



**Files:** 2010-0416, 2010-0620 and  
2010-0657

**Issued at:** Ottawa, June 7, 2012

**LARRY PARDY AND THOMAS KEAGAN**

Complainants

AND

**THE DEPUTY MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN  
DEVELOPMENT CANADA**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaints of abuse of authority pursuant to sections 77(1)(a) and 77(1)(b) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Non-advertised process: the complaint is dismissed Advertised process: the complaints are substantiated
<b>Decision rendered by</b>	Lyette Babin-MacKay, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Pardy v. Deputy Minister of Aboriginal Affairs and Northern Development Canada</i>
<b>Neutral Citation</b>	2012 PSST 0014

# Reasons for Decision

## Introduction

**1** The complainants, Larry Pardy and Thomas Keagan, allege that the respondent, the Deputy Minister of Aboriginal Affairs and Northern Development Canada (AANDC), abused its authority in the advertised appointment process held to staff the EX-01 position of Director, Funding Services, Atlantic Region, (DFS) in Amherst, Nova Scotia, on an indeterminate basis. Both contend that the respondent assessed the essential qualifications improperly and personally favoured the appointee, Stephen Dunne. They also contend that Mr. Dunne's prior acting appointments in this position gave him an unfair advantage over other candidates in the process.

**2** The respondent denies all allegations. It asserts that Mr. Keagan was not successful because he did not meet one of the essential knowledge qualifications. As for Mr. Pardy, although he was found qualified, Mr. Dunne was chosen because he obtained the highest score in most of the assessment criteria and because, as an Aboriginal person, his appointment contributed to AANDC's employment equity objectives.

**3** Mr. Pardy also filed a separate complaint concerning Mr. Dunne's non-advertised acting appointment to this position, for the period of July 1, 2010, to September 30, 2010, which immediately preceded his above-mentioned indeterminate appointment. Mr. Pardy alleges personal favouritism and a breach of Public Service Commission (PSC) and AANDC policies with respect to this acting appointment. He also alleges abuse of authority in the assessment of the essential qualifications. The respondent denies the allegations.

**4** The PSC did not appear at the hearing but presented a written submission in which it reviewed the concept of abuse of authority and described relevant PSC policies and guidelines concerning, among others, the choice of appointment process, assessment and selection. It took no position on the merits of the complaints.

**5** For the reasons that follow, the Public Service Staffing Tribunal (the Tribunal) finds that the complaints regarding the indeterminate appointment are substantiated on the basis of personal favouritism towards the appointee, and abuse of authority in the

assessment of the essential qualification *Management Excellence – Financial Management*. The Tribunal has, however, determined that Mr. Pardy's complaint regarding Mr. Dunne's acting appointment is not substantiated.

## **Background**

**6** Both complainants are employees of AANDC, which was called Indian Affairs and Northern Development Canada (INAC) at the time of the appointments. Mr. Keagan is Manager, Capital Programs and Mr. Pardy is Manager, Lands, Atlantic Region, positions that are both at the PM-06 group and level.

### *The advertised appointment process*

**7** On October 16, 2009, the respondent published a *Job Opportunity Advertisement* (JOA) to staff the position of DFS on an indeterminate or acting basis. The appointment process was open to persons employed in the federal public service working across Canada.

**8** Ian Gray, Regional Director General (RDG), Atlantic Region and delegated manager for the process, prepared the Statement of Merit Criteria with the assistance of a Human Resources (HR) Advisor from the department's headquarters, using precedents from other regions for this type of position. In addition to screening requirements of education, experience and official language proficiency, the position called for the following essential qualifications and organizational needs:

#### ESSENTIAL QUALIFICATIONS

- Knowledge of the current priorities/challenges for the department (K-1)
- Knowledge of the political, social, economic and cultural characteristics of Atlantic Canada First Nations (K-2)
- Knowledge of the departmental Management Accountability Framework (K-3)
- Leadership Competencies:
  - Values and ethics: integrity and respect (C-1)
  - Strategic thinking: analysis and ideas (C-2)
  - Engagement: mobilizing people, organizations, partners (C-3)
  - Management Excellence: action management (C-4A), people management (C-4B), financial management (C-4C).

ORGANIZATIONAL NEEDS:

- Membership in one of the designated Employment Equity Groups

**9** The designated employment equity groups include Aboriginal persons. Both complainants, as well as Mr. Dunne, are Aboriginal persons.

**10** Of the 47 candidates, 20 were screened in and were invited to a written test, administered on-line at the candidates' desks on February 3, 2010. This test assessed the essential knowledge qualifications K-1 and K-2.

**11** Mr. Keagan did not obtain the required pass mark (12 points) for qualification K - 2 and was not considered further.

**12** Three candidates (Mr. Pardy, Mr. Dunne, and another candidate) successfully completed the written test and were invited to an interview, held on May 4, 2010, which assessed knowledge qualification K-3 and the leadership competencies.

**13** The interview assessment board consisted of Mr. Gray, chairperson; Alain Gélinas, Director General (DG), Corporate Accounting and Material Management, AANDC; and a third board member, the Deputy Minister, Aboriginal Affairs Secretariat, Government of New-Brunswick. Martin Czyzowicz, then Executive Resourcing Advisor, Executive Group Services Directorate, AANDC, was present at the interview and facilitated the consensus discussions among board members.

**14** Positive references and successful completion of the PSC test *Simulations for Executive Selection* (SELEX) were also required. A consultant conducted the verification of references and reported the results to the Associate RDG, Atlantic Region.

**15** The three candidates interviewed were deemed fully qualified.

**16** On October 1, 2010, a *Notification of Appointment or Proposal of Appointment* (NAPA) was published on *Publiservice* for Mr. Dunne's indeterminate appointment to the position.

**17** On October 6, 2010, and October 17, 2010, respectively, Mr. Keagan and Mr. Pardy filed complaints pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA).

