

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121129

Docket: A-493-11

Citation: 2012 FCA 314

**CORAM: NOËL J.A.
PELLETIER J.A.
MAINVILLE J.A.**

BETWEEN:

AIDA MARIÈME SECK

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Ottawa, Ontario, on November 7, 2012.

Judgment delivered at Ottawa, Ontario, on November 29, 2012.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

**NOËL J.A.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from the judgment (cited as 2011 FC 1355) by which Justice Bédard of the Federal Court (the “judge”) dismissed an application for judicial review of a decision of the Public Service Commission (the “Commission”). The Commission found that the appellant had given false references in the course of an appointment process within the federal public service and that fraud within the meaning of section 69 of the *Public Service Employment Act*, S.C. 2003, c. 22, sections 12 and 13 (the “Act”), had therefore occurred in that process.

Background

[2] The appellant applied for a position within the Department of Foreign Affairs in an internal appointment process organized by that Department in accordance with the Act. As required by the appointment process, the appellant named as a reference her immediate supervisor in a previous position, and that was Rose M’Kounga. Ms. M’Kounga gave the persons who were responsible for the competition exhaustive and very favourable written comments concerning the appellant’s skills and qualifications. Despite this, the appellant was not selected.

[3] Later, an internal administrative investigation by the Department of Natural Resources into the use of its computer system by one of its employees, Gisèle Seck (the appellant’s mother), uncovered some troubling facts that were reported to the Commission.

[4] The Commission then launched its own investigation concerning the appellant, under section 69 of the Act, which reads as follows:

69. If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, 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.

69. La Commission peut mener une enquête si elle a des motifs de croire qu’il pourrait y avoir eu fraude dans le processus de nomination; si elle est convaincue de l’existence de la fraude, elle peut :

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

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

[5] After summoning and hearing a number of witnesses, including the appellant and Ms. M'Kounga, the investigator appointed by the Commission concluded: (a) that Ms. M'Kounga had not been the appellant's supervisor, and (b) that the reference that Ms. M'Kounga gave regarding the appellant had been prepared by the appellant and her mother, and Ms. M'Kounga had simply sent it to the persons responsible for the appointment process. In the Commission's opinion, that constituted fraud in the appointment process.

[6] The Commission therefore took the following three corrective actions:

a. For a period of three years, the appellant must obtain written permission from the Commission before accepting a position within the federal public service. If she accepts a determinate or indeterminate appointment within the federal public service without first obtaining such permission, her appointment will be revoked.

b. A copy of the investigation report and the record of decision, as well as all other relevant information concerning the appellant, were sent to her employer, the Canada Revenue Agency.

c. A copy of the investigation report and all other relevant information were also sent to the Royal Canadian Mounted Police, since section 133 of the Act provides that every person who commits fraud in any appointment process is guilty of an offence punishable on summary conviction.

Judgment of the Federal Court

[7] Three issues were raised before the judge: (a) Could the Commission conduct an investigation and take corrective action under section 69 of the Act in the circumstances of the case? (b) Did the Commission breach the principles of natural justice and procedural fairness? (c) Was the Commission's decision well founded, given the evidence gathered in the course of the investigation?

[8] The judge used the reasonableness standard of review to assess whether the Commission had jurisdiction to conduct the investigation in question given that the appellant was not the successful candidate at the end of the selection process. She concluded that section 69 of the Act gave the Commission the power to investigate any fraud that may have been committed in the course of an appointment process in the public service, and not just fraud that has led to the appointment of a candidate who committed that fraud.

[9] The judge applied the correctness standard of review when considering whether the Commission had acted fairly. She noted that the Commission, through its investigator, had clearly informed the appellant of the nature of the investigation and of the allegations against her at each step of the investigation, and that the appellant had been given the opportunity to be heard and to be represented by counsel.

[10] Finally, the judge concluded that the Commission had been reasonable in its assessment and analysis of the evidence gathered during the investigation. On this point, the judge noted that the facts presented by the appellant and Ms. M'Kounga were contradictory and inconsistent, particularly regarding the period during which the appellant had allegedly worked under the supervision of Ms. M'Kounga and the place at which this work had allegedly been performed. Consequently, the judge held that it was reasonable for the Commission to conclude that Ms. M'Kounga had not supervised the appellant during the period in question.

[11] The judge also held that it was reasonable for the Commission to conclude, on the basis of the numerous emails in the record, that the favourable comments regarding the appellant that

Ms. M’Kounga had sent in the course of the appointment process in question had been prepared by the appellant and her mother.

Issues on appeal

[12] The fundamental issue raised by the appellant in this appeal is the scope of the Commission’s jurisdiction under section 69 of the Act. This is the main issue that this Court must consider.

