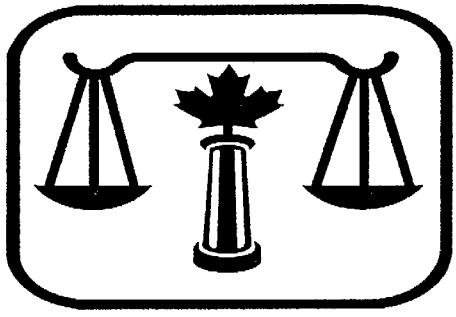
LEGAL SERVICES
PUBLIC SERVICE COMMISSION

RECENT JUDICIAL DECISIONS OF INTEREST TO THE PUBLIC SERVICE COMMISSION
2002



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Ayangma v. *The Queen*

Action by the plaintiff seeking damages on the grounds of discrimination as a result of failure to appoint him to a position within the Executive Group at Health Canada. The action was based on the NCARR decision rendered in 1997 by the Canadian Human Rights Tribunal, the *Canadian Charter of Rights and Freedoms* and the *Official Languages Act.*

Facts

In 2000, the plaintiff applied for a position within the Executive Group at Health Canada. After another candidate was appointed to the position, he filed an appeal, on the grounds of discrimination and non-compliance with the NCARR decision, which stipulated that selection boards should include representation of a member of a visible minority, in order to increase the representation of visible minorities within the Department.

The appeal was allowed on the sole ground that the selection board members did not have sufficient knowledge of French to communicate with the plaintiff during his interview. However, the Appeal Board found that the elimination of the plaintiff from the competition was fair and equitable. Thereafter, the plaintiff commenced an application for judicial review, but did not pursue the matter.

In the meantime, the Commission had proposed corrective measures, to which the plaintiff objected. Subsequently, the Commission decided to cancel the selection process and proposed to conduct a new competition for the position with a new board and new selection tools. The plaintiff refused to participate in the new competition, deciding instead to commence an action claiming damages on the grounds that his language rights had been breached and that he had been discriminated against. He also argued that the Department and certain of its employees were in breach of the *NCARR* order.

Federal Court Trial Division (Blanchard: June 25, 2002)

After the Attorney General of Canada filed a motion for summary judgment, the Court dismissed the plaintiff's action. It noted first that the findings from *NCARR* could not be applied to the case because the plaintiff had not been a party to *NCARR*, had not been an employee of the Department at the time, and had failed to establish a public interest standing. Furthermore, *NCARR* does not automatically impose the presence of members of visible minorities on all selection boards.

The Court found that the appropriate remedy was the responsibility of the Public Service Commission. In deciding not to participate in the new competition, the plaintiff did not exhaust all the remedies available to him under the *Public Service Employment Act.* As a result, the Court concluded that it had no jurisdiction to hear the plaintiff's allegations concerning public service hiring practices.

As for the allegations concerning the breach of language rights, the Court noted that ss. 21, 22 and 28 of the *Official Languages Act* related to service delivery to the public, not to internal staffing competitions. Section 39 is a statement of commitment by the Government of Canada to ensuring equitable participation by members of official language groups; it confers no rights and is not enforceable under s. 77. Noting that the plaintiff had initiated and subsequently discontinued a complaint to the Commissioner of Official Languages, the Court concluded that, since the plaintiff had already obtained a remedy from the Public Service Commission, the issue was *res judicata*.

The Court also rejected the allegations of discrimination based on the *Canadian Charter of Rights and Freedoms* and of breach of the *Public Service Employment Act*, on the grounds that there was no evidence to that effect and that breach of a statutory provision is not conclusive of liability. The Court found that the plaintiff had not been discriminated against: he did not obtain the position he applied for because he did not have the necessary qualifications, not because he was a member of a visible minority. On this issue, the Appeal Board had rejected the plaintiff's claim of discrimination and the plaintiff had discontinued his application for judicial review.

Counsel: Jessica Perreira
Jean-Charles Ducharme

Janine Bailey* v. *her Majesty the Queen in Right of Canada et al and Elisabeth Lavoie et al* v. *Her Majesty the Queen in Right of Canada et al, decision rendered 8 march, 2002, by the Supreme Court of Canada

Executive Summary

The Supreme Court of Canada dismissed the appeals, finding that the provision of the *Public Service Employment Act* allowing the Canadian citizenship preference is constitutionally valid. In view of the majority (6 judges), the preference provided to Canadian citizens in the selection for appointment to the Public Service does not contravene the *Charter*. Among the majority, two judges concluded that the preference does not discriminate against non-citizens. Four judges concluded, however, that the preference is discriminatory as it creates inequalities for a class of person, non-citizens, that has an impact on their human dignity, but that this discrimination is nevertheless a reasonable limitation on the rights of non-citizens in light of the policy objectives on the promotion of citizenship. Three judges formed the dissenting minority finding that the preference infringes the equality rights protected by the *Charter* in a way that it marginalises immigrants from the fabric of Canadian life, and that it is not constitutionally justified.

ANALYSIS

Issue

The appellants, all three of whom are permanent residents, challenged the constitutional validity of paragraph 16(4)(*c*) of the *Public Service Employment Act*, which gives preference to Canadian citizens in competitions open to the public for the staffing of positions in the Public Service (through the operation of paragraph 16(4)(*c*), the Commission has the discretion to give a preference to Canadian citizens to be appointed before non-citizens if there are sufficient qualified Canadian candidates on the eligibility list). The appellants alleged that the preference given to Canadian citizens contravenes their right to equality under *Charter* as it bars them from access to Public Service positions. They also argue that this discrimination cannot be justified as being a reasonable limit in a free and democratic society.

Facts

The Appellant Janine Bailey is a Dutch citizen and a citizen of the European Union. She became a permanent resident of Canada in November 1986, and was eligible to become a Canadian citizen in November 1989. If she became a Canadian citizen, she would have to relinquish her Dutch citizenship. In June 1987, she received a short-term appointment with the Canada Employment and Immigration Commission. Between then and 1992, she applied through open competition to a number of positions as an immigration counsellor, but was not referred as there were sufficient qualified Canadians applicants.

The Appellant Elisabeth Lavoie is an Austrian citizen and a citizen of the European Union. She became a permanent resident of Canada in June 1988, and was eligible to become a Canadian citizen in June 1991. By becoming a Canadian citizen, she would have lost her Austrian citizenship, thereby limiting her opportunities for future employment in the Public Service of Austria. After twenty-two weeks of work in a series of short contracts with the then Department of Supply and Services, she applied to an indeterminate position but was not referred by the Public Service Commission because a qualified Canadian citizen was available.

The Appellant Jeanne To Thanh Hien is a French citizen and a citizen of the European Union. She became a permanent resident of Canada in 1987 and a Canadian citizen in 1991. As a permanent resident, she not successful in obtaining employment in the Public Service.

