is going to be posted nationally so the likelyhood [*sic*] of having qualified individuals who are bilingual is I would assume higher than 50% (???). The rationale needs to address the "attempts" we have made to "ensure" there are no other qualified candidats [*sic*] who meet the language requirements.
>
> The other piece to consider is that the non-imperative candidate who is selected has 2 years to attain the required level. If they do not meet there is a possibility (one of 4 conditions) for 2 one year extenions [*sic*] or they must be deployed to a position for which they meet all req'ts including language. We would need to have a non-bilingual EX-02 in our back pocket. There are no exceptions to this and we (President) report through the DSAR annually.

[88] The "DSAR" in public service parlance is the Departmental Staffing Accountability Report which measures performance under the PSEA each year. This is intended to provide assurance to Parliament that the core values of merit and non-partisanship, and the guiding values of fairness, transparency, access and representativeness are respected in appointments.

[89] I think that it is clear from this message that ACOA personnel were aware that they were at risk of being non-compliant with the PSEA core values should the decision be made to

proceed with the external staffing process and also that they knew that there was likely to be a sizable number of internal candidates who met the language requirements if the job was posted nationally. Thus they had to provide a rationale that addressed the "attempts" made to "ensure" there were no other qualified bilingual candidates. This does not suggest an effort to meet the core values but rather a warning that Mr Estabrooks and the responsible managers would have to cover their tracks if they were to proceed otherwise.

[90] It is also striking that Mme Léger points to the consequences of proceeding with non-imperative staffing. Any successful candidate who did not meet the language requirements of the position would be entitled to two years training and possibly for two years longer to become bilingual. And if he did not succeed in that time frame, the successful candidate would be guaranteed an equivalent position elsewhere in the organization. This followed an earlier warning from Ms Sullivan in July 2010 that there wouldn't be support for non-imperative staffing for budgetary reasons because of the cost implications of having to fill the position on an interim basis in addition to paying the salary costs of the successful candidate and possibly having to support an additional position at the EX-2 level. This warning was prescient. As noted above, Mr MacAdam had yet to meet the language requirements of the position by January 2014.

[91] In the result, Mr MacAdam went directly from his position in the Minister's office to a guaranteed EX-2 position whatever success he might achieve in language training. Barring a more senior level appointment or lucrative position in the private sector, this could not have been a softer landing for a former political staffer looking for a more secure position close to home.

[92] One of the questions that I had in reviewing the record of this staffing process is how it was possible that Mr MacAdam became the only qualified candidate for what is a relatively senior and secure position in the federal public service. EX-2 positions do not grow on trees, particularly in Atlantic Canada. The applicants argue that it was understood by ACOA management that potential candidates would not want to move to PEI for career and personal reasons. That may be a reasonable explanation but I wondered whether there was another.

[93] I agree with the applicants that rumour, scuttlebutt and speculation that "the job was for MacAdam", should have no place in determining whether improper conduct took place in a staffing competition. But if such rumours were circulating, as Mme Léger stated, it is not difficult to draw the inference that they could have had a chilling effect on other qualified candidates who might otherwise have been interested in the position. This may go some way to explain why they did not apply.

[94] As for the actual assessment board interviews, the scribbled notes taken at the time are of little help. There does not appear to have been a serious effort made to record the interviews. And apart from a bald statement that "Kevin MacAdam was the only qualified candidate", no explanation is provided for why the other candidates interviewed did not qualify. Mr Dorsey acknowledged that he did not provide any explanation to one of the candidates who had gone to the trouble of travelling to Charlottetown for the interview. Another was told he did not succeed, according to Mr Dorsey, because he had "never been in a substantive EX" and "it was a significant leap". That candidate later raised the fairness and transparency of the process with Mr Dorsey. Mr Dorsey says that the candidate "drew some conclusions because of who was

eventually successful" and that he, Mr Dorsey, had explained why the candidate didn't meet the requirements. Unfortunately, those explanations do not appear in the notes.

[95] This is not to suggest that Mr MacAdam was not qualified for the position. It is unquestionable that he knew the economic conditions on the island well and was very familiar with the ACOA process both from his prior experience as a provincial minister and five years working for the responsible federal minister. In a fair competition for the position, apart from the language requirement, Mr MacAdam may well have come out on top of any other candidates. But any likelihood of that outcome does not answer the Commission's conclusion that improper conduct helped him get the job.

[96] The sole difficulty that I have with the amended investigative report and the Commission's decision is with regard to the finding of improper conduct on the part of Mr Estabrooks. I understand that the Commission considers that it is important to hold Human Resource personnel accountable for the staffing advice they give managers. However, Mr Estabrooks' involvement in the impugned process was marginal at best. He was subordinate to, and took direction from, Mr Dorsey as the responsible manager.

