

Federal Court



Cour fédérale

**Date: 20180312**

**Docket: T-222-17**

**Citation: 2018 FC 286**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, March 12, 2018**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**SYLVIE R. LEMELIN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the matter

[1] Following an investigation conducted under section 69 of the *Public Service Employment Act*, SC 2003, c 22, sections 12, 13 [Act], the Public Service Commission [PSC] found that Sylvie R. Lemelin had committed fraud during the appointment process for the position of [TRANSLATION] National Coordinator, Healthcare Professionals Program, in the Canadian Coast

Guard. Ms. Lemelin stated that she had a bachelor's degree in nursing service administration from Belford University and submitted, in support of her application, copies of a degree from that university and a transcript listing the courses taken, grades received and her grade point average of 3.19. The investigation revealed that the applicant had not taken any courses from that university, which, in fact, does not exist and never has existed. The PSC thus revoked her appointment and imposed certain restrictions on any new appointments within the federal public service for a period of three years.

[2] Ms. Lemelin is seeking judicial review of that decision, alleging that the investigator appointed by the PSC breached the principles of procedural fairness and that the PSC erred in its finding of fraud within the meaning of section 69 of the Act.

[3] For the reasons that follow, the Court's intervention is not required, and this application for judicial review will be dismissed.

## II. Preliminary issue

### *Admissibility of additional documents filed by the applicant in support of her affidavit*

[4] In support of her affidavit, Ms. Lemelin filed a number of documents that were not before the investigator, including excerpts from the websites of most Quebec universities concerning the prerequisites for recognizing academic, extracurricular or experiential credentials.

[5] She argues that this evidence is necessary because it indicates that the investigator erred when he stated, at paragraph 58 of his report, that [TRANSLATION] "a reasonable person, in the

same circumstances, ought to know that obtaining university degrees is based on academic achievement, not on life experience.”

[6] I am rather of the opinion that none of the exceptions to the rule that only documents that were before the decision-maker should be considered by this Court in an application for judicial review apply in this case (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 19–20; *Smith v Canada*, 2001 FCA 86 at paragraphs 5 and 7; *Ritchie v Canada (Attorney General)*, 2016 FC 527 at paragraphs 21–23).

[7] Furthermore, these additional exhibits do not actually contradict the investigator’s statements. It is clear that none of the degrees from Quebec universities can be awarded solely on the basis of life experience and that this is an exceptional method the various institutions use to award a limited number of credits through equivalency. Nor do all faculties and departments offer this option, and those that do carry out a strict analysis to ensure the relevance, validity, quality and equivalency of the experience.

[8] I am therefore of the view that these documents are inadmissible and that paragraphs 72 to 74 of the applicant’s memorandum should not be considered.

### III. Facts

[9] Ms. Lemelin obtained a certificate in community health from the Université du Québec à Trois-Rivières in 1986.

[10] Since 1992, she has held various nursing positions within the federal public service. From 2002 until the revocation of her appointment to the position in the decision under review, she worked for the Department of Fisheries and Oceans [DFO].

[11] From the winter 2007 to winter 2008 semesters, Ms. Lemelin was enrolled in the bachelor of nursing program at Université Laval and earned 36 of the required 105 credits of that program, mostly through equivalency (27 out of the 36 credits obtained) with her previous certificate.

[12] In March 2007, the applicant received an email from Belford University offering her various postsecondary degrees based on her life experience and work experience, thus not requiring any study. The email, sent to her personal address, reads as follows:

Sorry to drop in on you, but you were referred to us by a friend/working associate.

As of January 2006, our University has started a work experience degree program.

We can offer you 3 of the following choices:

- Associate Degree
- Bachelor's Degree
- Master's Degree

Our work experience/life experience degrees are the same degrees we give our full time students, but we base them upon your past knowledge and therefore require no studying.

Due to back logs we will need 1-2 weeks to verify your information and send your degree with transcripts in the mail.