The discretionary citizenship preference expressed in s. 16(4)(c) PSEA applies at the candidate referral stage. The preference applies to open competitions, in which members of the public and employees are eligible to compete. In these cases, the Public Service Commission exercised its discretion under s. 16(4)(c) in accordance with guidelines in effect during the relevant period. Those guidelines state that the citizenship preference does not exclude non-Canadians from competing in open competitions or from being accepted into candidate inventories, but that non-citizens will not be referred as candidates until the inventory of qualified Canadian candidates has been exhausted.

Federal Court, Trial Division (Nos. T-1686-90 and T-2479-90, April 21, 1995, Wetston J.)

Wetston J. concluded that the preference given to Canadian citizens contravenes section 15 of the *Charter*, but that the preference can be justified under section 1 of the *Charter*.

The preference contravenes the right to equality:

Wetston J. held that paragraph 16(4)(*c*) creates an inequality and contains a distinction based on a personal characteristic that treats persons differently. The Court concluded that, in the instant case, the complainants were disadvantaged by the citizenship preference because this preference virtually precludes referral to open competitions whether the permanent resident is in or outside the Public Service. Moreover, the difference in treatment is closely related to the personal characteristic of the person or group of persons, i.e., citizenship. It is only on account of the plaintiffs' lack of citizenship that the disadvantage was imposed on them. Accordingly, the

Court held that paragraph 16(4)(*c*) of the *PSEA* infringes the right to equality guaranteed in subsection 15(1) of the *Charter*.

The preference may be justified as a reasonable limit:

Wetston J. nevertheless concluded that the infringement could be justified as a reasonable limit that can be demonstrably justified in a free and democratic society, because:

- the objective of the provision is two-fold: first, to enhance the value and importance of Canadian citizenship and, second, to provide an incentive to permanent residents to naturalize;

- these two objectives are important, and are therefore pressing and substantial;
- a rational connection exists between the legislative objective and the means chosen to achieve it, that is, the citizenship preference;

- the provision is designed so as to impair the right to equality as little as possible.

Federal Court of Appeal (Nos. A-317-95 et A-318-95; May 19, 1999; Marceau, Desjardins, and Linden, JJ.A.)

The Court dismissed the appeal: Marceau and Desjardins JJ.A. dismissed the appeal with separate reasons for decision, while Linden J.A. would have allowed the appeal.

Marceau J.A.

According to Marceau, J.A., the distinction made in the *PSEA* does not give rise to the type of discrimination prohibited by section 15. In essence, he explains that a comparison of the privileges of citizenship with those granted to immigrants does not even engage the possibility of an infringement of the right to equality provided in section 15.

He explains that it is impossible to conduct an analysis on the equality principle which would lead to a finding of discrimination in the case at bar in light of the terms and conditions upon which immigrants are admitted to and allowed to stay in this country. The similarities between citizens and non-citizens are not sufficient to establish that the two groups are entitled to identical treatment. A reference to the equality principle, beyond what pertains directly to their common condition as human beings, is not logical. Essentially, equality between citizens and non-citizens would result in an abolition of the concept of citizenship altogether.

Marceau J.A. accepts the trial judge's conclusion that the objectives of the citizenship preference are two-fold: (i) to enhance the meaning, value and importance of Canadian citizenship by according citizens preferential access to federal public service employment and, as a result, (ii) to encourage permanent residents to naturalize.

Following the recent decision of the Supreme Court of Canada in *Law v. Minister of Human Resources Development* (1999), 170 D.L.R. (4th) 1, Marceau J.A. interprets the two lines of reasoning that emerge from Supreme Court decisions as guidelines to be followed in conducting the equality analysis in order to ascertain whether human dignity has been infringed. Moreover, given its objectives and the limited scope of its application, the citizenship preference does not infringe the right to equality provided in subsection 15(1) of the *Charter*, whichever of the two tests is applied.

Under the first test, it is acceptable that certain rights, privileges and obligations be ascribed to citizenship. Under the second test, the objective of enhancing the value of citizenship does not denigrate immigrants based upon personal characteristics. In particular, the citizenship preference does not demean the dignity of the appellants or non-citizens generally.

Desjardins J.A.

By way of introduction, Desjardins J.A. points out that the *Charter* itself confers a significant number of constitutional rights only to citizens. She also accepts the trial judge's conclusion that Parliament's intent in adopting this provision was to enhance the meaningfulness of Canadian citizenship and encourage naturalization. According to Desjardins J.A., preferential access to employment in the public service appears to be just another right or privilege meant to reinforce the links between a state and its citizens. It is therefore very likely that this preference is a valid distinction, and does not consist discrimination against non-citizens. However, Desjardins J.A. did not answer this question definitively, choosing instead to focus on the analysis required by section 1.

She concludes that the preference is saved by the application of section 1 based on the test enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103: the objective pursued by the impugned provision is reasonable, the means chosen (the preference) is rationally connected to the objective, the importance of the legislative objectives outweighs the disadvantage created for non-citizens, and the possibility of obtaining dual citizenship mitigates the impact of the preference for non-citizens.

Linden J.A. (dissenting)

Linden J.A. states at the outset that a citizenship-based distinction that does not flow from the rights granted in the *Charter* itself may constitute discrimination within the meaning of subsection 15(1), and this distinction should therefore be scrutinized with a critical eye. He adds that, given the history of Canada's treatment of immigrants, they are very properly protected by subsection 15(1).

Linden J.A. also recalls that the fact that a distinction is drawn exclusively on an enumerated or analogous ground under subsection 15(1) will generally suffice to establish discrimination because drawing distinctions on the basis of characteristics that are frequently the basis of

stereotyping and discrimination must be avoided. However, a provision that respects the merits and capacities of individual claimants may be saved. In the final analysis, it must be determined whether the provision conflicts with the purpose of subsection 15(1), namely, the protection of human dignity.

He arrives at the conclusion that the preference infringes the right to equality in light of four factors: (i) Canada has historically discriminated against non-citizens precisely by denying them access to employment in the public service; (ii) denying access to employment is far more serious than denying some monetary benefit or procedural right; (iii) citizenship is not enhanced by derogating from the rights of non-citizens; and (iv) the provision makes no reference to the needs or abilities of non-citizens.

Linden J.A. then turns to a section 1 analysis. With regard to the provision's objectives, he adds to them the intent to address concerns of commitment and loyalty which arise when non-citizens are called upon to serve the Canadian public. He adds, however, that he agrees with the trial judge that enhancing Canadian citizenship and encouraging non-citizens to naturalize are objectives of sufficient importance to warrant some compromise of non-citizens' right to equality.