*The non-advertised appointment process*

**18** Mr. Dunne had been acting in the position of DFS continuously since June 12, 2007, when the JOA for the indeterminate position was published in October 2009. He continued acting in the position until his indeterminate appointment on October 1, 2010.

**19** When the notification of the extension of Mr. Dunne's acting appointment for the period from July 1, 2010, to September 30, 2010, was published on *Publiservice* on July 19, 2010, Mr. Pardy submitted a complaint to the Tribunal pursuant to ss. 77(1)(a) and (b) of the PSEA.

**20** For the purpose of the hearing, the Tribunal consolidated Mr. Keagan's and Mr. Pardy's complaints regarding both appointment processes, in accordance with s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 as amended by SOR 2011-116.

**Issues**

**21** The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority when it appointed Mr. Dunne on an acting basis from July 1, 2010, to September 30, 2010?
- (ii) Did the respondent abuse its authority in the advertised appointment process?

**Analysis**

**22** In *Brown v. Canada (Attorney General)*, 2009 FC 758, the Federal Court found that the Tribunal must consider all relevant evidence in determining if there has been an abuse of authority in an appointment process, and that it must look at the overall

perspective of the events that occurred (see also *Brown v. Deputy Minister of National Defence*, 2010 PSST 0012).

**23** Accordingly, in examining these complaints, the Tribunal will review the evidence pertaining to all the appointment processes, as the acting appointments that took place before the extension of July 1, 2010, and the advertised appointment that followed are interconnected. As will be explained below, complaints were not formally brought before the Tribunal regarding those prior acting appointments. Nevertheless, they are part of the sequence of events that led to Mr. Dunne's acting appointment in July 2010, and are part of the Tribunal's consideration in assessing the complainants' allegations.

**Issue I: Did the respondent abuse its authority when it appointed Mr. Dunne on an acting basis from July 1, 2010, to September 30, 2010?**

**24** In this complaint, Mr. Pardy alleges that the respondent abused its authority and personally favoured Mr. Dunne when it chose him to act in the position of DFS from July 1, 2010, to September 30, 2010, and in the six appointments that preceded it, from June 12, 2007, to June 30, 2010.

**25** He contends that the respondent breached the PSC *Policy on Choice of Appointment Process* (the PSC policy) and the AANDC's *Policy – Criteria for the Use of Non-Advertised Appointment Processes* (the AANDC policy). Contrary to departmental criteria, the respondent disregarded access to developmental opportunities and career aspirations of employees. No urgency justified the appointment method chosen. The appointments should also have been offered to other qualified employees on a rotating basis. In addition, the respondent failed to issue complete written rationales in support of each appointment. Finally, he contends that Mr. Dunne was assessed on the basis of outdated qualifications.

**26** The respondent denies all allegations. It contends that operational reasons led it to choose Mr. Dunne for these acting appointments, which complied with all policies. The respondent's view is that it was not required to meet every departmental criterion, and that the rationales on file were sufficient to justify the use of non-advertised processes.

**27** Mr. Pardy related administrative decisions dating back to 2005, which he believes favoured Mr. Dunne, then described how Mr. Dunne came to act in the position of DFS.

**28** He explained that in late 2006, the substantive incumbent of the DFS position was reassigned elsewhere in the department and that in May 2007, as part of a pilot project with the Royal Canadian Mounted Police (RCMP), an RCMP officer assumed the duties of DFS. Around that time, the Atlantic Regional Office proposed to National Headquarters (NHQ) that a position of Associate DFS, at the AS-08 group and level, be established to support the RCMP officer. Pending a decision on this proposal, Mr. Dunne, whose substantive position was at the PM-06 group and level, was assigned to perform the functions of this proposed position.

**29** When NHQ refused to approve the creation of an AS-08 Associate DFS position, the respondent appointed Mr. Dunne retroactively to the position of DFS on an acting basis at the EX-01 group and level, even though the RCMP officer was still performing the duties of DFS.

**30** Mr. Gray confirmed the events surrounding the initial staffing of the position of DFS. He was then Associate RDG and was appointed RDG later, in September 2007. Mr. Gray testified that the decision to pay Mr. Dunne at the EX-01 group and level was taken to compensate him for the duties he was performing as Associate DFS in addition to the duties of his substantive PM-06 position. According to Mr. Gray, this arrangement was possible because the RCMP officer's salary was being paid by the RCMP, which enabled the respondent to pay Mr. Dunne a salary at the EX-01 group and level in the DFS position.

**31** When the pilot project with the RCMP ended, sometime in 2008, Mr. Dunne assumed the full range of duties of DFS, still on an acting basis.

**32** Mr. Gray explained that Mr. Dunne was the logical choice for an acting appointment as DFS. As senior financial officer in charge of all financial officers dealing with First Nations (FN), Mr. Dunne had shown strong leadership in addressing the difficult operational situation that existed at that time. When the pilot project with the

RCMP ended, Mr. Gray chose to keep Mr. Dunne in the acting DFS position because he had demonstrated his capabilities during the previous five years. In addition, Mr. Dunne is an Aboriginal person and the department had undertaken to maintain Aboriginal representation at the management table. Mr. Dunne also holds a master's degree in business administration. In the circumstances, it was not in the department's interest to end his appointment and appoint someone else. According to Mr. Gray, relations between the FN partners and departmental officials are delicate and require consistency. They are not conducive to training and rotational situations. Each acting appointment was of short duration because the substantive position of DFS was not vacant, as its incumbent was on assignment.

**33** Mr. Gray stated that he included a number of these factors in the rationale that was prepared in May 2008, in support of the first extension of the acting appointment, from January 1 to June 30, 2008.

**34** When the incumbent of the DFS position retired in 2009, the department initiated an internal advertised process to staff the position on an indeterminate basis.