Our Education office has someone available 24 hours a day, 7 days a week.

If you are interested then call us at: 1-270-837-3127

[TRADUCTION]

Désolé de vous prendre à l'improviste, mais vous nous avez été recommandé par un ami et collègue de travail.

En date de janvier 2006, notre université a lancé un programme de diplôme travail-études.

Nous pouvons vous offrir les trois choix suivants :

- Grade d'associé
- Baccalauréat
- Maîtrise

Nos diplômes de travail-études sont identiques aux diplômes offerts à nos étudiants à temps plein, mais ils sont fondés sur vos connaissances antérieures et n'exigent donc pas d'études.

Étant donné le travail en retard, il nous faudra de 1 à 2 semaines pour vérifier vos renseignements et vous envoyer votre diplôme par la poste, accompagné de votre relevé de notes.

[13] A few days later, she forwarded that email to the personal email address of her immediate supervisor, copying it to the personal addresses of two other unidentified individuals. It seems that her supervisor at the time and her colleagues encouraged her to enrol and to take the opportunity to obtain a bachelor's degree.

[14] Ms. Lemelin thus sent her resume, the necessary fees of about \$1,500 and a number of letters of recommendation provided by colleagues in the federal public service (including her immediate supervisor) and by doctors she had worked with in the past.

[15] On April 13, 2007, she received a bachelor's degree in nursing service administration from Belford University and a detailed transcript listing 30 courses taken over six sessions, for which she obtained grades ranging from A to C+ (for a grade point average of 3.19).

[16] On February 11, 2008, Ms. Lemelin withdrew from the bachelor of nursing program at Université Laval. In addition to the credits she obtained through equivalency, she took seven courses there, failing four and receiving grades of D or D+ in the other three.

[17] In 2009, Belford University contacted Ms. Lemelin again in order to gauge her interest in obtaining a master's degree. She accepted the offer and sent the required fees, new letters of recommendation and a paper of about 20 pages.

[18] On June 29, 2009, she received her master's degree in nursing service administration and another transcript as detailed as the previous one. Once again, she received a grade point average of 3.19. She was also awarded a certificate of distinction for her master's degree.

[19] In July and August 2009, DFO announced the internal appointment process for the position under review. The Statement of Merit Criteria for the position required the following education:

[TRANSLATION] Graduation with a degree from a recognized university with acceptable specialization in nursing, nursing service administration, nursing education or another relevant specialization.

[20] On August 6, 2009, Ms. Lemelin submitted her application after having been encouraged to do so by her superiors—this was the second posting for the position; the applicant did not apply when the position was first posted. She included a summary of her studies in her application, namely her certificate in community health from the Université du Québec à Trois-Rivières and her bachelor's degree in nursing service administration from Belford University. She did not mention the courses she took at Université Laval in 2007–2008, nor the master's degree she received on June 29, 2009.

[21] She was appointed to the position on May 31, 2010.

[22] In the spring of 2010, Belford University contacted Ms. Lemelin again, informing her that she was now eligible for the doctor of nursing program. She received her doctoral degree along with a certificate of excellence on June 29, 2010, after having paid the tuition fees and submitted a written document of about 100 pages. She appeared in person at the office of Belford University in Texas while she was visiting her parents in the United States. There was no building at the address she was given, only an administrative office.

[23] Shortly after that, Ms. Lemelin sent all her degrees to the human resources department at DFO and, until her appointment was revoked, she was receiving the education allowance provided for in her collective agreement in the amount of \$3,850 per year.

[24] In August 2012, following a class action instituted on behalf of 30,000 members, Belford University, Belford High School and an administrator of those institutions were ordered to pay

US\$22.7 million. The evidence showed that these were fake academic institutions that kept a post office box in the United States, but whose degrees were mailed from the United Arab Emirates.

[25] In December 2014, Ms. Lemelin's new supervisor assumed her duties. The relationship between the two was difficult, and the new supervisor questioned Ms. Lemelin's competencies and level of autonomy. The supervisor found that Ms. Lemelin required a great deal of supervision.