Addressing the second component of the *Oakes* test, Linden J.A. finds that the goals of the provision are related to the legislative objectives, but that these objectives could have been achieved through alternative means in order to minimally impair the rights of non-citizens. Moreover, he adds that there is no evidence that the preference in fact helps to achieve these objectives. He therefore concludes that the preference accorded to Canadian citizens cannot be justified as being a reasonable limit that can be demonstrably justified in a free and democratic society.

Supreme Court of Canada

The Supreme Court dismissed the appeals. Arbour J. and Lebel J., in separate reasons, found no discrimination and declared the citizenship preference valid. Gonthier, Iacobucci, Major and Bastarache JJ. found that the citizenship preference was discriminating against non-citizens but it is a reasonable limit on their rights to equality in order to achieve Canada citizenship policy objectives. McLachlin C.J. and L'Heureux-Dubé and Binnie JJ., found that the Canadian citizenship preference discriminates against non-citizens in that it marginalises immigrants from the fabric of Canadian life and that it was not justified in a free and democratic society.

Arbour J.

The citizenship preference does not infringe the equality rights under the *Charter*. The reasonable person in circumstances similar to the appellants would conclude that the citizenship preference does not offend the essential human dignity of the appellants and therefore does not discriminate. Not all distinctions resulting in differential treatment at law can properly be said to

violate equality rights. Virtually all liberals democracies impose citizenship-based restrictions on access to their public services. These restrictions indicate widespread international agreement that such restrictions do not implicate the essential human dignity of non-citizens and it is not discriminatory. At most, what the citizenship preference deprives the appellants of is a chance to enter into the Public Service through an open competition where there are sufficient qualified Canadian applicants.

Lebel J.

The citizenship preference does not violate the equality rights under the *Charter* as it does not affect the essential dignity of non-citizens.

Gonthier, Iacobucci, Major, and Bastarache JJ.:

The citizenship preference of the *PSEA* infringes on the equality rights under the *Charter*. The *PSEA* provision conflicts with the purpose of the equality rights Section of the *Charter*, which is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Section 15 of the *Charter* states that: «[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability». The *PSEA* provision allowing citizenship preference to Canadians «draws a clear distinction between citizens and non-citizens, and citizenship constitutes an analogous ground of discrimination under [the *Charter*]». This means that the Supreme Court has recognized that non-citizens is a class of persons which are treated differently based on their citizenship and that it constitute a ground of discrimination similar national or ethnic origin or any other listed in Section 15 of the *Charter*. The distinction between citizens and non-citizens «is not made on the basis of any actual personal differences between individuals...[it] places an additional burden on an already disadvantaged group.» It is well-recognized in law that «non-citizens suffer from political marginalisation, stereotyping and historical disadvantage». The *PSEA* preference «does not aim to ameliorate the predicament of a group more disadvantage than non-citizens» rather Canadian citizens enjoy greater status on the whole than the appellants and non-citizens in general. The nature of interest, namely employment, is one that warrant constitutional protection.

«Whether the law perpetuates the view that non-citizens are less capable or less worthy of recognition or value as human beings or as members of Canadian society is the overarching question.» «[W]ork is a fundamental aspect of a person's life, and a law which operates to limit the range of employment options for non-citizens is still likely to implicate the individual's livelihood, self-worth and human dignity». The appellants «felt legitimately burden by the idea that, having made their home in Canada...their professional development was stifled on the basis of their citizenship status». The distinction on the basis of citizenship is different in this context

than not being able to vote or sit in the Senate as employment is vital to one's livelihood and self-worth, and that there is no apparent link between one's citizenship and one's ability to perform a particular job, and, finally, that it may be associated to stereotypical assumptions about loyalty and commitment to the country. «Freedom of choice in work and employment are fundamental aspects of this society and, perhaps unlikely voting and other political activities, should be, in the eyes of immigrants, as equally accessible to them as to Canadians citizens. Discrimination in these areas has the potential to marginalise immigrants from the fabric of Canadian life and exacerbate their existing disadvantage in the Canadian labour market. This is true whether or not the discrimination operates on the basis of stereotyping if it makes immigrants feel less deserving of concern, respect and consideration, it runs afoul of [the *Charter*]».

On the issue as to whether the restriction on equality rights is justified the Bastarache J. indicates that «there is no denying that the citizenship preference is also intended to further Canada's citizenship policy». He further states that: «[it] only makes sense for a country as open and diverse as Canada to enact a policy that integrates its population; in an era of increased movement across-borders, citizenship still provides immigrants with a basic sense of identity and belonging. Canada has sought to strike [a] balance not only by limiting the number of privileges accorded to Canadian citizens, but by allowing dual citizenship, relaxing naturalization requirements and, in the appellant T-Thanh-Hien's case, making special efforts to find employment for qualified visible minorities. By taking measure such as these, Parliament attempts to reconcile the goals of enhancing Canadian citizenship and respecting cultural diversity. I am thus comfortable concluding that the objectives behind [the citizenship preference] are sufficiently important to justify limiting the appellants' equality rights.»

The appellants argued that the citizenship preference in open competitions effectively prevents non–citizens from breaking into the Public Service. Bastarache J. respond that «the fact that most positions are filled internally shows that it is almost as difficult for citizens to enter the Public Service as non-citizens; thus, the latter's disadvantage relative to the former does not significant...I have difficulty characterizing the effect of [the citizenship preference] as a disproportionate and unjustified breach of the *Charter*.»

«I acknowledge that the legislation creates differential treatment which, in some cases, functions to impair the dignity and freedom of non-citizens. However, I note that the *Charter* permits certain forms of discrimination where they pursue an important objective in a proportionate manner.»

McLaghlin, C.J., L'Heureux-Dubé, Binnie JJ.

The minority of judges found the citizenship preference to be discriminatory and infringing on equality rights in such a way that it could not be justified under the *Charter*. They agree with Bastarache J. that the citizenship preference infringes on equality rights «in a way that marginalises immigrants from the fabric of Canadian life». They disagree, however, that this discrimination is justified as a «reasonable limit on equality».

The *PSEA* provision makes a distinction on the basis of citizenship that has already been found by the Supreme Court in another decision as a ground of discrimination analogous to the others enumerated in the *Charter* (e.g. race, colour, national or ethnic origin). «The distinction here at issue, denial of employment opportunity, is the same distinction recognized [by the Court]. A discriminatory distinction is one that violates human dignity...a law which bars an entire class of persons from certain forms of employment, solely on the ground of a lack of citizenship status and without consideration of the qualifications or merits of individuals in the group, violates human dignity». Finally, to the argument that appellants could have chosen to obtain Canadian citizenship, the minority judges responded that «[the] very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory».