**35** Mr. Pardy tabled organizational charts of the AANDC Atlantic Region. He stated, that they demonstrate that there existed a sufficient number of qualified employees within the department, several of whom are Aboriginal persons, who could also have acted in the position, on a rotational basis.

**36** On June 25, 2010, Mr. Pardy asked Mr. Gray about the possibility of appointing other employees to the acting position of DFS on a rotational basis, "given the experience and other benefits that an acting assignment provides to candidates". Mr. Pardy testified that when he made this enquiry, he believed that the advertised appointment process would not be completed for another six to eight months. In his view, two-month rotations would have been appropriate given that the acting appointment had already lasted three years; the longer an acting appointment lasts, the more appropriate it is to have other employees rotated into the position. In any case, the *Considerations* section of the PSC policy advises managers to consider this approach.



**37** Mr. Gray replied the same day: he would not make changes regarding Mr. Dunne's acting appointment as he anticipated that the process for the indeterminate position would soon be completed.

**38** Mr. Gray explained in his testimony that he chose to extend Mr. Dunne's acting appointment in July 2010 and not offer it to others on rotation because the advertised process for the indeterminate position was nearing completion. For Mr. Gray, it did not make sense to interrupt the acting appointment at this point because, by then, Mr. Dunne had been found qualified in the advertised process and would be offered the indeterminate position.

**39** Overall, Mr. Dunne's non-advertised EX-01 acting appointments spanned a period of over three years, as follows:

June 12, 2007, to December 31, 2007,	(notification made on January 31, 2008)
January 1, 2008, to June 30, 2008,	(notification made on June 2, 2008)
July 1, 2008, to March 31, 2009,	(notification made on November 27, 2008)
April 1, 2009, to September 30, 2009,	(notification made on June 19, 2009)
October 1, 2009, to March 31, 2010,	(notification made on November 10, 2009)
April 1, 2010, to June 30, 2010,	(notification made on April 21, 2010)
July 1, 2010, to September 30, 2010,	(notification made on July 19, 2010)

**40** The respondent has explained the operational circumstances that led it to choose Mr. Dunne to act in the position of DFS commencing in June 2007, and not to rotate the appointments among other qualified employees. That first acting appointment and the ones that followed were not the subject of complaints. The Tribunal is nevertheless troubled by the respondent's decision to grant Mr. Dunne an acting appointment as DFS at the EX-01 group and level while the duties of DFS were actually being performed by the RCMP officer. This acting appointment, in effect, circumvented NHQ's decision to refuse the establishment of an AS-08 position and strongly suggests a preferential treatment of Mr. Dunne, but again, no complaint was received when the notification was issued.

**41** As to the acting appointment from July 1, 2010, to September 30, 2010, that is the subject of this complaint, the evidence does confirm Mr. Gray's testimony that the

advertised process was nearing completion when Mr. Pardy requested, on June 25, 2010, that the acting appointment be rotated among employees. The NAPA for Mr. Dunne's indeterminate appointment was issued about three months later on October 1, 2010.

**42** Under s. 30(4) of the PSEA, managers have the discretion to consider only one person for appointment to a position (see *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 0024).

**43** Given the advanced stage of the indeterminate appointment process when it was made, the Tribunal finds that Mr. Gray's decision not to consider other employees for the acting appointment from July 1, 2010, to September 30, 2010, was reasonable and does not denote personal favouritism.

#### *The lack of written rationales*

**44** Mr. Pardy testified that no rationale was submitted for the acting appointment at issue in this complaint, and that only two rationales were submitted for the six acting appointments that preceded it.

**45** The first rationale was submitted on May 30, 2008, with a *Non-Advertised Appointment Process Checklist* indicating that the appointment had commenced on June 12, 2007. The Checklist cited "Appointment of an Aboriginal employee as part of a career development program" and "Appointment of a member of a designated group" as criteria in support of the use of a non-advertised process. An update to this rationale was requested by Mr. Czyzowicz and submitted on March 29, 2010, shortly before the acting appointment that commenced on April 1, 2010. It reiterates the criteria cited in the first rationale.

**46** Mr. Czyzowicz testified that he was not required to request another rationale but did so because he considered the May 30, 2008, rationale to be somewhat dated.

**47** The requirement for managers to provide a written rationale for each non-advertised appointment process is clearly set out in the PSC and in the AANDC policies. A rationale must explain how the non-advertised appointment process

meets the established criteria and the four appointment values of fairness, transparency, access and representativeness.

**48** In *Robert and Sabourin* at paras. 69-71, the Tribunal confirmed that a written rationale must be provided for each non-advertised appointment process.

**49** The respondent's repeated failures to provide a rationale for most of the acting appointments made between June 12, 2007, and June 30, 2010, were errors and contravened PSC and AANDC policies. Although the two rationales on file do refer to elements of the departmental criteria (appointment of an aboriginal employee and of a member of a designated group) and thus could be said to address the PSEA staffing value of representativeness, they do not explain how the processes met the other staffing values of fairness, transparency and access. This is of serious concern to the Tribunal given that the appointments ultimately exceeded three years but again, Mr. Pardy did not file complaints when notifications of these acting appointments were issued.

**50** The Tribunal finds that the respondent erred when it failed to complete a written rationale for the acting appointment from July 1, 2010, to September 30, 2010. However, given that the respondent believed, albeit erroneously, that the rationale provided on March 29, 2010, for the acting appointment from April 1, 2010, to June 30, 2010, would also apply to the extension effective July 1, 2010, and given that this acting appointment ended on September 30, 2010, and was not renewed, the Tribunal finds that this error is not sufficiently serious as to constitute an abuse of authority.