[26] The relationship deteriorated to the point that Ms. Lemelin took sick leave from June 2015 to January 2016. During her absence, her supervisor looked into her academic record and learned through Internet research that Belford University did not exist and that it issued nothing but fake degrees. A complaint against Ms. Lemelin was filed with DFO, which asked the PSC to investigate.

[27] The purpose of the investigation was to determine whether Ms. Lemelin had committed fraud during the internal appointment process by submitting her bachelor's degree issued by Belford University in support of her application.

[28] The investigator appointed by the PSC interviewed seven people, including the applicant, her immediate supervisor and the human resources advisor assigned to the appointment process. The investigator sent a factual report to those individuals for their input; Ms. Lemelin's only comment was to ask why the report contained only the testimonies of the three people mentioned



above and failed to provide any information on the testimonies provided by the other four people who were interviewed. The investigator replied that only relevant information gathered during the investigation was included in the report. Ms. Lemelin requested access to the questions and answers of the other witnesses but was denied because the information was “Protected B.” If she wanted access, she would have to submit an access to information request.

[29] In his report, the investigator concluded that Ms. Lemelin had committed fraud during the internal appointment process by submitting a fake bachelor’s degree in support of her application.

[30] The applicant sent her comments on the investigation report and the proposed corrective measures to the PSC, again stating that she wished to have access to the testimonies of the other four witnesses who were interviewed.

[31] On January 18, 2017, the PSC informed the applicant that it accepted the investigation report’s conclusions and recommendations to revoke her appointment to the position of National Coordinator and impose a three-year period of restrictions on her employment within the federal public service.

#### IV. Impugned decision

[32] Adopting the investigator’s conclusions and recommendations in their entirety, the PSC thus found that there had been fraud and that the internal appointment process had been

compromised, since the applicant was appointed to the position of National Coordinator without having met the education criterion of the position.

[33] Although the investigation report outlined only three of the seven testimonies, the investigator stated the following at paragraph 7 of his report:

[TRANSLATION]  
Although not necessarily reproduced in this report, all relevant information gathered during this investigation was taken into consideration for the analysis and conclusions in the investigation report.

[34] In his analysis, the investigator applied the definition of fraud provided by the Federal Court of Appeal in *Seck v Canada (Attorney General)*, 2012 FCA 314, which has two essential elements: “(1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation” (at paragraph 39). He also stated that the burden of proof is that which applies in civil matters, namely the balance of probabilities.

[35] The investigator thus proceeded to determine whether the evidence showed, on a balance of probabilities, that: (1) the applicant had acted dishonestly by applying for the position of National Coordinator and stating that she held a bachelor’s degree from Belford University; and (2) the appointment process had been compromised by that dishonest action.

[36] The investigator found that the applicant had acted dishonestly since she knew, when she submitted her application, that the validity of her bachelor’s degree and accreditation from Belford University was suspect. She nevertheless submitted her application without acting on her doubts at the time.

[37] The investigator relied on the following evidence:

- When she submitted her application, the applicant did not include her transcript from Université Laval, which would have shown that when she obtained her first degree from Belford University, she was studying at Université Laval. She also did not submit her master's degree from Belford University.
- The applicant's bachelor's, master's and doctoral degrees have no academic value because Belford University does not exist and never has existed.
- The investigator did not find the applicant's testimony to be credible. For example, she admitted that when she received her first degree in the mail, she wondered about not having had to take any courses to obtain a bachelor's degree, especially since her degree was accompanied by a detailed transcript for courses she had never taken. On another occasion, she denied having questioned the validity of the degrees she obtained from Belford University.
- The investigator did not believe that the applicant had behaved the way a reasonable person would have in the same circumstances, especially considering her previous university experience. He stressed that a reasonable person [TRANSLATION] "ought to have known that obtaining university degrees is based on academic achievement, not on life experience" and that a reasonable person [TRANSLATION] "would have done more than simply wonder about the way Belford operated before taking steps to obtain two graduate degrees from the same institution" (at paragraph 58 of the investigation report).

