

**Date:** 20250317

**Files:** 771-02-43052, 43122, and 43123

**Citation:** 2025 FPSLREB 24

*Federal Public Sector  
Labour Relations and  
Employment Board Act and  
Public Service Employment Act*



Before a panel of the  
Federal Public Sector  
Labour Relations and  
Employment Board

BETWEEN

**JAMES COOKE**

Complainant

and

**DEPUTY HEAD  
(Correctional Service of Canada)**

Respondent

Indexed as  
*Cooke v. Deputy Head (Correctional Service of Canada)*

In the matter of complaints of abuse of authority under section 77(1) of the *Public Service Employment Act*

**Before:** David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Burcu Gurkan, Union of Safety and Justice Employees (USJE-PSAC)

**For the Respondent:** Méliissa Lacroix, counsel

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Decided on the basis of written submissions,  
filed November 29 and December 4, 2023,  
and January 29, February 14 and 28, March 19, and May 6, 2024.

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## REASONS FOR DECISION

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### I. Introduction

[1] The complainant in this matter, James Cooke, raises issues with respect to Indigenous identity and the call for reconciliation with Indigenous peoples. When his complaints were made, he was an Indigenous program officer working for the Correctional Service of Canada (CSC) at the Stony Mountain Institution in Stony Mountain, Manitoba (“Stony Mountain”).

[2] The three complaints that he made all concern an appointment made under the authority of the deputy head of CSC (“the respondent”) of Kelly Penner (“the appointee”) to the position of Programs Manager, Stony Mountain, classified at the WP-05 group and level. The appointment process number was 2019-PEN-IA-PRA-147439-1, and the “Notice of Appointment or Proposed Appointment” (NAPA) was issued on May 12, 2021.

[3] The complainant was an unsuccessful candidate in the appointment process in question.

[4] The complainant alleged that the respondent abused its authority in three ways: in the application of merit, under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*); in its choice to use an advertised process to make the appointment, under s. 77(1)(b); and for failing to assess him in the official language of his choice, under s. 77(1)(c).

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

[6] I believe that it is important that administrative tribunals take seriously issues related to Indigenous reconciliation. Organizations such as the Canadian Council of Administrative Tribunals and the Canadian Institute of Administrative Justice have encouraged administrative tribunal members to do so, and learn from the Truth and Reconciliation Commission of Canada and its 2015 final report, which included 94 “Calls to Action”.

[7] That said, administrative tribunals can only render judgements about complaints that are rooted in the jurisdiction established for them under their governing statutes.

[8] In these complaints, the complainant took the position that the respondent should have required successful candidates to identify as Indigenous. He also alleged that he should have been assessed, at least in part, in Ojibway. and raised several issues related to systemic anti-Indigenous racism within the CSC.

[9] There is no provision under the *PSEA* for making a complaint about the employment equity designation of an appointment process to the Federal Public Sector Labour Relations Board (“the Board”).

[10] Under the *PSEA*, Ojibway is not an official language, which means that a complaint made under s. 77(1)(c) of the *PSEA* that the complainant was not assessed in Ojibway could not be sustained.

[11] With respect to his systemic racism allegations, I will explain why the Board does not have the authority to address these issues as they are not linked to an issue that is within the Board’s jurisdiction.

[12] The complainant also made allegations that the respondent did not appropriately evaluate criteria related to Indigenous sensitivity and therefore that the appointment was made without merit, and that the appointment process was tainted by discrimination, matters which are within the Board’s jurisdiction. On the basis of the parties’ written submissions, I have decided to use the authority granted the Board under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; “the Board Act”) to decide the complaints without holding an oral hearing, and these allegations of the complainant are dismissed on their merits.

[13] I wish to note that in some of the documents and early submissions related to these complaints, both parties sometimes used the term “Aboriginal” in their reference to positions, programs, employment equity designations, or identities. In their more recent submissions, they consistently used the term “Indigenous” to refer to those positions, programs, employment equity designations, or identities. I have opted to use the term “Indigenous” throughout this decision, except when directly quoting from the earlier submissions or documents.

## II. Background

[14] To help frame the reasons for decision that follow, I will begin by providing more detail about the complaints and the procedural history followed by the Board to determine them.

[15] The complaint given Board file number 771-02-43052 (“complaint no. 1”) was made on May 31, 2021.

[16] In complaint no. 1, the complainant specifically listed each of ss. 77(1)(a) (merit), (b) (choice of process), and (c) (official language) as the grounds for his complaint. Although he did not specifically use the word “discrimination”, he also alleged that the process “... was preordained from the onset based on Privilege and Entitlement.”

[17] The complaint given Board file number 771-02-43122 (“complaint no. 2”) was made on June 14, 2021. It related to the same appointee, the same position, and the same appointment process as did complaint no. 1. The complainant also raised issues of discrimination on the grounds of race and national or ethnic origin.

[18] The complaint given Board file number 771-02-43123 (“complaint no. 3”) was also made on June 14, 2021. It, too, related to the same appointee, the same position, and the same appointment process as did complaints no. 1 and 2. The only difference of significance was in the remedy portion. In complaint no. 2, the complainant sought disciplinary actions, demotion, or job loss as remedies. In complaint no. 3, he also sought as remedy that the job posting be readvertised “... based on Fairness, Transparency, Equal Opportunities”.

[19] On July 6, 2021, the respondent requested that the Board consolidate the three complaints, as they were similar in nature and related to the same appointment process and appointment. The complainant did not respond to the consolidation request.

[20] On July 13, 2021, the Board consolidated the files.

[21] The complainant made his allegations on August 16, 2021 (“the complainant’s allegations”). Numbered for ease of reference, they were as follows:

*1) The Employer abused its Authority by not requiring the selection to be limited to Indigenous persons.*

*2) The Employer abused its Authority by using improper criteria for rating Sensitivity to Cultural/Knowledge and Diversity of Indigenous Peoples.*

*3) The employer's Abuse of Authority in oppressing or depriving specific cultural, racial or ethnic groups in advancing or equal opportunities.*

*4) The employer's abuse of Authority that discriminates against Indigenous people, values, traditions, lifestyles and cultural practices*

*5) The employer's Abuse of Authority is unfair when it imposes burdens or withholds benefits or opportunities from any person on one of the prohibited grounds. Race, gender, pregnancy, ethic or social origin, color, sexual orientation, age, disability, marital status , belief, culture*

*6) The employer's Abuse of Authority to neglect or engage all levels of government to work together to advance reconciliation. (TRC 94 recommendations)*

*[Sic throughout]*

[22] The deputy head's reply to the allegations was made on September 15, 2021. It denied that it had abused its authority, as follows.