#### *The late notifications of appointment*

**51** Finally, although no allegation was raised about this matter, the Tribunal is concerned about the fact that the respondent was generally late in providing notifications for this series of acting appointments. Notification for the acting appointment that is the subject of this complaint was only given on July 19, 2010, two and one-half weeks after its July 1, 2010, start date, and the notifications for the acting appointments that preceded it were issued well after their start date. For example,

notification for the June 12, 2007, to December 31, 2007, acting appointment was only given on January 31, 2008, one month after the original end date. Notification for the July 1, 2008, to March 31, 2009, appointment was given on November 27, 2008, almost five months late.

**52** Section 13 of the *Public Service Employment Regulations*, SOR/2005-334 (the PSER) is clear: notification of acting appointments of four months or more must be given **at the time that the acting appointments are made or proposed**, not months later or after the appointment period has ended, as was the case with the June 12, 2007, to December 31, 2007, acting appointment (see *Robert and Sabourin* at para. 90). Each extension constitutes an appointment and is subject to the requirements of the PSEA and the PSER (see *Wylie v. President of the Canada Border Services*, 2006 PSST 0007 at para. 20).

**53** By making retroactive appointments or posting the *Information Regarding Acting Appointment* notices long after the acting appointments have ceased, the respondent is in effect depriving employees in the area of selection of the opportunity to pursue their recourse rights against those acting appointments in a timely and effective manner. To post notices late or after the appointment has ended defeats much of the purpose of providing recourse rights to employees.

**54** Although failure to notify persons in the area of recourse of the prior acting appointments in a timely manner denotes serious carelessness, Mr. Pardy did not file complaints regarding these appointments.

**55** As to the acting appointment at issue in this complaint, it was not renewed.

**56** In summary, the Tribunal finds that the respondent did not abuse its authority in appointing Mr. Dunne as DFS on an acting basis from July 1, 2010, to September 30, 2010.

**Issue II: Did the respondent abuse its authority in the advertised appointment process?**

**A) The assessment of Knowledge and of the Leadership Competencies**

**57** In their complaints concerning the advertised appointment process, the complainants allege that the essential qualifications were not properly assessed, and that the respondent personally favoured Mr. Dunne.

**58** Mr. Keagan alleges that Mr. Dunne was personally favoured in the manner in which his written test was marked. He contends that he would have obtained the pass mark for K-2 if his submission had been assessed as Mr. Dunne's was. Mr. Keagan also alleges that the written test and the essential qualifications personally favoured current and former directors at the Regional Office of AANDC, such as Mr. Dunne who was acting DFS. Finally, he alleges that knowledge qualifications K-1 and K-2 were not assessed separately.

**59** Mr. Pardy contends that the interview questions did not properly assess knowledge qualification K-3 and the Leadership Competency *Financial Management* (C-4C). He also asserts that because relative merit was used to assess the candidates, he should have been the successful candidate because he received more points than Mr. Dunne.

**60** The respondent denies all allegations. Mr. Dunne was not personally favoured, he was chosen because he met organizational employment equity needs (he is an Aboriginal person) and he performed better than the other candidates at the interview.

**The written test**

**61** The written test assessed knowledge qualifications K-1 and K-2. In a briefing note of no more than 1500 words to the Deputy Minister, candidates were to comment on the political, social, economic and cultural characteristics of Atlantic Canada First Nations and relate this information to the current priorities and challenges of the department.

**62** Ten elements, described in the *Answer Key*, were sought in the marking of the candidates' submissions. Element 10 addressed qualification K-1 and elements 1 to 9 addressed knowledge qualification K-2. The maximum score available for each of the ten elements ranged from 1 to 4 points, for a possible maximum score of 3 points for K-1 (pass mark 2/3) and of 17 points for K-2 (pass mark 12/17).

**63** Mr. Keagan completed the written test but he did not obtain the required pass mark for knowledge qualification K-2.

**64** Part of Mr. Keagan's allegation with regard to his own assessment relates to the fact that the respondent stated, in its reply to his allegations, that his submission for the written test was only approximately 300 words long. Mr. Keagan maintained that his submission contained about 1,350 words and that his test had not been considered completely. In testimony, the respondent acknowledged that its reply was in error. Mr. Gray testified that he corrected Mr. Keagan's full four-page submission.

*The assessment of knowledge qualification K-2*

**65** Mr. Keagan referred to elements 7, 8 and 9 in support of his contention that Mr. Dunne was favoured in the scoring of his test. He stated that Mr. Dunne received a full mark (1 point) for elements 7 and 8 although his submission was incomplete. Mr. Keagan listed the missing information. He also stated that Mr. Dunne received the full score of three points for element 9, although his submission made no mention of a concept that appeared on the *Answer Key* for this question, the "Blue Ribbon Panel". Mr. Keagan explained that Mr. Dunne would have been familiar with element 9 through his role as DFS.

**66** The *Answer Key* indicates that Element 9 sought the following information:

"There should be a discussion of TB's blue ribbon panel and INAC's response ([Transfer Payment Program]). This should be placed in the context of INAC's financial relationship with FN's and the programs and services implicated in this process. A knowledge of the intervention process must be demonstrated as well as its effects on INAC First nation (*sic*) relations".

**67** The parties did not explain the nature of the "Blue Ribbon Panel".

**68** Mr. Keagan stated that his own submission fully addressed all the required items, including those sought in elements 4, 6, 7 and 9. He gave very brief examples of some items he had mentioned for these elements of K-2. In his view, he should have received one more point for each of these elements.

**69** Mr. Gray testified that he prepared the written test, in consultation with an advisor from NHQ. He disagreed with Mr. Keagan's claim that the test personally favoured Mr. Dunne because of his prior experience as acting director. According to Mr. Gray, the knowledge questions were very broad in nature, and one did not require prior experience as a director to answer them. Historical and current information was available to candidates on the Internet and in history books, and it was possible for a person not working in his directorate to be successful on the test, as was the case for a candidate from another organization who received the highest mark in the knowledge test.