[38] The investigator found that the appointment process had been compromised because the applicant clearly did not meet all the essential qualifications of the position. The investigator thus stated that he was satisfied that both elements of fraud were present in this case.

V. Issues and standard of review

[39] This application for judicial review raises the following issues:

- A. *Was there a violation of the rules of procedural fairness?*
- B. *Did the PSC err in accepting the investigation report and concluding that the applicant had committed fraud?*

[40] It is settled law that the correctness standard applies to all issues concerning procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79).

[41] Furthermore, the standard of reasonableness applies to the decision itself since the application and interpretation of section 69 of the Act fall within the PSC's jurisdiction (*Canada (Attorney General) v Shakov*, 2017 FCA 250 at paragraph 61).

[42] The Court must therefore review the PSC's decision to determine whether it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law and whether it meets the requirements of intelligibility and transparency (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

## VI. Analysis

### A. *Was there a violation of the rules of procedural fairness?*

[43] It is settled law that an administrative decision-maker's duty with respect to procedural fairness varies according to the specific context of each case, the applicable law and the litigant's rights involved in the decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 21). With respect to labour relations, where a person's right to continue their employment is at stake, "a high standard of justice is required" (*Kane v Bd of Governors of UBC*, [1980] 1 SCR 1105 at page 1113). It follows that the decision-making process for removing employees from their duties or for revoking their appointment to the position they occupy requires a high degree of procedural fairness.

[44] I would add that an allegation of fraud in this context requires an even higher level of procedural fairness, considering the impact of such accusations on an individual's career and on their prospects for future employment. I cite here the remarks of my colleague

Justice Luc Martineau in *Samatar v Canada (Attorney General)*, 2012 FC 1263:

[124] The primary asset, if not the sole asset, of a public servant is his or her integrity. Fraud is the ultimate accusation that can lead to the highest form of punishment: the loss of confidence by the employer and the public in the personal integrity of the public servant. In situations where the Commission decides to disclose the name of the person involved (disclosure summaries section), the individual's personal participation in the fraud committed is publicly exposed, which, of course, will have a considerable impact on his or her reputation and future employment opportunities.

[125] It is true that, technically speaking, the public servants affected by the impugned order have the right to be presumed innocent. Nonetheless, in the minds of the public or an employer—

for which the legal subtleties are often incomprehensible—the public servants affected are “guilty of fraud”, even if their guilt was not established beyond a reasonable doubt before a criminal court. Furthermore, certain public summaries state that the Commission found specific named individuals “to have committed fraud”: Ms. Marin-Vuletic – investigation report 2010-CSD-00088.10365/2010-CSD-00089.10367; Ms. Vuletic - investigation report 2010-CSD-00088.10366/2010-CSD-00089.10368 and Ms. Lavoie - investigation report 2008-IPC-00333.6908.

[126] For all of the above-mentioned reasons, I am of the opinion that the Commission’s exercise of the power set out in section 69 of the PSEA justifies “greater procedural protection”....

[45] That said, the applicant has not persuaded me that the principles of procedural fairness were breached in the course of the investigation process that led to the PSC’s decision.

[46] The applicant had the opportunity to comment on the factual report and on the investigation report and, even though the applicant asked on two occasions for access to the record of all the testimonies provided to the investigator, he was under no obligation to provide them to her.

[47] In *Syndicat des employés de production du Québec et de l’Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, the Supreme Court of Canada stated the following at page 902 of its reasons:

... the Commission had a duty to inform the parties of the substance of the evidence obtained by the investigator and which was put before the Commission. Furthermore, it was incumbent on the Commission to give the parties the opportunity to respond to this evidence and make all relevant representations in relation thereto.

[48] That was precisely the process the PSC followed in this case.