[23] With respect to the first allegation, the respondent noted that the appointment process materials stated that the selection "... may be limited to employment equity members ..." but did not require this as an essential qualification. It submitted that the CSC's staffing management policy allows the delegated hiring manager to establish the essential and merit criteria and that there was "... no organizational obligation or commitment to appoint qualified indigenous [sic] peoples before all other qualified candidates in an advertised process."

[24] With respect to the second allegation, the respondent confirmed that "Sensitivity to cultural diversity" was part of the Statement of Merit Criteria (SOMC) for the position but stated that "Knowledge and diversity of Indigenous peoples" was not. It noted that the complainant was eliminated from the screening phase of the process based on an essential experience qualification and that therefore, he did not undergo any assessment of the qualification related to cultural sensitivity. As such, he did not have access to the assessment tool or criteria in question when his complaint was made, the respondent said.

[25] With respect to the remaining (discrimination) allegations, the respondent took the position that the complainant did not establish a *prima facie* case of discrimination, following the test set out by the former Public Service Staffing Tribunal (PSST) in *Murray v. Chairperson of the Immigration and Refugee Board of Canada*, 2009 PSST 33.

[26] A hearing of the complaints was scheduled to take place via videoconference on December 18 and 19, 2023.

[27] In preparation for the hearing, on November 15, 2023, the Board sought the parties' answers to a series of questions on the complaints and their readiness to proceed.

[28] On November 29, 2023, the complainant provided his responses to the Board's questions; he also requested the postponement of the hearing, as some of his seven anticipated witnesses would not be available.

[29] On December 4, 2023, the respondent provided its responses to the Board's questions.

[30] Given the parties' submissions, I granted the postponement of the hearing and convened a case management conference (CMC) that took place on the first day of the scheduled hearing, December 18, 2023. The purpose was to discuss the issues raised in the parties' submissions.

#### **A. Discrimination allegations**

[31] In the Board's email of November 15, 2023, the complainant was asked whether he had provided notice to the Canadian Human Rights Commission (CHRC) that his complaints raised issues of discrimination. He reported that he had not.

[32] Before and at the CMC, the respondent took the position that the Board should not grant the complainant additional time to rectify his failure to provide the required notice and rule his discrimination allegations inadmissible; see *Jacobson v. Chairperson of the Immigration and Refugee Board*, 2009 PSST 19 at para. 7.

[33] Following the CMC, I decided that if the complainant wished to continue with his discrimination allegations, he would have to file notice to the CHRC, no later than January 31, 2024.

[34] The notice to the CHRC is required by s. 78 of the *PSEA*, which states as follows:

*78 Where a complaint raises an issue involving the interpretation or application of the Canadian Human Rights Act, the complainant shall, in accordance with the regulations of the Board, notify the Canadian Human Rights Commission of the issue.*

*78 Le plaignant qui soulève une question liée à l'interprétation ou à l'application de la Loi canadienne sur les droits de la personne en donne avis à la Commission canadienne des droits de la personne conformément aux règlements de la Commission des relations de travail et de l'emploi.*

[35] Section 20 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6; “the *Regulations*”) sets out what the notice to the CHRC must contain. The information required is reflected in the Board’s “Staffing Complaint Form 5”, available on its website.

[36] Neither the *PSEA* nor the *Regulations* set a deadline by which the complainant must provide notice to the CHRC. The notice serves the important purposes of allowing the CHRC to determine whether it wishes to make submissions on the complaint and of allowing the respondent to know more precisely how it is alleged to have breached the provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). Deadlines set by the Board should keep those principles in mind.

[37] I decided that the complainant should be given time to file his notice with the CHRC, and I set the timelines for the written submissions of the parties in such a way that the respondent would have a full opportunity to respond to the allegations made in his notice to the CHRC. I also made provisions to modify the timeline for written submissions if the CHRC opted to participate.

[38] The complainant filed his Form 5 with the Board on January 29, 2024 (“the complainant’s CHRC submissions”). On January 31, 2024, he confirmed that those submissions had also been filed with the CHRC.

[39] The Board never received a request from the CHRC to make submissions on these complaints.

## **B. The written submissions process**

[40] In its reply to the Board’s questions, on December 4, 2023, the respondent took the position that the complainant had failed “[...] to provide full particulars of the *Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Employment Act*

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relevant facts on which the Complainant intends to rely to substantiate the general and vague allegations and assertions of abuse of authority [...]”. It argued that such particulars are required by s. 22(2)(d) of the *Regulations*, and made a motion requesting that the Board exercise its powers under s. 22(3) of the *Regulations* and s. 22 of the *Board Act* to decide the complaints without holding an oral hearing. It also argued these points at the CMC.

[41] At and following the CMC, I explained to the complainant that in assessing the respondent’s motion, I would assess whether he made out an arguable case that his complaint is founded. I invited him to make further submissions outlining the facts that he intended to rely on in the complaint and to attach to his submissions the documents that he intended to rely on in support of these facts. He was invited to make additional arguments as to how these facts give rise to his allegations that the respondent abused its authority by making the appointment that is the subject of this complaint.

[42] The complainant was also asked to provide any further specifics or arguments with respect to his allegation that the respondent abused its authority under s. 77(1)(c) of the *PSEA*, which references the requirement at s. 37(1) that the complainant be assessed in the official language of his or her choice.

[43] The complainant was also asked to provide any further specifics or arguments with respect to his allegation that the respondent abused its authority by not requiring the appointment process in question to be limited to Indigenous persons. He was specifically invited to refer to two decisions, one by the PSST and the other by the Board, addressing the Board’s jurisdiction in this area, namely, *Umar-Khitab v. Deputy Head of Service Canada*, 2007 PSST 5 at paras. 15 and 21, and *Shafaie v. Deputy Head (Department of Health)*, 2022 FPSLREB 15 at para. 34.

[44] The complainant made his written submissions on February 14, 2024. The only documents he attached were the job posting for the appointment process in question, with a closing date of February 14, 2019, as well as an earlier version of the posting, which had a closing date of February 11, 2019.