On the issue whether the discrimination could be justified as a reasonable limit on equality rights, the minority judges stated that the Supreme Court did find, in the past, that «cases will be rare where it is found reasonable in a free and democratic society to discriminate». Although they agree with the majority that the two objectives behind the citizenship preference is to encourage non-citizens to naturalize and to enhance citizenship, they disagree that the preference is rationally connected to those objectives. They are not satisfied that «'enhancing citizenship' and encouraging a small class of civil servants to become Canadian citizens are pressing and substantial objectives» met by the citizenship preference. To the contrary, the citizenship preference rather than enhancing citizenship, «undermines this goal, by presenting Canadian citizenship as benefiting from, as nourished by, discrimination against non-citizens, a group which this Court has long recognized as a 'discrete and insular minority' deserving of protection... such reasoning is incompatible with the view of Canadian citizenship as defined by 'tolerance', 'a belief in equality' and 'respect for all individuals'. To put it another way, we fail to see how the value of Canadian citizenship can in any way be enhanced by a law that ... discriminates against non-citizens, particularly given ... that 'our nation has [historically] drawn strength from the flow of people to our shore'». «A law that favours the relatively advantaged group of Canadian citizens over the relatively disadvantaged group of non-citizens serves to undermine, not further, the value of Canadian citizenship, based as it is on principles of inclusion and acceptance».

«As our colleague Bastarache J. concedes... [the citizenship preference] 'does not promote the interests of vulnerable group, is not premised on particularly complex social science evidence, and interferes with an activity (namely employment) whose social value is relatively high'. Indeed, this Court has recognized that employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity, sel-worth and emotional well-being». The minority judges conclude that «there is no rational connection between the discrimination effected by [the citizenship preference] of the *PSEA* and the objective of enhancing citizenship».

«In arriving at this conclusion, we place no restrictions on Parliament's ability to impose citizenship-based restrictions on certain Public service jobs (such as positions that relate to a political function or national security) as legitimate qualifications of employment.»

Counsel: Graham Garton, Q.C.
Yvonne Milosevic
Jean-Daniel Bélanger

Patricia Barbeau v. *Attorney General of Canada, T. Marwitz and C. Oleniuk*

This application for judicial review pertains to an Appeal Board's finding that the selection board interpreted rather than enlarged the experience requirement in a Statement of Qualifications.

Facts

Human Resources Development Canada (HRDC) held a competition for the position of Human Resources Generalist & Supporting People Coordinator (PE-02). The Statement of Qualifications called for «experience in providing advice, guidance, and service to HRCC directors, the management team and staff related to human resource management, learning, staff development and staff training.» However, one of the selection board members (who composed the Statement of Qualifications together with the other member) when responding to an e-mail query from a potential candidate, stated that anyone involved in preparing training, lesson plans, delivering training etc. to staff, the management team or directors , would meet the experience requirement, and that the experience did not have to be HRDC specific. This information was not communicated to anyone else. Three candidates applied and all three met the screening requirements. They were assessed by oral interview and reference checks. Ms. Barbeau failed to attain the minimum standard for personal suitability. She appealed the appointments primarily on the basis that the department broadened the Statement of Qualifications, stated differently, that it applied a more «relaxed» experience requirement.

Appeal Board (Ojalammi: 00-REH-00785, February 23, 2001)

The Appeal Board dismissed the appeal. Specifically, it concluded that the approach adopted by the selection board was not an enlargement of the experience requirement, rather it was an interpretation of that requirement. The Appeal Board also found that the Statement of Qualifications was filed with redundancies. It also held that the experience requirement simply called for candidates to have experience in providing a service related to human resource management to staff and management.

Federal Court, Trial Division (Blais: T-584-01, April 19, 2002)

The Court found that the interpretation made of the experience requirement in the Statement of Qualifications raised an issue of mixed fact and law, and that the applicable standard was reasonableness simpliciter. The Court found that the discrepancy created between the wording in the Statement of Qualifications regarding the experience requirement and the interpretation given in the e-mail exchange caused the competition to be flawed from the beginning, and tainted the entire competition process. The Court relied on the finding that the two selection board members were the same individuals who composed the Statement of Qualifications. Further, that the information communicated via e-mail to the potential candidate had the effect of excluding potential candidates from the competition.

Counsel: J. Sanderson Graham
Lysanne K. Griffin

Cahill v. Attorney General of Canada

Judicial review of the decision of a recourse officer who dismissed a complaint, on the grounds that Commission policy does not require it to refer priority persons to departments for term appointments of less than 12 months. The Court found that the case was moot and upheld the legality of the Commission's policy.

Facts

On October 21, 1999, the applicant, an employee of Correctional Services in Kingston, relocated to Ottawa with his wife and was granted spousal relocation priority. When his position in Kingston was filled by another employee in December 1999, he was granted leave priority (s. 30 of the Act). The applicant wanted to obtain employment at the earliest opportunity and was prepared to accept a term position while awaiting an indeterminate one. The applicant met with a consultant of the Commission and requested referral for consideration as an employee entitled to statutory priority. In March 2000, he was referred approximately 50 times and obtained five interviews. In November 2000, he received a term placement with the Department of Justice and in November 2001 he accepted an indeterminate position with the Department of the Solicitor General.

In the meantime, the applicant had filed a complaint with the Commission in January 2000, alleging that he had not been treated in accordance with his priority status. Despite his appointment in November 2000, he refused to withdraw his complaint, which was based on two allegations: he challenged both the reassessment conducted by the departments after receiving a referral by the Commission, and the Commission's policy (of only providing referrals for term positions of one year or longer). On December 21, 2000, the Commission's recourse officer dismissed the complaint. On January 21, 2001, the applicant submitted an application for judicial review, seeking damages in the amount of $25,000 for lost salary and benefits.

Federal Court Trial Division (Layden-Stevenson: July 11, 2002)

Although the applicant had abandoned his claim for damages, the Court nevertheless indicated that it lacked jurisdiction on an application for judicial review to award damages. The Court went on to examine the question of mootness of the applicant's application and found that his priority status had terminated when he accepted an indeterminate position. The Court concluded that the issue was moot because, with the appointment of the applicant in November 2001, there was no longer a live controversy between the parties. Even if the Court had dealt with the application and ruled in the applicant's favour, this would have had no practical effect. The application for judicial review was accordingly dismissed.

Notwithstanding its findings that the case was moot, the Court made a point of noting that it would have dismissed the application for judicial review in any event, even if it had decided to proceed with the case. On this question, the Court noted that there was nothing in the Act

that specified the nature of the infrastructure for administering priorities. Priority candidates can apply for positions on their own and the primary objective of the Commission's administrative infrastructure is to ensure that there is a reasonable opportunity for priority candidates to be connected with vacancies. Since this administrative structure had been introduced as a policy, the Court was of the opinion that it did not have the force of law, could not be used to create rights and, therefore, should not be reviewed by the courts. Finally, the Court ruled that the Commission's policy did not violate s. 30(1) of the Act.