**70** Mr. Gray acknowledged that Mr. Dunne did not specifically refer to the Blue Ribbon Panel in his answer but explained that he covered several other points, such as transfer payments and the department's response to the Blue Ribbon Panel initiative, and this was critical to Mr. Gray. Mr. Gray described in detail other portions of Mr. Dunne's answer for element 9, which led him to conclude that Mr. Dunne's submission for this element was ultimately the "strongest one".

**71** Mr. Gray did not specifically comment on Mr. Keagan's testimony about the marking of his own test, but stated that this was not a multiple choice test. He had tried to be as objective as possible but there was a certain degree of subjectivity in any marking. He explained that he had not been very rigid in his assessment of the submissions and that the answers he accepted were not limited to the ones indicated in the *Answer Key*. If a candidate's answer showed that he understood or had a general knowledge of an issue, Mr. Gray accepted the answer.

**72** Under s. 36 of the PSEA, managers have substantial discretion in the selection and use of assessment methods to determine whether a candidate meets the qualifications established for a given position. This discretion is not absolute and a

person who was not appointed can complain, under s. 77(1)(a) of the PSEA, that there was an abuse of authority in the selection and use of an assessment method (see *Visca v. Deputy Minister of Justice*, 2007 PSST 0024). However, in reviewing a complaint that qualifications have not been properly assessed, the Tribunal must not substitute its assessment of candidates' qualifications for the manager's or the board's assessment (see *Edwards v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 0010 at para. 34).

**73** Although Mr. Keagan asserts that the material he provided in his submission was sufficient to demonstrate that he met both knowledge qualifications K-1 and K-2, he did not explain how Mr. Gray's assessment of his submission may have been deficient. The Tribunal finds that Mr. Keagan did not demonstrate that the respondent abused its authority when it assessed his and Mr. Dunne's written tests.

**74** As to the allegation that the written test favoured candidates who were or had been directors at the Regional Office of AANDC, the Tribunal is satisfied with Mr. Gray's explanation that the questions were broad and could be answered by candidates with no prior experience as directors. Mr. Keagan did not present any evidence to call this explanation into question.

**75** Mr. Keagan had also alleged that there was a single combined pass mark for knowledge qualifications K-1 and K-2, and that one could not determine whether each qualification had been met. Mr. Gray testified that there was a distinct pass mark for each of K-1 and K-2.

**76** The Tribunal has examined the *Assessment Guide* and the *Answer Key* in evidence. They clearly indicate which knowledge qualification each element of the written test assessed. Each knowledge qualification was assessed separately.

**77** In summary, the Tribunal finds that Mr. Keagan has not demonstrated that his and Mr. Dunne's written tests were not assessed properly.



## **The interview**

**78** According to the *Assessment Guide* and the *Overall Assessment Rating*, Interview Question 1 assessed knowledge qualification K-3 and Interview Question 2 assessed Leadership Competencies C-1 to C-4B.

**79** Qualifications K-3 and C-1 to C-4C were rated by consensus of the board members, on the basis of a *Standard EX-01 Rating Scale* which uses a descriptive evaluation scale from 1 to 5 points.

**80** Leadership Competency C-4C *Management Excellence – Financial Management (Financial Management)* was to be assessed by means of the references and of the SELEX test, on a pass/fail basis. Interview Question 2 was to be used “for validation only”. No explanation is given on the documents as to what this validation entailed and how it was to be conducted, although a note by Mr. Gray in the recommended answers portion of the *Interview Questions and Answers* document (the *Recommended Answers*) indicates: “we can look to the references for the [assessment of] financial management”.

**81** Although *Financial Management* was to be rated on a pass/fail basis only, the assessment board nevertheless awarded the candidates’ marks out of 5 points, after the interview.

**82** Mr. Gray later deemed that all candidates had “passed” the references.

### *Interview Question 1*

**83** Interview Question 1 was used to assess *Knowledge of the departmental Management Accountability Framework (MAF)* (K-3). Candidates were asked to describe their approach to ensuring a good management of their directorate. The recommended answer referred to six elements of the MAF, namely Policy and Programs, People, Citizen-focussed Service, Risk Management, Stewardship and Accountability.

**84** Referring to the document titled [*Treasury Board*] *Management Accountability Framework* found on the Treasury Board Secretariat (TBS) website, Mr. Pardy stated that it shows that the MAF is structured around ten key elements that collectively define “management”. In his view, the assessment tool incorrectly referred to six elements only. He named the other four elements the expected answer should have included.

**85** Mr. Gray testified that in assessing the candidates’ responses, the assessment board focussed on the six elements of Management Excellence that are described in the TBS MAF, as are outlined in the *Recommended Answers*. Mr. Gray stated that senior management’s view is that the other four elements of the MAF buttress these six elements. Candidates were not penalized if they listed all the elements of the MAF.

**86** The section on the TBS website that describes the MAF and to which Mr. Pardy referred in his testimony does indicate that the ten elements of the MAF include Management Excellence in the six areas sought in the *Recommended Answers*: Policy and Programs, People, Citizen-focussed Service, Risk Management, Stewardship and Accountability. Mr. Gray confirmed in his testimony that candidates who listed all 10 elements of the MAF were not penalized.

**87** Mr. Pardy has not demonstrated that the respondent’s decision to use the six elements of Management Excellence in the assessment of this qualification was inappropriate.

#### *Interview Question 2*

**88** Interview Question 2 was used to assess Leadership Competencies. The question presented candidates with the facts of a given situation, who were to explain how they would respond to it.

**89** Mr. Gray stated that the leadership competency of *Financial Management* was assessed by means of the references and of the SELEX test, on a pass/fail basis. He added that no specific question assessed *Financial Management*; the candidates were asked the question merely as a means to validate the references. He did not explain what Interview Question 2 validated and how this was done.