[45] The PSC chose not to make any substantive submissions. It took no position on the respondent’s motion to dismiss the complaint without a hearing or in response to



any of the clarifications provided by the complainant. It reserved the right to make further submissions if the complaints proceeded to a hearing.

[46] The respondent was invited to make its submissions by March 19, 2024. It was also invited to outline the facts that it intended to rely on, to attach any documents in support of those facts, and to make any arguments in reply to those of the complainant.

[47] The respondent's submissions numbered 24 pages and included some 30 tabs of documents.

[48] In my directions to the parties about the written submissions process, I wrote as follows: "Following the completion of the above-noted written submission process, the Board may issue a written decision on the complaint, may schedule another CMC, may request further written submissions, or may schedule the complaint for an oral hearing."

[49] After reviewing the extent of the respondent's submissions and the scope of its book of documents, I decided that it would be in the interests of fairness to give the complainant the opportunity to make submissions in reply to those of the respondent.

[50] The complainant's final submissions were due, and were submitted, on May 6, 2024.

### **III. Summary of the submissions**

#### **A. For the complainant**

[51] By way of introduction, I will summarize the allegations and submissions of the complainant as falling into 7 main points:

- that during the advertised process for the appointment in question, the respondent ought to have required that the successful candidate identify as Indigenous;
- that during the selection process, the respondent ought to have allowed him to be assessed, at least in part, in Ojibway;
- that the respondent abused its authority by appointing the appointee, even though there were two other equally qualified candidates who identified as Indigenous or Métis;

- that the appointee falsely self-identified as Indigenous;
- that the respondent failed to properly assess certain merit criteria related to familiarity with Indigenous practices and culture;
- that his elimination from the appointment process was tainted by discrimination;
- that the respondent engages in systemic discrimination against Indigenous employees.

[52] I will now review the complainant's submissions chronologically, and in certain cases will quote extensively from them, to allow his position to be expressed directly in the words that he used.

[53] In his submissions of November 29, 2023, the complainant stated his intention to proceed with the complaint. He listed seven witnesses whom he intended to call. He restated his allegations pertaining to abuse of authority in the choice of an advertised process as follows:

...

- a. The grounds of my complaint are based on privilege, preordained, discrimination, grooming to protect the code for Correctional Services of Canada*
- b. Those who speak out or question are faced with reprisal, loss of advancement, abuse and manipulation to the point of exhaustion or to step away in shame.*
- c. Humiliation is a tactic well used to discredit you as an employee.*
- d. Gang Mentality where you are subjected to more than one Manger that protects the system.*
- e. White privilege "The unquestioned and unearned set of advantages, entitlements, benefits and choices bestowed upon people solely because of skin color".*

...

[Sic throughout]

[54] In relation to his allegations that the respondent abused its authority by not assessing him in the official language of his choice, the complainant wrote as follows: "This complaint is based on the grounds of English. Even though this complaint is regarding a position which is based on Indigenous perspectives, language, culture and identity, there has been no attempt made to accommodate for this."

[55] In the complainant's notice to the CHRC of January 31, 2024, he made a series of allegations, most of which fall into the category related to the respondent's alleged systemic discrimination against Indigenous employees. The following paragraphs have been excerpted from the notice:

...

*The indirect and direct discrimination towards Indigenous people by managers is overwhelming and painful for most. We are not allowed to voice our opinions, thoughts or ideas without the fear of being punished against management, treatment and against the entire corrections systems. It is political suicide and my own career was over as soon as I stood up against the discrimination, abuse of power and manipulation of advancement for others, along with a long list of other complaints.*

...

*The grounds for my complaint are based on Abuse of Authority and the application of merit. The individual in question falsely identified as a indigenous programs officer and was granted privilege to acting and advancement opportunities over True indigenous Peoples of Canada. Through the self-identification process we have Non Indigenous people teaching Indigenous programs and services, without the language, culture or community. Who as Indigenous people who have the right to revitalize, use, develop and transmit to future generations our histories, languages, oral traditions, philosophies and designate and retain our own names and identity.*

...

*The hiring process is unfair and works against Indigenous. How is it that a hiring process run be disqualified, when you have two Indigenous employees scoring equally to a Non Indigenous falsely identifying. They were going to appoint that person Non-Indigenous individual who was preordained and could not do so because an email went out to all the successful candidates by mistake.*

...

[Sic throughout]

[56] In his submissions of February 14, 2024, the complainant acknowledged the legal precedents established in *Umar-Khitab* and *Shafaie*, and stated that these "...establish the general principle that the [Board] typically does not assess the reasonableness of the area of selection." He argued that the job posters incorporated elements of Indigeneity and familiarity with Indigenous practices as "crucial criteria",

and that the process was unfair and led to an abuse of authority because the appointee was appointed over equally scoring Indigenous and Métis candidates.

[57] The complainant submitted that the respondent cancelled the original posting because it realized that it had made a mistake by appointing a “Falsely Self-Identified person in [his] opinion to Manage the Indigenous Programs staff.” He submitted that the CSC’s human resources plan for Stony Mountain acknowledged a need to target hiring Indigenous staff. He argued that in the respondent’s “articulation of selection decision” document, there was very little indication that the appointee had in-depth knowledge of or experience with Indigenous communities.

[58] He argued that appointing someone other than a qualified Indigenous person was counter to the needs of the position, and while the *PSEA* grants managers considerable discretion in staffing, it is not absolute; see *Jacobsen v. Deputy Minister of Environment Canada*, 2009 PSST 8 at para. 36, and *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, at para. 28. He argued that given the CSC’s human resources plan and the nature of the position, it would have been reasonable to include Indigeneity as an important component of consideration in the determination of merit.

[59] With respect to his discrimination allegations, the complainant argued that a relatively informed bystander could reasonably perceive bias in the whole process for this position; see *Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37 at paras. 90 and 97.

[60] The complainant made specific reference to the Truth and Reconciliation Commission’s 94 Calls of Action in the context of further submissions on his discrimination allegations, which were as follows:

...