Counsel: Josée Montreuil
Jean-Charles Ducharme

Sylvie Cyr and Suzanne Godin v. Attorney General of Canada

Surrounding conditions (heat and noise) prejudicial during the interview. Plaintiffs waited for eligibility lists to be published and then complained. Unacceptable.

Facts

This was a competition to staff program officer (WP-3) positions in various Quebec region penitentiaries. The interviews were staggered over several days. The plaintiffs were the first candidates to take the interviews. They argued that the interviews, which were held in a penitentiary, were conducted in surrounding conditions that prevented them from concentrating. The selection board asked that the premises be changed the day after the plaintiffs' interviews. The plaintiffs were unsuccessful at that stage and filed an application to appeal the proposed appointments, after the eligibility lists were published, on the basis that the surrounding conditions (noise and heat) in which they had their interviews were prejudicial and, accordingly, that the merit principle had not been observed.

Appeal Board (Baillie, July 13, 1999)

The Appeal Board agreed that there had been noise during the plaintiffs' interviews. Nevertheless, it decided to dismiss the appeal because the latter should have made their complaints to the selection board at the interviews, rather than waiting until the eligibility lists were published. As no specific complaints had been made, the selection board had made no decision on this point and, therefore, the Appeal Board could not settle an issue that had not been raised before the selection board. The Appeal Board could not make a decision in its place.

Federal Court Trial Division (Tremblay-Lamer, November 24, 2000)

The plaintiffs argued that the Appeal Board had erred in law in deciding that the selection process had observed the merit principle, despite the evidence brought to its attention that the surrounding conditions at the plaintiffs' interviews negatively affected their performances. Madam Justice Tremblay-Lamer referred to the case law of her own court, which has held on many occasions that a candidate seeking to have the selection board take into account his or her handicap, illness or any other factor likely to affect his or her performance in the interview must draw the matter to the selection board's attention clearly and unequivocally (see *Rajakarnua, Boucher*).

The Court pointed out that, since the plaintiffs did not ask the selection board to postpone their interview or take corrective action, the selection board did not deal with the matter. It was only after the eligibility lists were published that the plaintiffs complained. It was too late. The Court considered that the Appeal Board had not erred and dismissed the application for judicial review.

Federal Court of Appeal (Richard, Desjardins and Noël, February 19, 2002)

The Court dismissed the appeal, indicating that the trial judge had understood the Appeal Board's decision correctly.

Counsel: Claude Morissette
Jean-Charles Ducharme/Doris Francoeur-Larocque

Girouard v. Attorney General of Canada

Judicial review of a decision by an Appeal Board that allowed an appeal on the grounds that the appellant had been discriminated against and that the Department had failed to demonstrate that the assessment tool used was a *bona fide* occupational requirement.

Facts

In May 1999, the RCMP held a competition to staff an AS-02-level position of Official Languages Coordinator. One of the assessment tools used consisted of a Public Service Commission simulation exercise (PSC 428). The purpose of the test, which was 2.5 hours long, was to assess candidates on their ability to absorb and synthesize information. On June 17, the appellant submitted an accommodation application, based on a letter from a psychologist indicating that the appellant might suffer from dyslexia. In response, the Department offered to allow 50% more time for the test (i.e., a total of 3.75 hours), include two coffee breaks, and make a quiet room available for the appellant. The latter did not respond to the proposal, wrote the test under those conditions and did not pass.

Appeal Board (Giffin: November 29, 1999)

The Appeal Board allowed the appeal on the grounds that this case was *prima facie* one of discrimination and that the selection board had failed to demonstrate that the test was a *bona fide* occupational requirement. In order to make this finding, the Appeal Board referred to s. 12 of the *Public Service Employment Act*, which stipulates that the establishment and application of selection standards shall not be based on a person's disability. Noting that the assessment methods must treat all candidates equally and without discrimination, the Appeal Board pointed out that no consideration had been given to other selection methods and that, had that been the case, there would have been no undue hardship.

Federal Court Trial Division (McKeown: February 15, 2001)

The Court allowed the application for judicial review, on the grounds that this case was an assessment within the framework of a competition and not a selection standard: the simulation test was a selection tool, not a selection standard. It noted that the Appeal Board did not consider the correct question and erred in only considering the human rights issue, which was *ultra vires*. Basing its argument on *MacNeill*, the Court noted that an Appeal Board had no jurisdiction to enforce the provisions of the *Canadian Human Rights Act*. In this case, although the Appeal Board did not refer explicitly to that legislation, it nevertheless applied its principles. The Court also noted that, in determining the candidates' merit, the Commission was not discriminating on the basis of disability. The Court cited *Charest*, noting that when an unsuccessful candidate appeals, he is not challenging his failure to qualify but rather appealing the appointment of the successful candidate. The right of appeal was created not to protect the rights of the appellants but to prevent appointments that would

defeat the merit principle. Still, this does not prevent the Appeal Board from ensuring the absence of discrimination, under s. 12, but only in the context of the merit principle. Finally, the Court was of the opinion that the RCMP appeared to have acted reasonably in accommodating the appellant, although the Appeal Board did not speak to that issue.

Federal Court of Appeal (Strayer, Isaac and Sexton: May 29, 2002)

The appeal was dismissed and the case must be reheard before a new Appeal Board. The Court began by noting that the *Public Service Employment Act* long preceded the advent of the *Canadian Human Rights Act*, which also stipulates that it is not intended to supersede any other forms of redress available in other federal laws. Since the right of appeal provided in the *Public Service Employment Act* exists in order to counteract an appointment that goes against the merit principle, the protection of the appellant's rights is not the issue. Furthermore, the burden of proof rests on the appellant.

The Court indicated that, if the Department did take steps to accommodate a candidate, it must show that such accommodation was reasonable and did not put the other candidates at a disadvantage, in order to avoid compromising the merit principle. The Court agreed with the trial judge's examples of questions that should be considered by the Appeal Board (e.g., was the extra time allotted appropriate given the nature of the job? Was the extra time fair to the other candidates? Would the appellant's disability mean that she needed more time? Was the extra time appropriate given the nature of the test?).

In contrast to the approach recommended by the Appeal Board, the appellant was challenging not the discrimination against her but the appointment of another person, which was incompatible with the merit principle. The effect was thus not to create *prima facie* evidence of discrimination. Furthermore, there was no discrimination in the selection standards. Finally, the Court indicated that, prior to proceeding with accommodation measures, the Personnel Psychology Centre should have obtained a complete assessment resulting in a finding that the appellant had a disability, rather than proceeding on the basis of a simple opinion by a psychologist.

Counsel: Sandy Graham
Jean-Charles Ducharme

Giroux v. The Queen

Action for damages for actions and remarks by a selection board. When an administrative remedy is proposed, it must be fully used before an action for damages may be contemplated.