[13] On appeal, as before the Federal Court, the appellant is challenging the fairness of the procedure followed by the Commission, and she still maintains that the Commission’s analysis of the evidence is unreasonable.

Main issue: The scope of the Commission’s jurisdiction to investigate and take corrective action under section 69 of the Act

(a) Standard of review

[14] In an appeal involving an application for judicial review, this Court must determine whether the reviewing judge chose and applied the appropriate standard of review; if the judge did not do so, this Court must then review the impugned administrative decision in light of the applicable standard. The judge’s selection of the appropriate standard of review is itself a question of law, subject to review on the standard of correctness: *Dr Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraph 43; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40,

[2005] 2 S.C.R. 100, at paragraph 35; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at paragraphs 13 and 14.

[15] The judge applied the reasonableness standard to the main issue raised by the appellant, and did so on the basis that the Commission was interpreting its home statute. At the hearing of this appeal, the respondent also submitted that the applicable standard is reasonableness.

However, recently, in another appeal related to this case, namely *Anissa Samatar v. Attorney General of Canada*, 2012 FC 1263 (*Samatar*), Justice Martineau of the Federal Court had to deal with the same issue and disagreed (at paragraphs 35 and 75 to 93 of *Samatar*) with the standard of review applied by the judge in the present case. Justice Martineau is of the opinion that the matter of the scope of section 69 of the Act is a question of jurisdiction or a question of law that is of vital importance for the public service appointment process and that calls for the application of the correctness standard.

[16] As the following analysis illustrates, the main issue raised by this appeal is the jurisdiction of the Commission under section 69 considering the powers of deputy heads and managers under subsection 15(3) of the Act and of the jurisdiction of the new Public Service Staffing Tribunal. Indeed, as I note further on, the Commission's jurisdiction under section 69 of the Act must be determined by taking into account the concept of "fraud" referred to in that provision, which sets the Commission's jurisdiction apart from that of deputy heads under subsection 15(3) in relation to "improper conduct". Questions regarding jurisdictional lines are subject to review on the correctness standard: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 ("*Dunsmuir*"), at paragraph 61.

[17] The judge applied the reasonableness standard to the jurisdictional issue submitted to her, namely, whether the Commission could launch an investigation under section 69 when the appellant was not selected or appointed as a result of the selection process. This issue sparked a debate over what constitutes a “true” question of jurisdiction within the meaning of *Dunsmuir* at paragraph 59, a debate in which the Supreme Court of Canada itself is partaking: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 34 to 39. In the present case, it is not necessary to decide whether this case raises a “true” question of jurisdiction, reviewed on a correctness standard, or a question of statutory interpretation, reviewed on a reasonableness standard. Rather, the debate before us centres on questions concerning the jurisdictional lines between the administrative agencies in question, and these questions call for the application of the correctness standard.

[18] This is sufficient to dispose of the issue of the applicable standard of review. As *Dunsmuir* in its entirety suggests, and as Justice Rothstein so aptly points out in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, above, at paragraph 38, the courts should try to avoid, to the extent possible, a drawn-out debate on the applicable standard of review and seek to deal instead with the substantive merits of the issues that are truly of interest to the parties and the Canadian public.

(b) The Commission’s decision concerning its jurisdiction

[19] Before the Commission, the appellant submitted that it could conduct an investigation and take corrective action under section 69 of the Act only if there had been an appointment

obtained by fraud. She relied on her argument that the alleged facts did not constitute fraud. She also relied on her submission that the Commission could not proceed under this section except if it was seeking to revoke or to avoid an appointment. Since the appellant's alleged actions did not constitute fraud, since the appellant was not selected in the appointment process in question, and since as a result no appointment could be revoked or avoided, the Commission did not have the jurisdiction to conduct an investigation and to take corrective action.

[20] The Commission's investigator did not carry out a textual or contextual analysis of section 69. The investigator nevertheless rejected the appellant's objection to the Commission's jurisdiction for the reasons stated at paragraphs 44 to 46 of the investigation report:

44. The *Canadian Oxford Dictionary* defines fraud as follows:

The action or an instance of deceiving someone in order to make money or obtain an advantage illegally. A person or thing that is not what it is claimed or expected to be a dishonest trick or stratagem.

...

45. According to the definition, fraud contains an element of intention; the person committing an act of fraud is doing so in the hope of gaining something. The intention of committing fraud can also be inferred from the circumstances. To conclude that fraud occurred during this appointment process, the evidence must show, on the balance of probabilities that false references were provided for Marième Seck by Rose M'Kounga.

46. ... The purpose of section 69 of the PSEA is to determine if fraud occurred during an appointment process, regardless of whether the candidate suspected of committing the fraudulent act has been appointed to the position or not. Often, the fraud is discovered before the conclusion of an appointment process and the person is never appointed. This does not mean that the allegation of fraud cannot and should not be investigated.