*The discrimination allegations outlined in the complaints are not standalone assertions but are intrinsically linked to the core issues of abuse of authority, bias, and unfairness in the appointment process. These allegations are not tangential but constitute a fundamental aspect of the circumstances surrounding the appointments in question. It is clear that while the Stony Mountain Institution, through its own HR hiring goals, purports to become more inclusive and close the gap with regards to “a shortage of Indigenous staff available to support indigenous initiatives, and a need for increased Indigenous representation at SMI relative to the Indigenous inmate population,” its own internal hiring practices*

*belie that intention. In both its position advertisement and its articulation for the appointment very little consideration was given to establishing either Indigeneity or a close and familiar connection to Indigenous communities.*

*Moreover, the Calls to Action by the Truth and Reconciliation Commission (TRC) underscore the significance of upholding and safeguarding Indigenous languages and culture. Specifically, Calls to Action 13 to 17 concentrate on Indigenous education and the revitalization of Indigenous languages. These recommendations stress the necessity for enhanced support for Indigenous language programs, the integration of Indigenous languages into educational curricula, and the allocation of resources to aid Indigenous language preservation and revitalization initiatives. While we acknowledge that this may typically fall outside the Board's jurisdiction, we argue that, considering the aforementioned points, promoting familiarity with and the use of Indigenous languages, or at least facilitating access to them in the selection process, would represent a positive step toward fostering greater Inclusion and Diversity.*

...

## **B. For the respondent**

[61] In its submissions of March 19, 2024, the respondent relied on a number of factual assertions about the appointment process in question, including the following:

- The purpose of the process was to create a pool of candidates for indeterminate, acting, and other types of possible appointments to WP-05 program manager positions across the Prairie region of the CSC in January 2019.
- Initially, the process was advertised internally with process number 2019-PEN-IA-PRA-147439 and a closing date of February 11, 2019.
- Shortly following the posting of the position, the respondent realized that it had not included Calgary, Alberta, as one of the possible work locations. Consequently, the initial process was cancelled. A new poster, bearing the appointment process number 2019-PEN-IA-PRA-147439-1, was released, with a closing date of February 14, 2019. A total of nine potential work locations were listed on the revised poster.
- The cancellation of the initial poster and the release of the new poster took place before the selection board began reviewing any applications. No appointments were made in relation to the initial poster.

- The internal advertised process used a national, generic SOMC to encompass several different program manager positions.
- The area of selection in the poster was limited as follows: “Persons employed in the Public Service of Canada working for the Correctional Service of Canada, Parole Board Canada, and the office of the Correctional Investigator, in the Prairie Region (Alberta, Saskatchewan, Manitoba).” The area of selection for the appointment process did not limit applications to members of any employment equity groups; however, the poster stipulated that “[s]election **may** be limited to members of the following Employment Equity groups: Aboriginal persons, persons with disabilities, visible minorities, women” [emphasis in the original].
- Among the stipulated essential qualifications to be considered for the position was one that read “... (2) extensive\* experience managing and/or making recommendations on offender reintegration ...”, and “extensive” was defined as “... the depth and breadth of experience normally associated with having performed a broad range of complex inter-related activities and the performance of these duties.”
- Also included as an essential qualification was “Sensitivity to Cultural Diversity”. Three experience criteria related to Indigenous offender programs were listed as “may be needed for the job”. These were “Experience delivering Aboriginal programs”, “Experience working with Aboriginal women in conflict with the law”, and “Extensive\* experience working in and/or with an Aboriginal community or organization”, and “extensive” was defined using the same terms as the essential qualification noted in the last point.

[62] The respondent made the following factual assertions about the **complainant’s** application to the appointment process in question:

- He submitted his application under the 2019-PEN-IA-PRA-147439-1 process on February 13, 2019. At that time, the complainant was an Indigenous correctional program officer. In his application, he self-identified as Indigenous and indicated that Stony Mountain was among the work locations that interested him.
- On or around February 26, 2019, the complainant was erroneously advised that he met the screening requirements for the appointment process. Two days later, he was advised that the previous communication was in error and that he had been screened out for **not** meeting the essential qualification of having “[e]xtensive\*

experience managing and/or making recommendations on offender reintegration.” He was informed that he could seek an informal discussion about his elimination from the selection process.

- As a result of being screened out, the complainant did not participate in the subsequent assessment tools of the process, including a written exam, an interview, and reference checks.
- The complainant did not request an informal discussion.

[63] The respondent made the following factual assertions about the **appointee's** application to the appointment process in question and subsequent appointment:

- The appointee submitted her application under the 2019-PEN-IA-PRA-147439-1 process on February 12, 2019. At that time, she was employed by the CSC as an Indigenous correctional program officer at Stony Mountain. She was also serving as an acting regional program manager - Indigenous integrated correctional program model facilitator trainer for the CSC. In her application, she did not declare any information on employment equity. She indicated that Stony Mountain was among the work locations that interested her.
- The appointee was among 68 out of 92 applicants who were screened in based on the essential education and experience requirements. Moving to the next stage, she was among 39 applicants who passed the written exam. Of those 39, 12 self-declared as Indigenous, and 27 did not.
- The appointee was among 27 applicants who were found qualified for appointment following the final-interview and reference-check stages of the process. Of those 27, 10 self-declared as Indigenous. Only 7 of the successful applicants had chosen Stony Mountain as one of their locations of interest; of them, only 1 self-declared as Indigenous.
- In April of 2021, the CSC had an indeterminate vacancy for the position of Programs Manager at Stony Mountain and chose to staff the vacancy via the advertised appointment process in question. The hiring manager was provided the names of five qualified candidates from the pool, of which one had self-declared as Indigenous. The hiring manager assessed the appointee against the SOMC and selected her as the right fit for the indeterminate appointment. The hiring manager completed an articulation of selection decision document, which indicated that the appointee scored the highest in three essential qualifications,

and explained why those merit criteria were chosen for the particular selection decision.

- A “Notice of Consideration” with respect to the appointment of the appointee was posted on or around May 6, 2021. The NAPA was posted on May 12, 2021, with the deadline for making a complaint as a result of the appointment set at May 27, 2021.

[64] Turning to the respondent’s arguments, it took the position that the Board does not have jurisdiction over a complaint alleging that it abused its authority by not limiting the area of selection to Indigenous candidates. The establishment of an area of selection, including one related to a designated employment equity group, is provided for at s. 34 of the *PSEA*. The respondent argued that the Board does not have jurisdiction to consider complaints with respect to s. 34; see *Umar-Khitab*, at paras. 15 and 16, *Shafaie*, at para. 34, *Gulia v. Chief Administrator of the Courts Administration Service*, 2020 FPSLRB 39 at paras. 19 and 20, and *Lysak v. Commissioner of the Royal Canadian Mounted Police*, 2024 FPSLRB 3 at paras. 25, 27, and 94.