**90** Mr. Gray was questioned about the following paragraph in the *Recommended Answers*:

The correct answers are based on the "Effective Behaviours" for Directors which is listed as part of the [Performance Management Program] process. I would argue it does cover off the 4 competencies – as you indicate, we can look to the references for the financial management. It is very difficult to come up with one question that raises all these points.

**91** He stated that this was an editing note in response to comments from NHQ-HR, and was not intended to be part of the answer. Here, he was telling NHQ-HR that Interview Question 2 did in fact cover the four competencies and that he could turn to the references to address *Financial Management*. Mr. Gray explained that what he meant here was that the interview question and the interview tool were secondary. However, he did not expect the reference to overturn the findings.

**92** According to the *Assessment Guide* and to the *Overall Assessment Rating*, the references were to serve in the assessment of all Leadership Competencies and in the validation of the qualification of *Financial Management*.

**93** Mr. Gray acknowledged that neither he nor the assessment board received or read any record of the reference checks, which were conducted by a consultant. He testified that the Associate RDG had been in touch with the consultant and had reviewed the information provided by the referees. The Associate RDG had then advised him that all the references were "in order", were "good and strong", and that there was "nothing to worry about" in them.

**94** Mr. Gray acknowledged that the assessment board awarded marks for financial management at the interview, although the reference checks had not yet been completed. He was "not sure" why marks had been assigned to each candidate for this qualification on the *Overall Assessment Rating* and on the *Assessment Guide*, and he could not "articulate in detail" the reason why Mr. Dunne had received a higher score, by one-half point, than the other two candidates. He stated that the rating for this qualification was on a pass/fail basis and that he was "not in a position to say" why the assessment board had assigned a score to the candidates' answers. He stated that the board had not totaled the marks. He agreed that when one added the marks assigned

to Mr. Pardy in the *Overall Assessment Rating* and on the *Assessment Guide*, his marks were higher than Mr. Dunne's, but stated that the two results could not be compared. He did not explain why.

**95** Mr. Gray stated that he had seen both Mr. Dunne and Mr. Pardy's financial management and that the reference checks would not have made a difference. He added that the interview was a "critical piece" in the board's decision. It was the main element of the assessment and when it was completed, the results were clear. In Mr. Gray's view, the references had only served "to tidy up the paperwork". He would have been very shocked if the references had changed the findings of who had performed best at the interview. Human Resources informed him that the records of the reference checks were put on file.

**96** In his testimony, assessment board member Mr. Gélinas stated that he did not assess the references and that the board did not reconvene to review them. He acknowledged that there was no evaluation guide "as such" to assess the references. Asked what the scores shown on the *Assessment Guide* were based on, Mr. Gélinas was somewhat vague, stating: "J'imagine que cette compétence a été évaluée plus d'une fois (I imagine that this qualification was assessed more than once [translation])".

**97** The discretion that s. 36 of the PSEA provides deputy heads to choose and use assessment methods is not absolute. The assessment methods must effectively assess the qualification and be used in a fair and reasonable manner or a deputy head may be found to have abused its authority (see *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029, at para. 144).

**98** In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 54, the Tribunal explained the consequences of not providing evidence to refute evidence presented to support a complaint:

54. While it is open to the respondent, for its part, to simply deny the assertion, once the complainant has presented some evidence in support of his or her assertion that an abuse of authority had occurred, then the respondent will likely wish to raise a positive defence to the assertion. Moreover, it is open to the Tribunal to draw reasonable

inferences from uncontested facts and, thus, if the respondent does not provide evidence to explain its reasons for a particular course of action or conduct, it risks being faced with an adverse finding by the Tribunal, namely, a substantiated complaint [...]

**99** The Tribunal has reviewed the *Assessment Guide* and the *Overall Assessment Rating*. Both indicate that *Financial Management* is to be assessed by means of references and of the SELEX test, on a pass/fail basis. Interview Question 2 is to serve to “validate”. According to Mr. Gray, the interview was a critical piece in the board’s decision; it was the main element of the assessment and when it was completed, the results were clear. However, he acknowledged that no specific interview question assessed *Financial Management*.

**100** The respondent has presented no evidence to explain how and if a validation of *Financial Management* was done. Mr. Gray’s testimony in that regard is vague and contradictory. He speaks of the references “validating” the interview, yet he did not examine the report of the references, does not know what it contained or what questions the referees were asked.

**101** Although *Financial Management* was to be assessed on a pass/fail basis, Mr. Gray is unable to explain the scores that the board assigned to the candidates, nor why Mr. Dunne was given an additional one-half point for this qualification. In addition, Mr. Gray acknowledges that candidates’ answers to Interview Question 2 were scored before the reference checks had been completed, in contradiction to the email he sent after the interview stating that reference checks needed to be completed before results could be issued.

**102** The respondent has presented no evidence that an actual assessment of *Financial Management* took place at the interview. Similarly, it has not explained what information was sought or obtained from the references and did not describe how this information could be used to “validate” the interview. Accordingly, the Tribunal finds that the respondent has not demonstrated that the references “validated” the interview.

**103** This case differs from *Costello v. Deputy Minister of Fisheries and Oceans Canada*, 2009 PSST 0032, where the Tribunal found that abuse of authority had not been demonstrated. The assessment board, in that case, used the references to

validate the assessment results and to ensure that there would be no “negative surprises.” The Tribunal found that the qualification had been fully assessed at the interview and the referees’ answers as to how candidates performed on the qualifications in their current or former positions were only of interest if the referees provided information that was inconsistent with what had been learned during the interviews. In the present case, however, the *Assessment Guide* specified that the assessment of the qualification would be made by means of the references.

**104** As to Mr. Gray’s statement that he had seen Mr. Pardy’s and Mr. Dunne’s financial management and that the references would not make a difference, the Tribunal is not satisfied that this amounts to a sufficient and proper assessment of the qualification. Indeed, the assessment board did interview a third candidate in this process and the respondent has presented no evidence that Mr. Gray had personal knowledge of this candidate’s financial management.