[49] The investigator did not have to “describe in his report every single piece of evidence submitted by the parties”, nor “send the parties all the evidence filed” (*Jean v Canadian Broadcasting Corporation*, 2015 FC 541 at paragraphs 25–26). I also endorse the remarks of my colleague Justice Anne L. Mactavish in *El-Helou v Courts Administrative Service*, 2012 FC 1111:

[75] I agree with the respondents that Mr. El-Helou was not necessarily entitled to see all of the transcripts of all of the witness interviews or each and every document produced to the investigator. Rather, the case law merely requires that he be made aware of the “substance of the case” (*Radulesco*) or the “substance of the evidence obtained by the investigator” (*SEPQA, Mercier*).

[76] This requirement will generally be satisfied by the disclosure of the investigator’s report and the provision of an opportunity for comment....

[50] The investigator provided the applicant with the substance of the relevant evidence that had been submitted to him and gave her the opportunity to comment prior to the PSC’s decision. This approach is consistent with the case law and satisfies the principles of procedural fairness that apply in this type of situation.

B. *Did the PSC err in accepting the investigation report and concluding that the applicant had committed fraud?*

(1) Applicable law

[51] The test for a finding of fraud within the meaning of section 69 of the Act is set out by the Federal Court of Appeal in *Seck*, above. It is derived from criminal law and has two essential

elements: “(1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation” (at paragraph 39). Nonetheless, the burden of proof that applies to the question of whether there was fraud in an appointment process is that of the balance of probabilities.

[52] In *Seck*, the Federal Court of Appeal does not explicitly refer to the two components of any criminal act, namely the *actus reus* and the *mens rea*. However, it does so implicitly by relying on three precedents that outline the role of each of these components in determining the existence of fraud. For example, in *R v Théroux*, [1993] 2 SCR 5 at pages 25 and 26, the Supreme Court indicates that:

... To establish the *actus reus* of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act.. .. [I]t will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the *mens rea* of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.

[53] In other words, the *actus reus* and the *mens rea* must be proven with respect to both elements of the test for fraud.

[54] That is the approach taken by this Court in *Egbers v Canada (Attorney General)*, 2015 FC 1342, precisely in the context of applying section 69 of the Act. In that case, the Court indicated that: “[T]he *mens rea* for fraud is subjective. The question is not what the applicants ought to have known, or what was reasonable, but what they actually knew. This requires a



consideration of the full factual context” (at paragraph 46). Applying that test, the Court found that the PSC had not considered the *mens rea* or the subjective element specific to the individuals accused of fraud, but rather the reasonable person test. That test can be used to determine whether the *actus reus* has been established, but not the *mens rea*.

(2) The law as applied to the facts of this case

[55] Only the first element of the test set out in *Seck* is at issue in this case. Since the applicant was appointed to the National Coordinator position and thus received an education allowance without holding the required degree, deprivation is established.

[56] I also find that it was reasonable for the PSC to find that the *actus reus* of a dishonest act or the concealment of important facts has been demonstrated. It was indeed a matter of “show[ing] that the impugned act is one which a reasonable person would see as dishonest” (*Théroux*, above, at pages 25–26). Submitting a university degree obtained without having taken any courses and on the sole basis of a few reference letters and the payment of a specified amount is without a doubt a dishonest act that would be considered as such by a reasonable person in the same circumstances. A reasonable person would have had more than just doubts considering that (i) Belford University sent not only a degree, but also a detailed transcript with the list of courses supposedly taken each semester and the grade supposedly obtained for each course; and that (ii) it was almost as easy to obtain a master’s degree and a doctorate in the same circumstances.

[57] As for the dishonest nature of the applicant's actions, she argues that the PSC's decision is unreasonable because the investigator did not apply the test set out by the courts in an appropriate manner. She argues that the PSC applied the objective test, namely that of the reasonable person, to the consideration of the *mens rea* or her guilty intent.