(c) *The modern approach to statutory interpretation*

[21] Section 69 must be interpreted according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. The modern approach to statutory interpretation was described in the following terms by Chief Justice McLachlin and Justice Major in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at paragraph 10:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[22] Therefore, according to the modern contextual approach to statutory interpretation, the grammatical and ordinary sense of a provision does not necessarily determine its scope. Consideration must be given not only to the ordinary and natural meaning of the words, but also the context in which they are used and the purpose of the provision within the greater statutory scheme where it is found: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at paragraph 27. The most significant element of this analysis remains the determination of legislative intent: *R. v. Monney*, [1999] 1 S.C.R. 652, at paragraph 26.

(d) *The legislative context*

[23] The Act is part of a new statutory framework, namely, S.C. 2003, c. 22, which implemented a major restructuring aimed at modernizing the employment and labour relations regime in the federal public service. This new statutory framework resulted in the new *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, which institutes a labour relations regime based on greater cooperation and consultation between the employer and bargaining agents. It also amended the *Financial Administration Act*, R.S.C. 1985, c. F-11, to put direct responsibility for certain aspects of human resources management in the hands of deputy heads, subject to policies and directives of the Treasury Board. It changed the structure of the Canadian Centre for Management Development to create the Canada School of Public Service, the organization responsible for learning and development activities for employees in the public service. Finally, it replaced the former *Public Service Employment Act*, R.S.C. 1985, c. P-33, with a new statute having the same title—the Act at issue in this appeal—aimed at modernizing the staffing regime in the public service.

[24] The Act's preamble describes the fundamental values of the federal public service. In particular, it states that the public service must be based on merit and non-partisanship and that these two values must be independently safeguarded. The public service must also strive for excellence, be representative of Canada's diversity and be able to serve the public with integrity and in the official language of its choice. The preamble also sets out the principle that 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.

[25] Part 1 of the Act continues the Public Service Commission but gives it a very different mandate from the one it had before the new statutory framework was enacted. The Commission is still responsible for staffing within the public service, but the Act now clearly states that staffing authority will be delegated to the deputy heads, who in turn may delegate it to managers in their respective organizations. The Commission may also conduct investigations and audits in accordance with the Act, but its jurisdiction in respect of most staffing complaints is largely ousted in favour of managers and a new administrative tribunal, the Public Service Staffing Tribunal.

[26] Part 2 of the Act governs appointments in the public service. Appointments must be made “on the basis of merit” (subsection 30(1)). For an appointment to be based on merit, the person to be appointed must meet “the essential qualifications for the work to be performed, as established by the deputy head” (paragraph 30(2)a)). Managers have broad appointment powers and, in exercising these powers, may use an advertised or non-advertised appointment process (section 33), determine areas of selection (section 34), and use any assessment method, such as a review of past performance and accomplishments, to determine whether a person possesses the required qualifications (section 36).

[27] Part 3 of the Act sets out the powers and obligations relating to deployments of employees within the public service. Part 4 specifies the terms and conditions of employment in the public service, particularly the obligation to take an oath to faithfully and honestly fulfil

one's duties, the effective date of an appointment, the period of employment, probationary periods, rates of pay on appointment and the rules regarding the laying off of employees.

[28] Part 5 of the Act concerns investigations and complaints relating to appointments. It describes the responsibilities and jurisdiction of the Commission regarding investigations, as well as those of the new Public Service Staffing Tribunal.

[29] The Commission's jurisdiction to investigate and to take corrective action is essentially limited to external appointment processes (section 66). Investigations and corrective action regarding internal appointment processes are the responsibility of the deputy heads (subsection 15(3)). Therefore, the Commission may only investigate an internal appointment process when the deputy head responsible for the process requests it or in the rare cases where the authority to make appointments has not been delegated to a deputy head (section 67), in cases where the Commission has reason to believe that an appointment or proposed appointment was not free from political influence (section 68), or if it has reason to believe that fraud may have occurred in an appointment process (section 69).

[30] Most complaints relating to internal appointment processes are now handled by the new Public Service Staffing Tribunal, which is the subject of Part 6 of the Act. Indeed, the Tribunal considers complaints from employees concerning the revocation of an appointment (section 74) or a refusal to make an appointment in an internal appointment process (section 77), except where there are allegations of fraud or political influence (subsection 77(3)).

[31] Part 7 of the Act governs the political activities of employees and the Commission's powers to investigate and take action in such matters. Finally, Part 8 of the Act contains general provisions, including section 133, which creates the only criminal offence under the Act, namely, committing fraud in an appointment process.