[65] Even if the Board found that it had jurisdiction over a complaint with respect to the area of selection, the policies of the PSC state that membership in a designated group can be required only when that employment equity group is underrepresented, the respondent argued. At the time the selection process in question was being run (in 2019), and at the time the appointment was made (in 2021), Indigenous representation at Stony Mountain for the WP occupational group was approximately 14 points higher than the rate of workforce availability. Therefore, given PSC policy, the respondent could not have, and should not have, limited the area of selection in the advertised process as desired by the complainant, it said.

[66] The respondent also argued that the complainant did not make out an arguable case that it abused its authority in the assessment of cultural sensitivity. He failed to clearly relate his complaint to the essential qualifications listed in the job poster and the SOMC and failed to set out how the respondent did not give sufficient attention to Indigeneity in the process, it said.

[67] The respondent argued that in the *PSEA*, s. 30(2) gives the deputy head the discretionary authority to establish the essential qualifications for the work to be performed and the methods used to assess candidates. While such discretion is not



absolute, to substantiate a complaint of abuse of authority, the complainant must establish that the methods used to assess the qualifications were unreasonable or amounted to a serious error, omission, or improper conduct; see *Agboton v. President of the Public Service Commission*, 2010 PSST 13 at paras. 80 and 81.

[68] The respondent argued that the complainant did not present any allegations or facts that would establish that the SOMC was unreasonable or unrelated to the work to be performed by the programs manager. It argued that the SOMC chosen in the selection process corresponded to the national generic SOMC for the position and that the assessment process that it used to make the appointment relied on those criteria. It argued that nothing alleged by the complainant gives rise to a finding that an error, a serious omission, or improper conduct tantamount to an abuse of authority occurred. In such situations, the Board has no basis to intervene, it argued; see *Jacobsen*, at paras. 35, 42, and 43, *Jacobson*, at paras. 74 and 77, *Jolin*, at paras. 26, 27, and 64 to 67, and *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at paras. 40 and 59.

[69] The respondent then addressed the complainant's allegation that knowledge of Indigenous-related subjects was not a priority in the hiring process and that the articulation of the selection decision provided only minimal indication that the appointee possessed in-depth knowledge and experience of Indigenous communities. It argued that the fact that the articulation of the selection decision did not highlight employment equity or detail how the appointee met the essential qualifications related to Indigenous culture and programs did not represent an abuse of authority or discrimination. The respondent said that it documented how the appointee met the essential qualifications listed in the selection process and that the complainant had admitted that the appointee met the essential qualifications of the position when he argued that she scored equally to two other candidates (a fact disputed by the respondent, which said that she scored higher than other candidates).

[70] The *PSEA* gives the respondent the discretion to prioritize its operational requirements and organizational needs when making an appointment, it argued. Employment equity is not required to take precedence, it argued; see *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 44. Once the essential criteria are met, the respondent has the discretion to choose someone that is the right fit; see *Steeves v.*

*Deputy Minister of National Defence*, 2011 PSST 9 at para. 58, and *Stamp v. Commissioner of the Correctional Service of Canada*, 2014 PSST 4 at para. 38.

[71] With respect to the complainant's discrimination allegations, the respondent argued that the Board's jurisprudence requires the complainant to first demonstrate a *prima facie* case, as set out by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd*, [1985] 2 SCR 536. In this case, the complainant would have to establish that the alleged discrimination was a factor in the appointment decision, it argued. To do so, the Board should apply the three-pronged "Shakes test" set out as follows in paragraph 80 of *Murray*, it argued:

80 ... The Shakes test is as follows:

- 1) The complainant was qualified for the particular employment;
- 2) The complainant was not hired; and,
- 3) Someone **no better qualified but lacking the distinguishing feature** which is the gravamen of the human rights complaint subsequently obtained the position.

[Emphasis in the original]

[72] The respondent argued that in the present case, only the second criterion is met. The complainant could not have been hired because he did not meet the essential qualifications of the position, as required at step one of the test.

[73] The respondent also argued that the complainant made inappropriate and unsubstantiated assumptions about the appointee's identity and her ability to fulfill the position, on the basis of his assumptions. The respondent argued that it is the right of the appointee not to disclose personal information about her identity. She was not required to make an employment equity declaration. It said that most of the complainant's allegations of abuse of authority, discrimination, and bias are founded on those inappropriate and unsubstantiated assumptions.

[74] Finally, the respondent argued that the Board should exercise its right to dismiss complaints without a hearing when the complainant fails to present an arguable case; see *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48 at paras. 46 to 48, *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at paras. 8, 9, 20, 82, 83, 158, and 162, and *Letnes v. Treasury Board (Royal Canadian Mounted Police)*, 2023 FPSLREB 33 at paras. 16 and 54 to 57. In fact, it said, in two of the three decisions cited

by the complainant in his arguments, the PSST decided to render its decision without an oral hearing; see *Jacobsen*, at paras. 4 and 57, and *Jolin*, at paras. 3 and 90.

### C. The complainant's reply submissions

[75] The complainant's reply submissions were made on May 6, 2024. He did not challenge any of the factual assertions made by the respondent, offer a different factual narrative, or provide any additional documents to counter those provided by the respondent.

[76] I will summarize the first seven of the complainant's additional arguments as follows:

- The Supreme Court of Canada outlines a three-step process for assessing claims of discrimination, and both the complainant and other Indigenous candidates faced adverse impacts through the selection process associated with their Indigenous identities.
- There is a historical context, including the legacy of residential schools and systemic disenfranchisement, which undermines equity and inclusion efforts within institutions such as the CSC.
- The Ontario provincial government has allowed the use of Indigenous languages within its legislature as a significant step toward reconciliation; federal institutions could do more to respect and promote Indigenous languages and rights.
- The *Shakes* test reveals that Indigenous candidates were qualified yet overlooked. This points to a failure within the staffing process to prioritize Indigenous cultural competencies.
- The complainant's experiences suggest a "... systemic inclination to prioritize institutional preservation over genuine inclusivity and equity."
- The cancellation and subsequent readvertisement of the position "... underscores considerable procedural irregularities and potential biases." The respondent's explanation for why this took place was not comprehensive.
- The selection outcome contradicts documented acknowledgments of the need to hire more Indigenous staff to support specific initiatives.