[97] In his response to the report and the proposed corrective actions, Mr Estabrooks explained the rationale for his recommendations with respect to the appointment process. He was made aware that Mr Dorsey was interested in considering someone from the Minister's office but did not know who that was and did not understand that Mr Dorsey wanted to consider only that person for the position. He was left with the sense that Mr Dorsey wanted to ensure that the

person could participate in the appointment process with internal candidates. Moreover, Mr Estabrooks worked in an environment where, as he indicated, ACOA management had a practice of using their knowledge of potential candidates outside the federal government as a factor in their determination to use external processes. His direct superior in the Human Resources Branch, Mme Frenette, thought that the process had been fair once everyone had an equal opportunity to apply.

[98] Mr Estabrooks submits that the Commission failed to take his representations into account in arriving at its final determination. If I had been the decision-maker at that stage, I might have agreed with Mr Estabrooks that his role was only advisory and that the responsibility for the process rested with the position manager Mr Dorsey and his superiors within the organization who had approved the form of the competition. However, it is not my role to substitute my opinion for that of the decision-maker. I am satisfied from reading the briefing note provided to the Commission with the investigation report that Mr Estabrooks' representations were brought to the Commission's attention and taken into consideration in the decision under review.

[99] On the basis of the thorough and fair record presented to the Commission, including the representations of each of the applicants, I am satisfied that the decision to find improper conduct was reasonable in the sense that it was justified, transparent and intelligible and within the range of possible, acceptable outcomes defensible in respect of the facts and the law.

B. *Were the corrective actions ordered against Messrs MacAdam, Estabrooks and Dorsey reasonable?*

(1) Mr MacAdam's arguments

[100] Even if the Commission's finding of improper conduct is reasonable, Mr MacAdam argues, the Commission erred in law in its decision to order revocation of his appointment. Revocation is not a required remedy under s 66 of the PSEA and does not further the remedial and corrective goals of the section. As found in previous decisions, revocation is an exceptional remedy. Deviation from the prior decisions in comparable cases suggests the corrective action in this case is unreasonable. Revocation should be reserved for the most serious of cases. It was not appropriate in these circumstances as the Commission found that Mr MacAdam himself did not engage in misconduct.

(2) Mr Dorsey's arguments

[101] Mr Dorsey submits that corrective measures are only valid exercises of the authority provided by section 66(b) of the PSEA when they are tailored to the individual responsible for the defect in question. The prohibition on delegating appointment authority to Mr Dorsey and the suspension of his staffing privileges are not "corrective" within the meaning of the PSEA. Nor are they consistent with measures taken in other similar cases.

[102] There was no evidence or finding that Mr Dorsey used either of those powers improperly in relation to the appointment of Mr MacAdam. There is no legal or factual basis for the order that Mr Dorsey complete the two courses. He properly relied on the recommendations and advice

that he received from the human resource professionals at ACOA. Thus there was no negligence or ethical lapse on the part of Mr Dorsey that required correction through further study.

(3) Mr Estabrooks' arguments

[103] The Commission's remedial order was unreasonable in his case, Mr Estabrooks submits, as the Commission ignored evidence that he was simply following established practices at the ACOA. His actions were supported by Mr LeBlanc, the President of ACOA and by his immediate superior Mme Frenette. Mr LeBlanc stated in a letter to the Commission that a finding that Mr Estabrooks acted improperly would be an injustice and would have a profound, detrimental impact on staffing in the public service. Mme Frenette gave evidence that if a potentially qualified individual is known, ACOA tried to give that person access to the appointment process.

[104] If it was reasonable for the Commission to find that selecting an external process was improper conduct, Mr Estabrooks submits, the corrective action in response ought to have been aimed at those responsible for it. The practice of considering the existence of potential candidates in choosing a selection process was consistent throughout ACOA. Therefore, any remedy ought to have been systemic in nature, rather than penalizing Mr Estabrooks for following standard practice.

(4) Respondent's arguments

[105] The respondent submits that both the revocation of Mr MacAdam's appointment and the measures imposed on Messrs Dorsey and Estabrooks are reasonable in the circumstances and within the jurisdiction of the Commission on the basis of *Seck FCA*, above, at para 51.

[106] While there was no finding of improper conduct on the part of Mr MacAdam, the appointment process was affected by the fact that key decisions were made in order to allow Mr MacAdam to apply and participate in the process. Since the purpose of corrective actions is to normalize the appointment process by remedying the errors that occurred, the proper way to correct the defect in the process at bar is to revoke the appointment, submits the respondent. Revocations do not require a finding of wrongdoing on the part of the person appointed and therefore, the respondent argues, the revocation of Mr MacAdam's appointment is not a deviation from prior practice. Revocation of an appointment pursuant to s 66 of the PSEA is not a disciplinary action and the legal principles from the labour law context, such as proportionality and the gradation of sanctions, do not apply: *Seck, FCA*, above, at paras 48-51.