[32] The Commission's power to investigate under section 69 of the Act is thus part of a sweeping reform designed to modernize the public service's staffing system, particularly by delegating most staffing decisions to the lowest level possible. However, this reform seeks to maintain and safeguard the fundamental values of the public service, including the commitment to ensuring that appointments in the public service are based on merit and non-partisanship. Section 69 must therefore be understood and interpreted in that context.

[33] In light of the legislative context, there are three aspects of section 69 that must be considered in this appeal: (1) the concept of "fraud" in section 69, as distinguished from "improper conduct" under subsection 15(3) of Act, in respect of which deputy heads are authorized to conduct investigations and take corrective action in the case of an internal appointment process; (2) the question of whether an appointment must be at issue before an investigation can be pursued or corrective action under section 69 can be taken; and (3) the concept of "corrective action" and how such action is distinguished from "disciplinary" action by managers and "criminal" proceedings in courts of law.

(e) The concept of fraud in section 69 of the Act

[34] As I noted above, the new Act profoundly changed the mandate of the Commission; in general, staffing powers with which the Commission was previously invested are now exercised in large part by managers in the public administration. Thus, with a few exceptions, investigations and corrective action regarding an internal appointment process are not the Commission's responsibility. In this regard, subsections 15(3), (4) and (5) of the Act read as follows:

15. (3) Where the Commission authorizes a deputy head to make appointments pursuant to an internal appointment process, the authorization must include the power to revoke those appointments and to take corrective action whenever the deputy head, after investigation, is satisfied that an error, an omission or improper conduct affected the selection of a person for appointment.

(4) In authorizing a deputy head under subsection (3), the Commission is not required to include the authority to revoke appointments or to take corrective action in circumstances referred to in sections 68 [political influence] and 69 [fraud].

(5) The Commission may not revoke an appointment referred to in subsection (3) or take corrective action in relation to such an appointment except in circumstances referred to in sections 68 and 69.

15. (3) Dans les cas où la Commission autorise un administrateur général à exercer le pouvoir de faire des nominations dans le cadre d'un processus de nomination interne, l'autorisation doit comprendre le pouvoir de révoquer ces nominations — et de prendre des mesures correctives à leur égard — dans les cas où, après avoir mené une enquête, il est convaincu qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée.

(4) Le paragraphe (3) n'oblige pas la Commission à inclure dans l'autorisation le pouvoir de révoquer ou de prendre des mesures correctives dans les cas prévus aux articles 68 [nomination fondée sur des motifs d'ordre politique] et 69 [fraude].

(5) La Commission ne peut exercer le pouvoir de révocation ni celui de prendre des mesures correctives à l'égard d'une nomination visée au paragraphe (3), sauf dans les cas prévus aux articles 68 et 69.

[35] Thus, the distinction between the Commission's jurisdiction and the jurisdiction of deputy heads with regard to investigations and corrective action in an internal appointment process depends on whether there was "improper conduct" within the meaning of subsection 15(3) of the Act or "fraud" within the meaning of section 69 of the Act. The Commission does not have jurisdiction in the case of "improper conduct" in an internal appointment process, but it does have exclusive jurisdiction to investigate cases of "fraud".

[36] The distinction is important, because if an appointment is revoked on the basis of improper conduct, the affected employee may file a complaint with the Public Service Staffing Tribunal, which will determine whether the revocation was reasonable (subsections 15(3) and 67(2) and section 74). Such a remedy is not available in cases of fraud (subsection 77(3)). In cases of fraud, the Commission's decision under section 69 is final, subject to judicial review by the Federal Court: *Federal Courts Act*, R.S.C. 1985, c. F-7, sections 18 and 18.1.

[37] The Act defines neither "fraud" nor "improper conduct". In this appeal, since "fraud" is a form of "improper conduct", we need only determine the parameters of the concept of fraud in order to delineate the jurisdiction of the Commission.

[38] I note that the only criminal offence created by the Act is "fraud in any appointment process" (section 133). The distinction between sections 69 and 133 of the Act thus lies in the burden of proof that applies for the purpose of establishing fraud rather than in the definition itself of fraud. When the Commission conducts an investigation under section 69, the applicable standard of proof is that of the balance of probabilities (see *F. H. v. McDougall*, 2008 SCC 53,

[2008] 3 S.C.R. 41, at paragraphs 40 and 49), whereas a court of law considering a charge under section 133 applies the more stringent standard of proof of “beyond a reasonable doubt” that is proper in criminal law.

[39] In my opinion, for the purposes of section 69 of the Act, the definition of “fraud” established by Justice Cory in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (*Cuerrier*), at paragraphs 110 to 116, should be used. Fraud thus has two essential elements: (1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation.