Facts

In 1995, the plaintiff was unsuccessful in a competition to fill an AU-04 position at Revenue Canada. An appeal from the competition was allowed and corrective measures were prescribed. When the selection board implemented the corrective measures, the plaintiff criticized it for abuse of power. When an appeal against the corrective measures was allowed, Revenue Canada initiated a second selection process. In the hearing of the appeal from the second process, false and misleading statements were allegedly made by the Department's representatives. On November 17, 1999, the plaintiff initiated an action for damages in the amount of $50,000, on the grounds that the selection board members abused their power and made defamatory remarks about the plaintiff. After a motion to dismiss the action was filed, a prothonotary dismissed the plaintiff's action. The plaintiff applied for judicial review of the decision.

Federal Court Trial Division (No. T-2004-99, May 25, 2001, P. Blais)

The Court dismissed the application for judicial review and upheld dismissal of the plaintiff's action. In the judge's view, simply finding that irregularities existed in the way the competition was held could not be a sufficient basis for establishing proof of abuse of power and negligence. The selection board tried, *bona fide*, to act in accordance with the instructions received. The damage allegedly suffered by the plaintiff was most likely due to the fact that he had not been assessed properly for the positions in question, thus reducing his chances. Referring to *Zarzour*, rendered in 2000 by the Federal Court of Appeal, the judge noted that a procedure that makes it possible to eliminate or repair damage resulting from a decision rendered is to be preferred. On this point, he was of the opinion that the appropriate procedure would have been an appeal to the Appeal Board and judicial review, if necessary, because if the allegations had turned out to be well founded, the selection process would have been terminated and the plaintiff would have had an opportunity to be assessed properly. By not raising the issue before the Appeal Board, the plaintiff contributed to the damage alleged. The judge did not agree that the plaintiff should be compensated for damage caused by his own omission.

Federal Court of Appeal (No. A-333-01, September 11, 2001, Desjardins, Noël and Nadon)

First, the Court noted that there was an enormous difference between erroneous information and a false statement. It went on to dismiss the appeal on the grounds that the trial judge did not err when he found that no false statements had been made and that the faults alleged had not been proven.

Counsel: Raymond Piché
Jean-Charles Ducharme

Giroux v. Attorney General of Canada

Judicial review of an Appeal Board decision refusing to rule that the selection board made an erroneous assessment. Role of selection board notes in candidate assessment.

Facts

In 1998, the Department of National Revenue staffed a number of managerial (AU-4) positions in the Longueuil Tax Services Office. The appellant failed on ability and personal suitability in the prerequisite stage. In one case, he maintained that the selection board had made an error in scoring his answers; in other cases, he argued that his answers to the questions were identical or similar to those of the other candidates to whom points were awarded, while he was denied the points.

Appeal Board (Carbonneau: June 28, 1999)

Citing *Ratelle, Blagdon* and *Scarizzi*, the Appeal Board dismissed the appellant's arguments on the grounds that it could not substitute its opinion for that of the selection board, especially as the latter's conclusions were not unreasonable. With respect to the appellant's interpretation of the notes taken by the selection board, the Appeal Board added that the selection board had assessed each of the candidates' answers in the context of an interview and not exclusively on the basis of the notes taken by its members.

Federal Court Trial Division (Denault: August 9, 2000)

The Court dismissed the application for judicial review, referring to *Ratelle, Blagdon* and *Scarrizi* on the question of the duties of the selection and appeal boards. In response to the allegation that the selection board had relied solely on its interview notes for the scoring, the Court dismissed this restrictive interpretation by the appellant and concluded that most of the candidates were scored right at the end and that the interview notes were used to enable members of the selection board to reach a consensus.

Federal Court of Appeal (Richard, Décary and Noël, March 21, 2002)

The Court dismissed the appeal on the grounds that the challenged passage in the Appeal Board reasons, to the effect that the selection board did not rely solely on its interview notes for the scoring, was, at most, a comment made by the Appeal Board after it had dismissed the various allegations made by the appellant.

Counsel: Guy Blouin
Jean-Charles Ducharme

Guenette & Gualtieri v. *Attorney General of Canada et al.*

Jurisdiction of the Superior Court of Justice (Ontario) to entertain an action for damages based on workplace disputes.

Facts

The plaintiffs are two employees of the Department of Foreign Affairs and International Trade. They filed a harassment complaint with the PSC. The plaintiff Guenette's complaint was upheld in part, while the plaintiff Gualtieri did not pursue her complaint. They filed grievances under section 91 of the *Public Service Staff Relations Act (PSSRA)* but did not pursue them. They both also filed a claim seeking damages in the amount of three million before the Superior Court of Justice (Ontario). They alleged that they suffered from harassment and abuse of authority after they complained about what they thought to be mismanagement and a waste of taxpayer's money in the acquisition, disposition and management of diplomatic properties abroad.

Superior Court of Justice (Ontario) (Chadwick, September 22, 2000)

The Attorney General of Canada brought a motion for summary judgment, which was successful. The Court held that it lacked jurisdiction to entertain the case on the ground that the employees' complaints are workplace disputes and the collective agreement and legislation constitute a complete code for the resolution of the dispute.

Ontario Court of Appeal (Laskin, MacPherson and Simmons, August 8, 2002)

The appellants argued that given the nature of their claim, which did not involve the interpretation or application of the collective agreement, there were no circumstances that would deprive the courts of jurisdiction. The Court found that the appellants were entitled to pursue their claim for damages. The appeal was allowed on the basis that Parliament had not intended the *PSSRA* regime to be exclusive. Since the claim could not be adjudicated under the *PSSRA*, the Court has jurisdiction to entertain the action based on workplace disputes.

Counsel: Linda Wall
Lysanne K. Griffin

Larose et al. v. Attorney General of Canada et al.

Application for judicial review of an interlocutory decision of the Appeal Board to the effect that the positions were reclassified positions to which incumbents could be appointed on the basis of individual merit rather than new positions, which would have required application of relative merit.

Facts

The Department changed the administrative structure of all Human Resource Centres of Canada in Quebec by abolishing one level of management. PM-04-level positions were reclassified into PM-05 positions as a result of this restructuring, according to selection by individual merit under the terms of s. 10(2) PSEA.

Appeal (Baillie)

The Chairman of the Appeal Board rendered an interlocutory decision dismissing the appellants' argument that the reclassification created new positions which required candidate selection by a competition, according to the principle of relative merit under s. 10(1) PSEA. The Appeal Board was of the opinion that, under the circumstances, the conditions for applying s. 10(2) of the PSEA had been met.