[77] I will quote in full his final three arguments:

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...

8. *The Truth and Reconciliation Commission's Calls to Action emphasize the need for enhanced support for Indigenous cultures and languages. The oversight in the selection process, which failed to adequately consider cultural competencies, directly contravenes these Calls to Action and the institution's purported objectives.*

9. *Given the complexities and the potential systemic and procedural inequities highlighted by this case, there is a compelling need for a comprehensive review by the Board. This review should not only assess potential discrimination but also examine the inherent biases within the selection criteria and processes that may perpetuate the marginalization of Indigenous candidates.*

10. *We trust that the Board will recognize the gravity of these issues and move to ensure that the principles of fairness, equity, and transparency govern the public sector staffing processes. It is essential that the Board considers these matters holistically, acknowledging the discrimination allegations as central to the overall understanding of the appointment process and the broader implications for equity within the federal public service. This response aims to provide a comprehensive rebuttal to the Respondent's claims, highlighting systemic issues, the need for legislative recognition of cultural competencies, and calling for a significant review to align staffing practices with broader societal values and legal standards for equity and inclusion.*

#### **IV. Analysis and reasons**

[78] I consider that there are these four issues before the Board:

- 1) The area-of-selection issue: Does the Board have jurisdiction to consider the allegation that the respondent abused its authority by not requiring successful candidates to self-identify as Indigenous?
- 2) The official-languages issue: Did the respondent fail to assess the complainant in the official language of his choice?
- 3) Has the complainant demonstrated that the respondent abused its authority pursuant to the *PSEA*?
- 4) Does the Board have jurisdiction over the complainant's allegations of systemic discrimination?

[79] The Board's consideration of these issues must be rooted in the wording of s. 77(1) of the *PSEA*, which reads as follows:

**77 (1)** When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

**(a)** an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

**(b)** an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

**(c)** the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

**77 (1)** Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

**a)** abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

**b)** abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

**c)** omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

#### **A. The area-of-selection issue**

[80] This issue arises from the complainant's allegations that the respondent abused its authority by not requiring that the selection process be limited to those candidates who identify as Indigenous. The Board does not have jurisdiction to consider this allegation.

[81] Under the PSEA, s. 34 provides that the PSC (or a deputy head designate) may determine the area of selection for an appointment process. This area-of-selection provision reads as follows and includes at s. 34(2) the establishment of any employment equity criteria:

#### **Area of selection**

**34 (1)** For purposes of eligibility in any appointment process, other than

#### **Zone de sélection**

**34 (1)** En vue de l'admissibilité à tout processus de nomination sauf

*an incumbent-based process, the Commission may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of section 3 of the Employment Equity Act.*

***Designated groups***

*(2) The Commission may establish different geographic, organizational or occupational criteria for designated groups within the meaning of section 3 of the Employment Equity Act than for other persons.*

*un processus de nomination fondé sur les qualités du titulaire, la Commission peut définir une zone de sélection en fixant des critères géographiques, organisationnels ou professionnels, ou en fixant comme critère l'appartenance à un groupe désigné au sens de l'article 3 de la Loi sur l'équité en matière d'emploi.*

***Groupes désignés***

*(2) La Commission peut établir, pour les groupes désignés au sens de l'article 3 de la Loi sur l'équité en matière d'emploi, des critères géographiques, organisationnels ou professionnels différents de ceux qui sont applicables aux autres.*

[82] There is no provision in the *PSEA* that allows an employee to make a complaint to the Board that a respondent abused its authority in the determination of an area of selection. There are three grounds under which a complaint can be made to the Board in s. 77 of the *PSEA*: s. 77(1)(a) allows a complaint to be made with respect to the requirement to make an appointment based on merit (by reference to s. 30(2)), s. 77(1)(b) allows a complaint to be made about the choice of an advertised or a non-advertised process, and s. 77(1)(c) allows a complaint to be made about the right of an employee to be assessed in the official language of their choice (by reference to s. 37(1)). None of these provisions or any provisions elsewhere in the *PSEA* allow for a complaint to be made to the Board that a respondent abused its authority in the establishment of an area of selection pursuant to s. 34(1).

[83] In fact, the complainant acknowledged the legal precedents set out in *Umar-Khitab* and *Shafaie*. However, he said that these cases stand for the proposition that the Board "... typically does not assess the reasonableness of the area of selection." This misses the essential point of the Board's case law, which is that the Board has consistently found that that it **does not have jurisdiction** over complaints made about the establishment of an area of selection; see *Umar-Khitab*, at paras. 15 and 16, *Shafaie*, at para. 34, *Gulia*, at paras. 19 and 20, and *Lysak*, at paras. 27, and 94. The complainant did not provide any examples in which the Board or its predecessors

departed from this case law or any arguments as to why it ought to. It is not open to the Board to take jurisdiction simply because the complainant requests it.

## **B. The official-languages issues**

[84] This issue arises from the complainant's allegations that the respondent abused its authority by not assessing him, at least in part, in Ojibway.

[85] The right of an employee to be assessed in the official language of their choice is set out at s. 37(1) of the *PSEA*, which reads as follows:

**37 (1)** *An examination or interview, when conducted for the purpose of assessing qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i), other than language proficiency, shall be conducted in English or French or both at the option of the candidate.*

**37 (1)** *Les examens ou entrevues, lorsqu'ils ont pour objet d'évaluer les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i), à l'exception de la langue, se tiennent en français ou en anglais, ou dans les deux langues, au choix du candidat.*

[86] Pursuant to s. 77(1)(c) of the *PSEA*, an employee can make a complaint to the Board that a respondent failed to assess them in English or French or both, as required under s. 37(1).

[87] The complainant made no allegation that gave rise to a complaint pursuant to s. 77(1)(c). His sole allegation with respect to the language issue was that the respondent did not give him the opportunity to be assessed, at least in part, in Ojibway. Despite his desire that the respondent incorporate a recognition of Ojibway or other Indigenous languages into its hiring practices, Ojibway is not an official language under the *PSEA*.