[40] Dishonesty is established where deceit, lies or other fraudulent means are knowingly used in an appointment process. This may include the non-disclosure or concealment of important facts in circumstances where that would be viewed by a reasonable person as dishonest.

[41] As Justice Cory notes at paragraphs 113 and 114 of *Cuerrier* —relying on *R. v. Olan*, [1978] 2 S.C.R. 1175, at page 1182, and *R. v. Théroux*, [1993] 2 S.C.R. 5, at pages 25 and 26 — the victim of the fraud is not required to prove that the fraudulent acts caused actual injury or loss. With regard to section 69 of the Act, to prove the second element, it therefore suffices to establish that the appointment process could have been compromised.

[42] If we apply these principles to the present case, fraud within the meaning of section 69 of the Act will be found if the evidence proves on a balance of probabilities that the appellant knowingly provided false references in order to deceive the persons responsible for the appointment process and thereby increase her chances of being appointed. Providing false

references undermines the appointment process; even if the person who committed the fraud is not appointed, the constituent elements of fraud have nevertheless been proved.

(f) Does there have to be an appointment at issue in order to investigate and take corrective action under section 69?

[43] As I have concluded, it is not necessary that an appointment result from the fraudulent acts in order for there to be fraud within the meaning of the Act. However, the appellant asserts that the very wording of section 69 includes this requirement since, according to the appellant, paragraphs (a) and (b) of that section are conjunctive, meaning the corrective action contemplated in paragraph (b) may only be taken where, under paragraph (a), the Commission revokes an appointment, or does not make one. In support of her argument, the appellant relies on the conjunction “and” that appears between paragraphs (a) and (b) in the English version of the section.

[44] In most of the cases contemplated by the Act, there has to be an actual or proposed appointment at issue in order for corrective action to be taken. Thus, it is only if the Commission or deputy head is “satisfied that there was an error, an omission or improper conduct that affected the selection of the person appointed” following an internal appointment process that an appointment may be revoked and corrective action taken (paragraph 15(3) and section 67). Similarly, in the case of an external appointment process, the Commission may intervene under section 66 of the Act only if “the appointment was not made or proposed to be made on the basis of merit, or . . . there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment”. Likewise, the Commission may intervene

under section 68 of the Act only “if it is satisfied that the appointment or proposed appointment was not free from political influence”.

[45] Under all these provisions, there must be an actual or proposed appointment at issue in order for a deputy head or the Commission to be able to intervene. However, this requirement was not added to section 69, which deals with fraud. This is clearly a deliberate choice by Parliament. Thus, under section 69, the Commission may investigate “[i]f it has reason to believe that fraud may have occurred in an appointment process”. Unlike subsection 15(3) and sections 66, 67 and 68 of the Act, section 69 does not require that an appointment, actual or proposed, be in issue for there to be an investigation and corrective action. This section addresses the appointment process itself and not just the outcome of that process.

[46] Parliament is thus seeking to ensure the integrity of the appointment process in the federal public service. Keeping the appointment process free of fraud is thus a fundamental value that Parliament seeks to safeguard through sections 69 and 133 of the Act. The Commission may therefore investigate and take corrective action when there is fraud in an appointment process whether the fraud led to a fraudulent appointment or not.

[47] As regards the word “and” in the English version of section 69, it must be interpreted as being disjunctive. The English word “and” may indeed be conjunctive or disjunctive, depending on the context: *Canada (Minister of Citizenship and Immigration) v. Hyde*, 2006 FCA 379, at paragraph 22; P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969), at pp. 232 to 234; R. Sullivan, *Construction of Statutes*, 5th ed.

(Markham: LexisNexis Canada, 2008), at pp. 81 to 84. Since section 69 seeks to guard against fraud in the appointment process itself and not just in the outcome of the process, the word “and” inserted between paragraphs (a) and (b) in the English version must be interpreted as being disjunctive.

(g) *Corrective action under section 69*

[48] In cases of fraud in the appointment process, the Commission may (a) “revoke the appointment or not make the appointment”, or (b) “take any corrective action that it considers appropriate”. These are 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.

[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.

[52] Similarly, the corrective action contemplated in section 69 does not include imposing criminal penalties on wrong-doing employees. That falls instead to the courts of law acting under section 133 of the Act. However, nothing prevents the Commission from disclosing the conclusions of its investigation to police authorities so that they may decide whether they should conduct their own investigation and, if appropriate, lay charges under section 133, having regard to the *Canada Evidence Act*, R.S.C. 1985, c. C-5; section 13 of the *Canadian Charter of Rights and Freedoms*; and the criminal law burden of proof of beyond a reasonable doubt.