Federal Court Trial Division (Tremblay-Lamer)

Madam Justice Tremblay-Lamer settled the issue by finding that the Appeal Board simply had no authority to determine whether the positions were reclassified or new. In the Court's view, this authority lies with the classification officers in accordance with the *Financial Administration Act* and the Appeal Board may not substitute its opinion for that of the classification officer. In short, under such circumstances, the Appeal Board's only function is to determine whether a proposed appointment was made on the merit principle but, in so doing, the Appeal Board cannot question the nature of the position (new position or reclassification). If necessary, this must be done by applying directly to the Federal Court for judicial review of the classification officer's decision.

Counsel: Raymond Piché
Martin Desmeules

Morris and Wilcox v. Attorney General of Canada

Application for judicial review of a decision of the Commission, after an appeal was allowed, ordering that a new selection process be held when the Commission had already issued corrective measures under s. 21(3) of the PSEA.

Facts

A competition for PM-02 positions was held in 1998. The applicants appealed to an Appeal Board, which ruled in their favour on March 1, 2000. On August 3, 2000, the regional consultant issued corrective measures to implement the decision. On February 28, 2001, after corrective action was discussed with the union representative, other measures were introduced in place of the initial measures. Neither package of corrective measures provided for a new selection process to be held. Discussions continued and the union representative opposed the new measures. On May 10, 2001, the regional consultant, after consulting within the Commission, scrapped the second package of corrective measures and ordered a new selection process to be held, primarily on the grounds that the candidate assessment conducted in 1998 was no longer valid.

Federal Court Trial Division (Gibson)

The essential point to remember is that Gibson J. held that the Commission has the authority to order a new competition, even when it has initially attempted to right the wrongs raised by the Appeal Board using measures under s. 21(3), when warranted by the facts. In doing so, the Commission has a duty of fairness toward the parties.

Counsel: J. Sanderson Graham
Martin Desmeules

Nault v. Attorney General of Canada

Application for judicial review of a decision of the recourse officer ruling that the selection board committed no error in assessing the candidate's experience.

Facts

PWGSC held an open competition to fill a number of FI-01 and FI-02 positions. Owing to time constraints, a general skills test was administered before assessing the experience of some of the candidates. Mr. Nault, whose experience had not yet been assessed, placed 11th in the test. However, he was rejected as a candidate because the documents submitted in support of his candidacy failed to establish that he had the requisite experience, and he was not invited to an interview. Forty-eight individuals were awarded positions as a result of this process.

Investigation (Rabot)

The plaintiff argued that he had the necessary experience, that his resume was sufficiently explicit and that the claim by the person responsible for the competition and selection board member that she could not determine whether the plaintiff met the requirements related to experience in research, analysis and validation of financial statements was absurd. The plaintiff challenged the reference to his lack of professional designation as an accountant, since it was not required for the competition. Nevertheless, the recourse officer held that the selection board's decision that he did not have the requisite experience was reasonable, and that such failure to satisfy one of the selection criteria justified not retaining him as a candidate for the subsequent stages of the selection process.

Federal Court Trial Division (Blais J.)

Like the recourse officer, the Court noted that PWGSC could have been clearer in its procedure, but concluded that the plaintiff had not, in fact, satisfied the experience criterion and therefore had not been ranked according to merit. The Court also found that the recourse officer had not committed any error.

Counsel: Guy A. Blouin
Martin Desmeules

Oriji v. *Attorney General of Canada*

Application for judicial review of the decision of the investigator based on a breach of procedural fairness, a misinterpretation of the facts and Section 22 of the PSEA.

Facts

Mr. Oriji was referred by the PSC to PWGSC for a CR-04 position. Mr. Oriji got the highest mark on a written exam assessing abilities of the candidates. He was contacted by a PWGSC official who told him that subject to language testing and reference checks, he would get the job. Mr. Oriji interpreted that phone call as a verbal job offer. However, before the language tests or reference checks were made, a priority situation arose at PWGSC and the CR-04 position Mr Oriji was hoping to get was filled.

The investigation (Black)

The investigator found that a verbal job offer is not a valid job offer according to Section 22 of the PSEA, which requires an instrument of appointment, i.e. a written document. Furthermore, the investigator concluded that the person who called Mr Oriji to tell him he got the highest mark on the exam did not make him a valid job offer because this person did not have the authority to make such an offer. Mr Oriji's complaint was dismissed.

Federal Court, Trial Division (Gibson)

The Court held that Section 22 of the PSEA does not require a written instrument for an offer of employment to be valid. This is because Section 22 provides that an appointment takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument. The Court concluded that if the instrument can refer to a date before the actual date of the instrument, it means that a person could have begun work without such a written instrument. Please note the Court did not conclude that such an offer was ever made to Mr. Oriji: the most important reason why the Court allowed the application is because the investigator had contacts with the PWGSC representative after the investigation and based her decision on facts that the plaintiff did not have the opportunity to comment. The Court found this constituted a breach of procedural fairness fatal to the investigation. The Court ordered that a new investigation be held by the PSC and awarded the costs to Mr. Oriji.

Counsel: Michael Roach
Martin Desmeules

Rhéaume v. Attorney General of Canada

In view of the subsequent creation of an appeal board to decide whether it had jurisdiction, the application for judicial review of a decision by the Deputy Registrar to take no further action on an appeal was moot.

Facts

The applicant had worked at the Canada Customs and Revenue Agency (formerly Revenue Canada) since 1993. On October 30, 2001, she submitted an appeal against all appointments to the position of AU-02 in the Technical Interpretation Service throughout Canada after January 1, 1999, when the Agency was created.

On November 19, 2001, the Deputy Registrar informed the applicant that no further action would be taken on her appeal on the grounds that no specific appointments had been identified, the appeal was outside the time limit and the Agency had not been subject to the *Public Service Employment Act* since its creation. In a letter dated December 3, 2001, the applicant asked the Commission to overturn the decision of the Deputy Registrar and decide whether it had jurisdiction to hear the appeal. On December 19, 2001, in order to avoid the limitation period, the applicant filed an application for judicial review of the decision of the Deputy Registrar.

Following her letter dated December 3, 2001, the Commission set up an appeal board to decide whether it had jurisdiction over the applicant's appeal. On February 6, 2002, the appeal board dismissed the applicant's appeal on the same grounds given by the Deputy Registrar. This decision was never challenged.

On February 12, 2002, the Attorney General of Canada made a motion to strike the applicant's application for judicial review. On February 25, 2002, the prothonotary allowed the motion on the grounds that the application for judicial review of the decision of the Deputy Registrar was moot, in view of the creation of an appeal board and the decision rendered on February 6, 2002. On March 5, 2002, the applicant appealed the order of the prothonotary.