[88] Even if Ojibway were considered an official language, the record demonstrates that the complainant was screened out at the application and résumé-review portion of the appointment process. He did not participate in the written test or interview stages. There is no indication that he requested or attempted to submit part or all of his application in Ojibway.

## **C. Has the complainant demonstrated that the respondent abused its authority pursuant to the *PSEA*?**

[89] As noted, before and at the CMC that was convened by the Board, the respondent took the position that the complainant failed to provide the necessary

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factual particulars to establish a *prima facie* case of abuse of authority. It argued that he was obliged to provide “full particulars of the relevant facts” by s. 22(2)(d) of the *Regulations*. It made a motion requesting that the Board exercise its powers under s. 22(3) of the *Regulations* and s. 22 of the *Board Act* to decide the complaints without holding a hearing.

[90] At the CMC, I discussed with the parties the use of a written submission process to consider the respondent’s motion. The complainant did not oppose the use of written submissions process for this purpose.

[91] Both parties were requested to provide written submissions on the question of whether the complainant made out an arguable case that the respondent abused its authority.

[92] However, given the nature and extent of the parties’ submissions, I have determined that is more appropriate in this case to assess the complaint on its merits.

[93] Assessing the complainant’s summary of facts and arguments was difficult, because, after reading all his submissions, it becomes clear that his essential position is that the respondent ought to have required the successful candidate to be Indigenous and that the CSC ought to have in place a more rigorous process than the self-identification process for determining whether a candidate is Indigenous. His case amounts to an argument that the respondent should not have appointed the appointee to the position and that it should have appointed someone who not only identifies as Indigenous but also is demonstrably so.

[94] In other words, the essence of his complaints was tied to the area-of-selection issue. As I have already concluded, the Board does not have jurisdiction to decide a complaint about that issue.

[95] Nevertheless, I have examined each of the complainant’s allegations.

#### **1. There was no abuse of authority in the choice of an advertised process**

[96] The complainant took the position that the respondent abused its authority when it made the decision to use an advertised process, pursuant to s. 77(1)(b) of the *PSEA*. However, in all his submissions, he does not clearly specify why he made this



allegation, does not provide facts relevant to this allegation, and does not even argue the question.

[97] The respondent's submissions on this point were that it conducted the appointment process number 2019-PEN-IA-PRA-147439 to create a pool of candidates prequalified for appointment to program manager positions at the WP-05 group and level across the Prairies Region of the CSC. It cancelled and reissued the advertised process as number 2019-PEN-IA-PRA-147439-1 because Calgary had been left off the original poster as a potential work location.

[98] The assessment of candidates took place in 2019. The complainant made an application to the pool and was screened out at the résumé stage for failing to meet one of the essential qualifications. The appointee was screened in and was eventually found prequalified under the pool. Two years later, she was appointed from the pool to the program manager position at Stony Mountain.

[99] Other than arguing that the respondent ought to have designated the position as having to be filled by an Indigenous person, it is not clear from his arguments how the respondent abused its authority in the choice of process. Should it have used a non-advertised process to make the Stony Mountain appointment? Should it have not used the pool to make the appointment? Is the position at Stony Mountain so unique that it was an abuse of authority for the respondent to use the prequalified pool to fill it? None of these questions are even addressed by the complainant. Nor are any facts alleged in support of answers to those questions.

[100] The sole pleading of the complainant that could be tied to a choice-of-process complaint relates to the cancellation and subsequent readvertisement of the position. He argued that the cancellation and readvertisement and then the subsequent selection of the appointee "... underscores considerable procedural irregularities and potential biases", which "... call into question the integrity and fairness of the selection process ...". He asserted that the respondent did not provide a comprehensive explanation for why the process unfolded the way it did and suggested that the position was readvertised to facilitate the appointment of the appointee. In fact, he suggested that the respondent reposted the position after realizing it "made a mistake" by appointing someone who wrongly self-identified as Indigenous.

[101] None of those allegations hold up. The complainant provided copies of both the original and the revised job advertisements, and they are entirely consistent with the respondent's version of events. The sole change to the poster was the addition of Calgary as a potential work location. Both he and the appointee applied under the revised poster. Nothing about the change to the job poster could possibly be argued as designed to facilitate the eventual appointment of the appointee.

[102] The posters were issued in 2019, and candidates were assessed then. It was **two years later** that the appointee was appointed to the position at Stony Mountain. At that time, she was employed by the CSC at Stony Mountain, and Stony Mountain was one of the work locations she asked to be considered for. Quite simply, the addition of Calgary as a potential work location under the appointment process did not enter into the respondent's consideration of the appointee.

[103] The respondent chose to use an internally advertised process to create a pool of prequalified candidates for appointments to vacancies at the WP-05 group and level, and it appointed the appointee from that process. I find no abuse of authority in the choice of process under that provision of the *PSEA*.

## **2. There was no abuse of authority in the assessment of merit**

[104] The complainant did not allege any facts with respect to his elimination from the selection process. The respondent explained that he was eliminated because he did not demonstrate how he met one of the essential experience criteria in the SOMC. He chose not to respond to that explanation or to provide any facts or arguments in support of the idea that the respondent abused its authority by making that assessment, leaving me to accept the respondent's explanation as a fact.

[105] Rather, the complainant alleged that the selection process did not appropriately assess candidates in terms of their sensitivity toward Indigenous issues and practices. He argued that the position required knowledge of correctional programs related to Indigenous offenders but that these were not prioritized in the selection process or in the articulation of the selection decision document (ASD) used to justify the appointment. However, he provided no particulars.

[106] The complainant also alleged that there were two other candidates "equally qualified" for the position at Stony Mountain, one of whom was Indigenous, and the

other was Métis. He said that he became aware of this as the local president. He took the position that the respondent ought to have favoured one of those candidates over the appointee. He cited a human resources planning document for Stony Mountain for 2020-2021 that stated a need to "... continue to work towards targeted hiring of Indigenous staff for Indigenous Initiatives ...". He cited from elsewhere in the document a statement that Stony Mountain had the following gap: "There is a shortage of Indigenous staff available to support indigenous [sic] initiatives, and a need for increased Indigenous representation at [Stony Mountain] relative to the Indigenous inmate population."