[53] In the present case, the Commission submitted its report to the employer and to the Royal Canadian Mounted Police, and it required the appellant to obtain its written permission before

accepting any position in the federal public service in the next three years. In my view, these measures are entirely consistent with the letter and the spirit of section 69 of the Act; they are within the Commission's jurisdiction and are reasonable in light of the circumstances of the case.

[54] The measures taken by the Commission do not prevent the appellant from applying for other positions in the federal public service. If the appellant is required to obtain the Commission's permission beforehand, it is to ensure the integrity of the appointment process by enabling the Commission to take a closer look at any future application by her in order to, among other purposes, make sure there is no fraud. The Commission also reserves the right, for a period of three years, not to consent to the appellant accepting a position in the public service. This is an additional corrective measure aimed at safeguarding the integrity of the public service appointment process. The appellant does not have any right to a new appointment in the public service, and the Canadian public is entitled to expect that those who commit fraud will be excluded from the appointment system, at least for a reasonable time. At stake here is the very credibility of the merit-based appointment system, which remains one of the fundamental values of the federal public service.

Second question: The fairness of the Commission's procedure

[55] As the judge stated, issues regarding the duty of fairness must be reviewed on the correctness standard: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43.

[56] Section 70 of the Act provides that in conducting any investigation under section 69 of the Act, the Commission has all the powers of a commissioner under Part II of the *Inquiries Act*, R.S.C. 1985, c. I-11. That act provides for two types of investigations. The first is described in Part I thereof, which concerns inquiries that the Governor in Council requests “into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof” (section 2 of the *Inquiries Act*). The second type of investigation is described in Part II of that act, which concerns investigations relating to the state and management of the business of a department, and the conduct of any person in the service of that department, insofar as that conduct relates to the official duties of the person (section 6 of the *Inquiries Act*). As Justice Cory noted in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, at paragraph 36, “[i]t is this second type of inquiry that is more often specifically concerned with the conduct of individuals”.

[57] Since the second type of investigation specifically concerns the conduct of individuals and is aimed at, in the case of section 69 of the Act, making findings regarding fraudulent conduct, the investigator’s duty of procedural fairness is particularly demanding, even though the findings lead to corrective action that can be neither disciplinary action, nor criminal penalties.

[58] Moreover, section 72 of the Act gives a person whose appointment is at issue the right to make representations to the person conducting the investigation. In addition, section 13 of the *Inquiries Act* sets out a minimum duty of procedural fairness toward a person who is under investigation:

13. No report shall be made against any person until reasonable notice has	13. La rédaction d’un rapport défavorable ne saurait intervenir sans
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<p>been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.</p>	<p>qu'auparavant la personne incriminée ait été informée par un préavis suffisant de la faute qui lui est imputée et qu'elle ait eu la possibilité de se faire entendre en personne ou par le ministère d'un avocat.</p>
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[59] It is possible that, in the case of an investigation under section 69 of the Act, the duty of fairness demands more than the minimal requirements set out in section 13 of the *Inquiries Act* and section 72 of the Act. It will be up to the federal courts to define this duty in other appropriate cases. For the purposes of this appeal, we need only note that the Commission and its investigator afforded the appellant a very high degree of procedural fairness at every stage of the investigation.

[60] Thus the appellant was informed at the outset, in a letter dated June 5, 2009, that the Commission would be conducting an investigation and that there were reasons to believe that she herself had written, in whole or in part, the reference given by Ms. M'Kounga. Moreover, a copy of the information that the Commission had received in this regard was provided to the appellant on that same occasion.

[61] The Commission also informed the appellant that she had the right to be accompanied by a person of her choosing during the investigation, and she availed herself of that right by retaining a lawyer. I note in this regard that the record does not show that the appellant asked for permission to cross-examine the witnesses who took part in the investigation.

[62] The investigator also gave the appellant a copy of the compromising emails concerning her and invited her to comment on them. The appellant had the opportunity to present her version of the events before the investigator drafted the report on the facts, and she met with the investigator with her counsel in attendance. The appellant received a copy of the investigator's preliminary report on the facts on January 28, 2010, and she had the opportunity to comment on it. The appellant also received a copy of the final investigation report. The appellant was also given the opportunity to comment on the corrective action contemplated as a result of that report.

[63] Therefore, the judge did not err in holding that the Commission and its investigator did not breach the rules of procedural fairness in the course of the investigation.

Third question: Was the Commission's decision correct in light of the evidence gathered during the investigation?

[64] As the judge noted, the standard of review applicable to the Commission's analysis of the evidence is reasonableness: *Dunsmuir*, at paragraph 53.

[65] In the present case, the evidence in the record supports the Commission's conclusions. The appellant and Ms. M'Kounga could not clearly state where they had worked together, and the emails entered in evidence show that the appellant and her mother worked on drafting the favourable comments given by Ms. M'Kounga regarding the appellant.