Federal Court of Canada – Trial Division

(Pelletier: March 25, 2002)

The Court first stated that it was possible to strike an application for judicial review that is devoid of any chance of success. Consequently, the prothonotary had jurisdiction to make the order to strike. The Court further declared that the application for judicial review could not deal with the substance of the appeal but only with the power to hear it. The Court also pointed out that the decision of the Commission to create an appeal board to hear the appeal already constituted everything that the Court could have given the applicant. The application for judicial review was moot because although the decision of the Deputy Registrar could be the subject of judicial review, it was not a decision by an appeal board. The Court agreed with the decision rendered by the prothonotary.

Federal Court of Appeal
(Desjardins, Noël and Nadon: May 15, 2003)

The Court agreed with the decision of the Trial Division in that the decision of the Deputy Registrar was not a decision by an appeal board. Since an appeal board was subsequently created, the application for judicial review of the decision of the Deputy Registrar was moot. When the prothonotary stated that the decision to be challenged was the one rendered by the appeal board, the applicant did not respond, despite the fact that she was still within the time limit to do so.

Counsel: Diane Pelletier
Jean-Charles Ducharme

Sargeant et al. v. Attorney General of Canada

Application for judicial review of a decision by a reviewer who refused to order disclosure of the assessments of the appointed candidates, under a recourse system established by the Canada Customs and Revenue Agency.

Operation

This case deals with the operation of the disclosure system provided by the Canada Customs and Revenue Agency. After the Agency was created in 1999, it developed a staffing system based on the creation of pre-qualified pools, containing the names of screened, qualified candidates without ranking them. Subsequently, appointments were made from the list according to criteria provided by the manager responsible for the positions to be filled. The prerequisite and assessment phases were conducted by selection boards, while the appointment phase was conducted by the responsible manager.

The recourse system involves considering at each phase whether a candidate has been treated arbitrarily. A candidate who is not appointed from a pre-qualified pool may request an individual feedback meeting with the manager who made the placement decision. At the next level, he may request a decision review by the supervisor of the manager hiring or by an independent reviewer in the Agency. The reviewer verifies whether the principles of procedural fairness have been followed and whether the information provided to the parties is accurate. The review is limited to the appointment phase and does not cover the prerequisite and assessment phases. Information disclosure is provided by the responsible manager. Personal information regarding the complainant is available to the reviewer, while personal information regarding other employees would be available to the applicant if relevant with regard to the nature of the complaint, and approved by an Agency official.

Facts

In 2000, the applicants applied for AU-02 Auditor positions. Twenty-eight people submitted applications and fourteen passed the prerequisite phase, four of whom subsequently withdrew. The selection board assessed the ten remaining candidates and determined that seven of them (including the two applicants) were qualified for the positions. The names of the seven persons were placed in a pre-qualified pool that was valid for a period of six months. During that period, the responsible manager decided to fill five positions. He exercised his discretion to apply two criteria: possession of a driver's licence and achievement of the highest scores in the assessment phase. The applicants requested an individual feedback meeting with the responsible manager, as well as full disclosure of all materials used to assess the candidates and the assessment documentation for all candidates who were assessed. The Agency offered the material concerning their own assessment, but refused to release the information about the other candidates. Subsequently, each applicant requested an independent third-party review and resubmitted the disclosure request. The Agency opposed disclosure on the grounds that it was relevant not to the placement decision

but to the candidates' assessment, and involved the disclosure of personal information. The reviewer held that her jurisdiction was limited to a review of the placement phase and that she was not authorized to review the assessment phase. She therefore concluded that the documents requested were not relevant to her review. Nevertheless, she suggested that the Agency supply the requesters with the scoring summaries, to which the Agency agreed.

Federal Court Trial Division (No. T-1362-01, October 4, 2002, E. Dawson)

Stipulating that the standard was correctness, the Court allowed the application for judicial review on the grounds that the reviewer misconstrued her jurisdiction and breached the principles of natural justice. The Court agreed, in principle, that the reviewer could not revisit the phases prior to creation of the pre-qualified pool, i.e., the candidate assessment phase. However, in this particular case, selection by the manager of candidates for placement on the basis of their marks at the assessment phase did create a linkage between the assessment and placement phases.

The reviewer misconstrued her jurisdiction because recourse to the assessments was required to provide meaningful recourse at the placement level. Procedural fairness requires that participants have a meaningful opportunity to present their case fully and fairly. A full and fair presentation of the applicants' case would require access to information from the assessment phase. This finding follows from the decision to appoint candidates on the basis of their relative performance in the assessment phase. Even if the merit principle is no longer applied in the Agency's staffing system, the decision of the manager to select the candidates on the basis of their scores, meant that it was relevant to consider the application of the standards at the assessment phase in order to ensure that they were consistently applied and that candidates were not treated in an arbitrary manner.

Counsel: Sandy Graham
Jean-Charles Ducharme

Delbert E. Stewart v. *Attorney General of Canada and Andrew Siggner*

This application for judicial review pertains to an Appeal Board's finding that notwithstanding the computer error in the On-line application system, the selection board acted reasonably by giving Mr. Stewart an opportunity to provide more information showing that he met the experience requirement.

Facts

Statistics Canada held a competition for the position Senior Analytical Advisor: Aboriginal Statistics (ES-06). Mr. Stewart applied using the On-line application process. The department received a résumé which was cut off mid-sentence, yet contained the applicant's declaration, name and date, and indicated 10/10 (pages) at the bottom. Mr. Stewart was initially screened out, and then was given the opportunity to show how he met the experience requirement. Unaware that his résumé was incomplete, Mr. Stewart declined the offer. The selection board concluded that he failed to meet the experience requirement for the position. Mr. Stewart then learned that the department based its decision on an incomplete résumé. He appealed the appointment on the basis that his complete résumé, submitted via the employer's own On-line computer system, proved that he met the experience requirement.

Appeal Board (Huneault: 00-STC-00853, November 29, 2000)

The Appeal Board denied the appeal. It found that Mr. Stewart was disqualified based on incomplete information due to an error in the On-line computer application system. In addition, the Appeal Board concluded that the selection board acted reasonably, in that Mr. Stewart's qualifications were assessed based on information after a process that could assess relative merit. It was Mr. Stewart's own decision to decline the department's offer to provide more information.

Federal Court, Trial Division (Kelen: T-2384-00, April 12, 2002)

The Court found that the Appeal Board's conclusion that the computer error, caused by the system, did not affect the application of the merit principle is a question of law and correctness is the appropriate standard of review. The Court stated that the failure to assess Mr. Stewart based on his complete résumé (incomplete due to computer error) was a defect in the selection process. There was a legitimate expectation that the selection board would notice that the résumé was incomplete. The selection board had the onus to «notice the obvious», and to bring that fact to Mr. Stewart's attention. Accordingly, the Appeal Board erred in fact in concluding that the selection board acted reasonably.

Counsel: Michael Roach
Lysanne K. Griffin