**105** As stated earlier, Mr. Pardy claims that he received more points than Mr. Dunne and that because the respondent used relative merit in the assessment, he was in fact the successful candidate, not Mr. Dunne. In the deputy head’s response to Mr. Pardy’s allegations, before the hearing, the respondent stated that the delegated manager completed a justification for the choice of candidate based on rank. In the document *Justification for choice of candidate*, which Mr. Gray signed on July 29, 2010, he states that Mr. Dunne was chosen because he obtained the highest score in most of the assessment criteria, and because he is an Aboriginal person. In its arguments, the respondent stated that Mr. Gray chose to appoint the Aboriginal person with the best score in the interview as the right fit.

**106** However, in testimony, Mr. Gray acknowledged that Mr. Pardy, who is also an Aboriginal person, received a higher overall score than Mr. Dunne. Mr. Gray was unable to explain his statement that in his view, the two results could not be compared. The assessment board also assigned scores to the qualification *Financial Management* in the interview, although all documents indicate the qualification would be assessed on a pass/fail basis.

**107** There is no set of strict rules in the PSEA on how a candidate who meets the essential and asset qualifications is chosen for appointment (See *Visca* at para. 34) and s. 30(2) of the PSEA grants considerable discretion to choose from amongst the applicants who meet the essential qualifications, the person who in the manager's judgement is the right fit for the job. However, this must be done in respect of the value of fairness and transparency and for this reason, the criteria that will be used in making such a choice should be outlined clearly and unequivocally.

**108** In the case at hand, although the respondent indicates it used "the highest score", therefore relative merit, in the choice of the eventual appointee, it does not indicate clearly which criteria and assessment tools were actually taken into consideration in the determination of this final score, given Mr. Gray's testimony that the assessment board did not total the marks.

**109** In the Tribunal's opinion, the ambiguity amounts to more than a simple error or omission. Rather, when considered with the failure to assess *Management Excellence -Financial Management* and with the cursory assessment of the references, it is tantamount to such serious carelessness and lack of transparency as to constitute bad faith (see *Morgenstern v. Commissioner of the Correctional Services of Canada*, 2010 PSST 0018, at para. 38).

**110** In summary, the Tribunal finds that the respondent abused its authority in failing to assess the leadership competency *Management Excellence -Financial Management*, and demonstrated bad faith in how it determined the successful candidate.

## **B) Predetermination of the successful candidate**

**111** The complainants described events and statements they believe demonstrate that the respondent personally favoured Mr. Dunne and had predetermined that he would be appointed to the indeterminate position:

- The March 2010 request to have Mr. Dunne make a presentation on the MAF to the Senior Management Committee;

- A comment by Mr. Gray to Debbie MacDonald in April 2010; and
- Statements made by Mr. Gray in May 2010.

*The presentation on the Management Accountability Framework*

**112** On March 22, 2010, at the request of Mr. Gray, Mr. Dunne made a presentation on the MAF to the Senior Management Committee. The complainants allege that this invitation was made in order to help Mr. Dunne prepare for the interview, which took place about six weeks later. Mr. Pardy asserts this presentation, which was not a normal part of the duties of the DFS, gave Mr. Dunne an opportunity to prepare for the interview. Mr. Keagan argues that this was an indication that the appointment was biased in Mr. Dunne's favour because of his role of DFS.

**113** The minutes of the March 22, 2010, meeting of the Senior Management Committee confirm that Mr. Gray requested that a meeting be scheduled with the broader management team to learn more about the MAF, its elements and what was being done to support NHQ.

**114** Mr. Pardy testified that he was told by Mr. Gray's assistant that Mr. Gray had requested this presentation because he knew that Mr. Dunne was studying the MAF for the interview. According to Mr. Pardy, Mr. Dunne also told him that he had been asked to make a presentation on the MAF. Mr. Pardy stated that Mr. Dunne joked as to whether he should do it. Mr. Pardy also stated that on May 4, 2010, after the interview, Mr. Dunne told him that he had given a presentation on the MAF a few weeks before and that the directors had seemed impressed.

**115** Mr. Gray's assistant and Mr. Dunne were not called to provide testimony. Mr. Pardy did not question Mr. Gray about the MAF presentation. However, the March 22, 2010, minutes do confirm that Mr. Gray did request such a presentation.

**116** Both the presentation and the interview related to the departmental MAF. A transcription of Mr. Dunne's handwritten notes of his presentation, entered into evidence, describes the MAF, lists its ten elements, and indicates the six areas identified as "opportunities for improvement" in the last round of assessment in the



Department. Interview Question 1, which assessed knowledge of the departmental MAF (K-3), was of a similar nature to the presentation, in that it asked candidates to refer to the key elements of the MAF and to describe the approach they would take, as DFS, to ensure a good management in their Directorate.

**117** All candidates were aware that knowledge of the departmental MAF was an essential qualification and the three successful candidates at the February 2010 written test knew that knowledge of the MAF would be a qualification assessed at the interview. Mr. Gray had prepared the interview questions, was well aware of their nature and knew that Mr. Dunne would be interviewed.

**118** The Tribunal finds it more likely than not that this presentation did give Mr. Dunne an opportunity to prepare for the interview that the other two candidates did not have.

*The statement to Debbie MacDonald*

**119** Mr. Pardy contends that statements that Mr. Gray made to Ms. MacDonald in April 2010 indicate that he had already decided that Mr. Dunne would be appointed to the DFS position.