[66] The appellant is asking the Court to reconsider these emails and make its own findings of fact. That is not the role of a reviewing court. In the present case, the role of the judge with regard to this issue was limited to determining whether the conclusions that the Commission

drew from the evidence were within the range of acceptable possible outcomes that are justifiable in light of the facts uncovered in the course of the investigation. Considering the evidence adduced and the sensibleness of the conclusions drawn from it by the Commission, the judge did not make any reviewable error in holding that these conclusions were reasonable.

Other issues

[67] On appeal, the appellant raised two new issues that she had not raised before the Federal Court, namely, the applicable burden of proof and the unreasonableness of the corrective action imposed by the Commission. The respondent objected to having this Court consider these two issues.

[68] The reasons above dispose of these two issues, regardless of whether or not they are validly raised before this Court. As I have already noted, the applicable burden of proof is proof on a balance of probabilities, and the corrective action in issue cannot be likened to disciplinary action to which the labour law principles of proportionality and progressive discipline apply. The additional grounds of appeal raised by the appellant would therefore be without merit, regardless of whether or not they were validly raised before this Court.

Disposition

[69] In conclusion, for the reasons set out above, I would dismiss the appeal with costs.

“Robert M. Mainville”

J.A.

“I agree.

Marc Noël J.A.”

“I agree.

J.D. Denis Pelletier J.A.”

APPENDIX

Excerpts from the *Public Service Employment Act*, S.C. 2003, c. 22, sections 12 and 13

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;

Canada will also continue to gain from a public service that strives for excellence, that is representative of Canada's diversity and that is able to serve the public with integrity and in their official language of choice;

qu'il demeure aussi avantageux pour le Canada de pouvoir compter sur une fonction publique vouée à l'excellence, représentative de la diversité canadienne et capable de servir la population avec intégrité et dans la langue officielle de son choix;

...

[...]

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;

que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manoeuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;

...

[...]

2. (1) The following definitions apply in this Act.

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

...

[...]

“external appointment process” means a process for making one or more

« processus de nomination externe »
Processus de nomination dans lequel

appointments in which persons may be considered whether or not they are employed in the public service.

“internal appointment process” means a process for making one or more appointments in which only persons employed in the public service may be considered.

15. (1) The Commission may authorize a deputy head to exercise or perform, in relation to his or her organization, in the manner and subject to any terms and conditions that the Commission directs, any of the powers and functions of the Commission under this Act, other than its powers under sections 17, 20 and 22, its power to investigate appointments under sections 66 to 69 and its powers under Part 7.

...

(3) Where the Commission authorizes a deputy head to make appointments pursuant to an internal appointment process, the authorization must include the power to revoke those appointments and to take corrective action whenever the deputy head, after investigation, is satisfied that an error, an omission or improper conduct affected the selection of a person for appointment.

(4) In authorizing a deputy head under subsection (3), the Commission is not required to include the authority to revoke appointments or to take

peuvent être prises en compte tant les personnes appartenant à la fonction publique que les autres.

« processus de nomination interne »
Processus de nomination dans lequel seules peuvent être prises en compte les personnes employées dans la fonction publique.

15. (1) La Commission peut, selon les modalités et aux conditions qu'elle fixe, autoriser l'administrateur général à exercer à l'égard de l'administration dont il est responsable toutes attributions que lui confère la présente loi, sauf en ce qui concerne les attributions prévues aux articles 17, 20 et 22, les pouvoirs d'enquête prévus aux articles 66 à 69 et les attributions prévues à la partie 7.

[...]

(3) Dans les cas où la Commission autorise un administrateur général à exercer le pouvoir de faire des nominations dans le cadre d'un processus de nomination interne, l'autorisation doit comprendre le pouvoir de révoquer ces nominations — et de prendre des mesures correctives à leur égard — dans les cas où, après avoir mené une enquête, il est convaincu qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée.

(4) Le paragraphe (3) n'oblige pas la Commission à inclure dans l'autorisation le pouvoir de révoquer ou de prendre des mesures correctives

corrective action in circumstances referred to in sections 68 and 69.

dans les cas prévus aux articles 68 et 69.

(5) The Commission may not revoke an appointment referred to in subsection (3) or take corrective action in relation to such an appointment except in circumstances referred to in sections 68 and 69.

(5) La Commission ne peut exercer le pouvoir de révocation ni celui de prendre des mesures correctives à l'égard d'une nomination visée au paragraphe (3), sauf dans les cas prévus aux articles 68 et 69.

...

[...]

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

30. (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.

...

[...]