[58] Moreover, the applicant emphasizes the facts that, according to her, actually demonstrate an absence of *mens rea*:

- She obtained her bachelor's degree from Belford University two years prior to the posting of the position under review.
- She sent the first email from Belford University to her supervisor at the time in order to ask for her advice.
- She did not even apply for the position during the first posting; she applied to the second posting on the recommendation of her superiors.
- She continued on the same course and obtained her master's and doctoral degrees from Belford University while the position required only a bachelor's degree.
- She herself was the victim of fraud, along with thousands of other people; she only realized during the course of the PSC investigation that the degrees she had paid for had no value.
- She was so convinced of the validity of her degrees that she hung them in her office, in full view of everyone.

[59] The applicant maintains that she made an error in good faith in believing that Belford University was an accredited institution and that its degrees had academic value, but that she had never intended to defraud anyone. She is asking the Court to set aside the report of the PSC's decision and to order her reinstatement to the position of National Coordinator with full compensation.

[60] First, since she does not meet the requirements of the position, I am of the opinion that this Court cannot order the applicant's reinstatement.

[61] On first impression, one could believe that there was some confusion between what a reasonable person in the same circumstances as the applicant would have known, and what the applicant knew or knowingly did.

[62] At paragraph 58 of his report, the investigator refers twice to the idea of the reasonable person in the same circumstances as the applicant.

[63] Nevertheless, a careful reading of his report indicates that the investigator examined the applicant's *mens rea*. I am of the opinion that the investigator found not only that the applicant showed surprising naïveté and greed, but also that she committed fraud by concealing an important fact when submitting her application, which led to deprivation.

[64] After reviewing the evidence as a whole, the investigator made two important findings in this regard:

[TRANSLATION]

[56] Ms. Lemelin's testimony is not credible.

...

[60] In light of the foregoing, it is reasonable to believe, on a balance of probabilities, that Ms. Lemelin knew when she submitted her application for the appointment process that the validity of her bachelor's degree was suspect, as was the accreditation from Belford University. The evidence showed that Ms. Lemelin said nothing about this to the officials responsible for the appointment process and that she indicated in her application that she had obtained a degree from Belford University.. .. [I]t is also reasonable to believe, on a balance of probabilities, that Ms. Lemelin acted dishonestly in not revealing these important facts, because she knew that she could not be appointed without meeting the requirements of the position, specifically the education requirement.

[65] Considering the evidence that was before the investigator, I am of the opinion that this finding falls within the range of possible outcomes which are defensible in respect of the facts and law.

[66] It is true that some of the evidence the applicant emphasizes argues in favour of significant naïveté/greed on her part rather than fraud. Nevertheless, it was up to the investigator and the PSC to weigh all of the evidence and to be satisfied, on a balance of probabilities, of the existence of fraud within the meaning of section 69 of the Act. Since their analysis and conclusion fall within the range of possible outcomes, it is not for the Court to substitute its own assessment.

## VII. Conclusion

The applicant has not satisfied me that there was a violation of a principle of procedural fairness in the investigation process led by the PSC, nor that the investigator erred in applying the test for finding that she had concealed an important fact in the internal appointment process and that deprivation resulted from that concealment.

**JUDGMENT in T-222-17**

**THIS COURT'S JUDGMENT is that:**

1. The applicant's application for judicial review is dismissed;
2. Costs in the amount of \$750, disbursements and taxes included, are awarded to the respondent.

\_\_\_\_\_  
"Jocelyne Gagné"

Judge

Certified true translation  
This 7th day of January 2020

Lionbridge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-222-17

**STYLE OF CAUSE:** SYLVIE R. LEMELIN v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** QUEBEC CITY, QUEBEC

**DATE OF HEARING:** FEBRUARY 7, 2018

**JUDGMENT AND REASONS:** GAGNÉ J.

**DATED:** MARCH 12, 2018

**APPEARANCES:**

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FOR THE APPLICANT

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