[107] Mr Dorsey's assertion that there is no connection between the corrective measures imposed and his actions is disingenuous. The President of ACOA decided to staff the DG Operations position by way of an external, bilingual non-imperative staffing action on Mr Dorsey's recommendation. Mr LeBlanc testified that the decision for an external process rested with Mr Dorsey and the HR officials.

[108] Since Messrs Dorsey and Estabrooks' actions ran contrary to the guiding values of the PSEA, in particular the values of fairness and transparency, the respondent submits that education in ethical leadership and staffing serve a corrective purpose. Furthermore, the respondent argues that the three-year prohibition on delegated appointment authority, and the additional prohibition from exercising staffing duties in Mr Dorsey's case, ensured that staffing decisions in the immediate future did not contravene PSEA values or the PSC policies.

(5) Analysis

[109] Although *Seck*, *FCA* above, at paragraphs 48-51, dealt with corrective action under s 69 of the PSEA, I am of the view that the principles set out by the Federal Court of Appeal are equally applicable in reviewing corrective action under s 66 of the PSEA. Both sections of the PSEA give the Commission the same powers of action where it finds that appointment processes have been tainted by fraud, in the case of s 69, or improper conduct, amongst other things, in the case of s 66. Those powers of action are: (a) "revoke the appointment or not make the appointment", or (b) "take any corrective action that it considers appropriate".

[110] In *Seck FCA*, above, at para 48, the Federal Court of Appeal held that these corrective measures are:

> 48 […] administrative measures intended to ensure the integrity of the appointment process in the federal public service, not disciplinary measures per se. This distinction is important, both for the purpose of delimiting the action that the Commission may take under the section in issue and for the purpose of defining the Commission's duty to deal fairly with the people it investigates.

[111] In light of this distinction, the Federal Court of Appeal then considered the Commission's role and mandate in administering these corrective measures as well as the remedy available in the face of such measures: *Seck FCA* , above, at paras 49-51:

> 49 The employers of public servants are responsible for the disciplinary action taken against them, and disciplinary action is governed by the *Public Service Labour Relations Act*. The Commission therefore may not take disciplinary action under section 69 of the Act. At most, it may, as it did in the appellant's case, pass on to the employer any relevant information collected in the course of its investigation. It will be up to the employer to take disciplinary action, if it sees fit to do so. The Commission's role and mandate have to do with the integrity of the appointment process in the public service rather than disciplining delinquent employees.
>
> 50 When the Commission revokes an appointment under section 69, it is not taking disciplinary action, as such an appointment is *void ab initio*. This is not a dismissal or a lay-off that may be grieved. Nor are the other corrective measures that the Commission may take subject to grievance.
>
> 51 If the Commission cannot take disciplinary action under section 69, the corrective action that it takes under that section cannot be grieved under the *Public Service Labour Relations Act*. The appropriate remedy is, rather, an application for judicial review before the Federal Court. Thus, labour law principles, such as proportionality and progressive discipline, do not apply to corrective action under section 69. Such corrective action must instead be reviewed using the principles of administrative law, that is, it must be within the jurisdiction of the Commission and be reasonable.

[112] The revocation of Mr MacAdam's appointment cannot be found to be unreasonable on the basis that this is not one of the most serious of cases since labour law principles such as proportionality and progressive discipline do not apply to corrective action under section 66: *Seck FCA*, above, at para 51. Furthermore, the revocation is not a disciplinary measure taken by the Commission. Rather, it is a recognition of the fact that the appointment process was tainted

as a result of improper conduct and therefore the appointment itself was *void ab initio*: *Seck FCA*, above, at para 50.

[113] I am also of the view that the corrective action in relation to Messrs Dorsey and Estabrooks is reasonable. The corrective measures were clearly designed to protect and reinforce the integrity of the appointment process. While they may be considered harsh in the circumstances with respect to Mr Estabrooks, they fall within the range of acceptable outcomes defensible on the facts and the law.

[114] In the result, the applications are dismissed with costs awarded the respondent on the normal scale.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications are dismissed. The respondent is awarded costs on the normal scale. A copy of this Judgment and Reasons shall be placed on each file.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1620-12, T-1673-12, T-1682-12
STYLE OF CAUSE:	KEVIN MACADAM v THE ATTORNEY GENERAL OF CANADA and KENT ESTABROOKS v THE ATTORNEYGENERAL OF CANADA and PATRICK DORSEY v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 9, 2014
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	MAY 12, 2014

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James Cameron	FOR THE APPLICANT (for Kent Estabrooks)
Murray L. Murphy	FOR THE APPLICANT (for Patrick Dorsey)
Robert MacKinnon Peter Nostbakken	FOR THE RESPONDENT

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