66. The Commission may investigate any external appointment process and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may

66. La Commission peut mener une enquête sur tout processus de nomination externe; si elle est convaincue que la nomination ou la proposition de nomination n'a pas été fondée sur le mérite ou qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, la Commission peut :

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

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

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

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

67. (1) The Commission may investigate an internal appointment process, other than one conducted by a deputy head acting under subsection 15(1), and, if it is satisfied

67. (1) La Commission peut mener une enquête sur tout processus de nomination interne, sauf dans le cas d'un processus de nomination entrepris par l'administrateur général

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.

(2) The Commission may, at the request of the deputy head, investigate an internal appointment process that was conducted by a deputy head acting under subsection 15(1), and report its findings to the deputy head and the deputy head may, if satisfied that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment,

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

(b) take any corrective action that he or she considers appropriate.

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

dans le cadre du paragraphe 15(1); si elle est convaincue 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.

(2) La Commission peut, sur demande de l'administrateur général, mener une enquête sur le processus de nomination interne entrepris par celui-ci dans le cadre du paragraphe 15(1), et lui présenter un rapport sur ses conclusions; s'il est convaincu qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, l'administrateur général peut :

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

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

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

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

69. If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, 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.

70. (1) In conducting any investigation under this Part, the Commission has all the powers of a commissioner under Part II of the *Inquiries Act*.

(2) An investigation shall be conducted by the Commission as informally and expeditiously as possible.

71. (1) The Commission may direct that any investigation under this Part be conducted, in whole or in part, by one or more Commissioners or other persons.

(2) A Commissioner directed under subsection (1) has the powers referred to in section 70 in relation to the matter before the Commissioner.

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

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

69. La Commission peut mener une enquête si elle a des motifs de croire qu'il pourrait y avoir eu fraude dans le processus de nomination; si elle est convaincue de l'existence de la fraude, elle peut :

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

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

70. (1) Pour les besoins de toute enquête qu'elle mène sous le régime de la présente partie, la Commission dispose des pouvoirs d'un commissaire nommé au titre de la partie II de la *Loi sur les enquêtes*.

(2) Les enquêtes sont menées par la Commission dans la mesure du possible sans formalisme et avec célérité.

71. (1) La Commission peut désigner, pour mener tout ou partie d'une enquête visée à la présente partie, un ou plusieurs commissaires ou autres personnes.

(2) Le commissaire désigné au titre du paragraphe (1) dispose, relativement à la question dont il est saisi, des pouvoirs attribués à la Commission

par l'article 70.

(3) Subject to any limitations specified by the Commission, a person directed under subsection (1), other than a Commissioner, has the powers referred to in section 70 in relation to the matter before the person.

(3) La personne désignée au titre du paragraphe (1) qui n'est pas commissaire dispose, relativement à la question dont elle est saisie, des pouvoirs attribués à la Commission par l'article 70, dans les limites que celle-ci fixe.

72. Where an investigation is conducted under this Part in relation to a person's appointment or proposed appointment, that person and the deputy head in relation to the appointment — or their representatives — are entitled to make submissions to the Commission, Commissioner or other person, whichever is conducting the investigation.

72. La personne dont la nomination ou la proposition de nomination est en cause dans le cadre d'une enquête visée à la présente partie et l'administrateur général concerné, ou leurs représentants, ont le droit de présenter leurs observations à la Commission ou, si une personne a été chargée de l'enquête, à celle-ci.

[...]

...

74. A person whose appointment is revoked by the Commission under subsection 67(1) or by the deputy head under subsection 15(3) or 67(2) may, in the manner and within the period provided by the Tribunal's regulations, make a complaint to the Tribunal that the revocation was unreasonable.

74. La personne dont la nomination est révoquée par la Commission en vertu du paragraphe 67(1) ou par l'administrateur général en vertu des paragraphes 15(3) ou 67(2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle la révocation n'était pas raisonnable.

[...]

...

77. (3) The Tribunal may not consider an allegation that fraud occurred in an appointment process or that an appointment or proposed appointment was not free from political influence.

77. (3) Le Tribunal ne peut entendre les allégations portant qu'il y a eu fraude dans le processus de nomination ou que la nomination ou la proposition de nomination a résulté de l'exercice d'une influence politique.

133. Every person who commits fraud

133. Quiconque commet une fraude

in any appointment process is guilty of an offence punishable on summary conviction.

dans le cadre d'une procédure de nomination est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-493-11

**APPEAL FROM THE JUDGMENT OF MADAM JUSTICE BÉDARD DATED
NOVEMBER 24, 2011, DOCKET NO. T-1263-10**

STYLE OF CAUSE: Seck v. Canada (Attorney General)

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 7, 2012

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

DATED: November 29, 2012

APPEARANCES:

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