**120** At the time of the appointment process, Ms. MacDonald was Manager, Human Resources, and was responsible for Labour Relations in the Atlantic Region. She testified that during a meeting with Mr. Gray, shortly before the interviews, he told her he had decided to give the position of DFS to Mr. Dunne because he had been acting in the position for the last three years and it would be “a terrible blow to his ego” if he was not appointed to the position. Ms. MacDonald testified that she immediately counseled Mr. Gray to let the assessment board do its work as the integrity of the process would be otherwise compromised. She related her concerns about Mr. Gray’s intentions to the Director of Corporate Services afterwards.

**121** Mr. Gray stated that he could not recall having made these statements to Ms. MacDonald. He affirmed that he did not have any concerns about Mr. Dunne’s ego and that he was not afraid to disappoint him. Mr. Dunne was no different than other employees he has to manage.

**122** While Mr. Gray could not recall having made this statement, Ms. MacDonald's recollection of the event is clear and led her to express her concerns to a senior manager. The Tribunal finds that it is more likely than not that Mr. Gray did tell Ms. MacDonald that he had decided to give the position of DFS to Mr. Dunne.

*The May 2010 statements*

**123** In his testimony, Mr. Pardy related a number of statements that Mr. Gray made to him after the interview of May 4, 2010, and before the reference checks were completed. He contends that they indicate that Mr. Gray had predetermined that Mr. Dunne would be the successful candidate.

**124** The interviews were held on May 4, 2010. Mr. Pardy testified that on May 5, 2010, Mr. Gray came to his office and informed him that Mr. Dunne was the successful candidate. Emails entered into evidence confirm that on May 7, 2010, Mr. Pardy asked Mr. Gray for an informal discussion, and that Mr. Gray agreed but cautioned that the process was not yet completed as reference checks remained to be done. Mr. Gray wrote that "given the assessment tool and relative role of reference checks, these are unlikely to change the preliminary results after the interviews".

**125** Mr. Pardy also testified that he made detailed notes of statements Mr. Gray made to him at their meeting of May 5, 2010, and at another meeting on May 12, 2010. He recounted some statements, such as:

- It would have been very difficult to unseat [Mr. Dunne] for the job he has been doing – he has been doing it very well;
- [Mr. Dunne] had presence during the interview, particularly on the DFS questions; it would have been a difficult transition for you to go in the DFS position;
- It is a tough job and [Mr. Dunne] is tough; you are not going to beat him on financial management.

**126** According to Mr. Pardy, Mr. Gray told him, on May 12, 2010, that his decision had been based on the cumulative scores, which indicated that Mr. Dunne was leading. Asked what the “right fit criteria” had been, Mr. Gray reportedly told Mr. Pardy that the board had not had that discussion.

**127** In testimony, Mr. Gray acknowledged that he was too hasty in announcing that Mr. Dunne was the successful candidate. He stated that he could not recall his discussions with Mr. Pardy or telling him that he was “not going to beat” Mr. Dunne on financial management. To his recollection, his discussion referred to Mr. Dunne’s strong performance at the interview. The board had decided who had done the best at the interview. He could not recall the details of a discussion about the right fit.

**128** Given the evidence and the findings in relation to the assessment of the qualification of *Financial Management*, and Mr. Gray’s comment to the effect that reference checks would not have made a difference because he had seen the financial management of Mr. Dunne, and that the references served only to “tidy up the paperwork”, the Tribunal finds that it is more likely than not that Mr. Gray made the above-mentioned statements to Mr. Pardy on May 5 and 12, 2010. It is likely that Mr. Gray had decided, before the reference checks were concluded, that Mr. Dunne would be appointed to the position of DFS.

**129** As the Tribunal has stated in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, evidence of personal favouritism can be direct, such as facts establishing clearly the close personal relationship between the person selecting and the appointee. However, the evidence may also be circumstantial where some actions, comments or events prior to and during the appointment process will have to be reviewed. Depending on its nature, circumstantial evidence can be as convincing as direct evidence.

**130** It is curious that the respondent decided to ask Mr. Dunne to prepare for and make a presentation on the MAF to the Senior Management Committee while the appointment process, in which knowledge of the MAF would be assessed, was ongoing.

This enabled him to prepare for the interview and gave him an unfair advantage over the other two candidates, who did not have a similar opportunity to prepare.

**131** As well, the statement made to Ms. MacDonald in April 2010, strongly indicates that Mr. Gray had already decided, early in the advertised process, if not from the start, that Mr. Dunne would be appointed to the position of DFS. By May 2010, the reference checks had become a mere formality that had to be followed. Mr. Gray had already made his decision to appoint Mr. Dunne, which was further confirmed by the statements that he made to Mr. Pardy at their meeting of May 5 and 12, 2010.

**132** The Tribunal finds that these actions and statements show that the respondent was not acting in good faith and, more likely than not, personally favoured Mr. Dunne in the advertised appointment.

**133** In conclusion, the Tribunal finds that the respondent abused its authority by failing to assess the qualification Leadership Competency – *Management Excellence -Financial Management*, being careless and lacking transparency in how it determined the eventual appointee, and personally favouring Mr. Dunne.

### **Decision**

**134** For all these reasons, the complaints concerning the advertised process are substantiated.

**135** Mr. Pardy's complaint concerning the non-advertised acting appointment is dismissed.

### **Order**

**136** The Tribunal orders the respondent to revoke Mr. Dunne's appointment within 60 days of this decision.

Member

**Parties of Record**

<b>Tribunal Files</b>	2010-0416, 2010-0620 and 2010-0657
<b>Style of Cause</b>	<i>Larry Pardy and Thomas Keagan v. the Deputy Minister of Aboriginal Affairs and Northern Development Canada</i>
<b>Hearing</b>	June 21 and 22, 2011; and September 21 and 22, 2011 Moncton, New-Brunswick
<b>Date of Reasons</b>	June 7, 2012
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Larry Pardy Thomas Keagan
<b>For the respondent</b>	Lea Bou Karam
<b>For the Public Service Commission</b>	Marc Séguin (written submissions)