[107] The respondent provided a copy the appointee's exam results, her interview assessment, and a copy of the ASD. While the ASD does not appear to address the appointee's qualifications relative to the Indigenous-related criteria, both the exam results and the interview assessments do. The appointee scored 14/21 on "Knowledge of correctional programs including their policies, standards and guidelines for women, Indigenous and ethno-cultural offenders." She passed the part of the interview that was used to assess cultural diversity.

[108] It is well established that when a complainant alleges an abuse of authority in the making of an appointment based on merit, they bear the burden of proving the allegation; see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 55. While noting that deputy heads are given significant discretion under s. 30(2)(a) of the *PSEA* to establish the essential qualifications for the work to be performed and under s. 36(1) to use the assessment methods that it considers appropriate, the Board has found that serious omissions or errors in the exercise of that discretion can amount to a finding that a deputy abused its authority; see, for example, *Agboton*, at paras. 80 and 81. Such errors or omissions must be found so egregious to be beyond the delegated manager's authority; see *Gulia*, at para. 8.

[109] Furthermore, the Board and its predecessors have found that a respondent has wide discretion to make an appointment from among those candidates found qualified; see *Visca*, at para. 44, *Steeves*, at para. 58, and *Stamp*, at para. 38.

[110] The complainant did not demonstrate that the respondent committed a serious error or omission in the assessment of the appointee. Clearly, he is of the view that criteria should have been weighed differently, assessed more appropriately, and

documented more thoroughly. However, he failed to provide specific examples of errors or omissions that could be found egregious. He chose not to rebut the respondent's submissions about its assessment process with any additional facts or arguments.

[111] The complainant's arguments also undermine his allegation that the appointee did not meet the essential qualifications for the position. His use of the phrase "equally qualified" when describing the Indigenous and Métis candidates implies, if not expressly admits, that she was qualified for the appointment. He simply feels that other candidates should have been chosen over her.

[112] More importantly, the Board and its predecessors have ruled that under the *PSEA*, a person cannot make a complaint of abuse of authority on behalf of other persons; see *Silke v. Deputy Minister of National Defence*, 2010 PSST 9 at para. 68, and *Karoulis Newman v. Canada Border Services Agency*, 2020 FPSLREB 22 at para. 41.

[113] In summary, the complainant's allegations and submissions do not address his own elimination from the appointment process, leaving me to conclude that he was eliminated because he lacked one of the essential qualifications. I find that his allegations and submissions with respect to the appointee's qualifications do not demonstrate that she was appointed without merit. His submissions do not demonstrate that there were errors or omissions in the assessment process. Finally, I have found that the Board cannot consider allegations made on behalf of other persons. Accordingly, I find that the complainant has failed to establish there was an abuse of authority in the application of merit.

### **3. The identity of the appointee is not a relevant issue in this complaint**

[114] Initially, the complainant indicated in the text of complaint no. 1 that he did not intend to challenge who is Indigenous and who is not. However, in his later submissions, he alleged that the appointee falsely identified as an Indigenous programs officer. He asserted that an equally qualified Indigenous or Métis candidate should have been appointed to the position over the appointee. His notice to the CHRC stated that managers have encouraged non-Indigenous employees to self-identify and stated that "Indigenous identity fraud is becoming normalized within the setting of [the CSC]."

[115] I take note of the considerable public attention to the problem of “pretendians” — persons who (allegedly) make a false claim of being Indigenous, to access fame, advantage, or recognition. Cases such as those of Joseph Boydon or Buffy Sainte-Marie have been given considerable attention.

[116] However, I find the question entirely irrelevant in the context of this complaint. Because the area of selection for the appointment process did not require successful candidates to be Indigenous, the identity of the appointee is irrelevant to any assessment of merit. Furthermore, the complainant quite simply provided no facts to support the allegation that the appointee falsely claimed Indigenous identity. His complaint about the appointment of the appointee boils down to a belief on his part that the appointment in question **ought** to have required the candidate to be Indigenous, and therefore, the appointee should not have been appointed.

**4. The complainant has not made out a *prima facie* case that his elimination from the appointment process was tainted by discrimination**

[117] In a recent decision, the Board succinctly set out the test for assessing discrimination in the context of a staffing complaint; see *Ngueyo v. Deputy Head (Canada School of Public Service)*, 2024 FPSLRB 107. At paragraphs 72 to 74, the Board summarized the requirement to establish a *prima facie* case of discrimination as follows, referencing *Moore v. British Columbia (Education)*, 2012 SCC 61:

*[72] In Moore, the Supreme Court of Canada set out a three-step test for establishing discrimination at first glance.*

*[73] First, the complainant had to demonstrate that she has a characteristic protected from discrimination, which she did, as stated previously. She has the protected characteristics of race and sex.*

*[74] The complainant then had to demonstrate that she experienced an adverse impact and that the protected characteristics were a factor in the adverse impact. Those are the second and third steps of the Moore test. In other words, the complainant had to demonstrate that she suffered an adverse impact due to the choice of process or the assessment of her application and then demonstrate that one of the protected characteristics — in this case, race and sex — or both was or were a factor in the choice that led to that adverse impact. The complainant had to demonstrate it on a balance of probabilities.*

[118] In these complaints, the complainant established that he has a characteristic protected from discrimination, meeting step 1: he is Indigenous. Second, he has

established that he was not found qualified during the appointment process. I consider this an adverse impact, meeting step 2.

[119] The complainant alleged that the appointee was promoted over two other “equally qualified” candidates who were Indigenous or Métis. However, this is not an adverse impact experienced by him. As already noted, in the staffing-complaint regime under the *PSEA*, an employee can make a complaint that he or she was not appointed but cannot make it on behalf of others.

[120] For the third step, the complainant did not plead any facts that would lead me to conclude that his race was a factor in being screened out during the selection process. He stated that he was eliminated for not meeting an experience criterion, and the respondent documented precisely which experience criterion was missing. He provided no circumstantial evidence or arguments that would allow me to conclude that his being Indigenous was a factor in his elimination from the selection process. This fails the third part of the test in *Moore*.

[121] Accordingly, the complainant has failed to demonstrate a *prima facie* case of discrimination.

**D. Does the Board have jurisdiction over the complainant’s allegations of systemic discrimination?**

[122] The complainant spends the majority of his submissions arguing that the respondent has engaged in systemic discrimination against Indigenous employees. He indicated the respondent’s decision to not require candidates to self-identify as Indigenous was tainted by discrimination. He argued that the self-identification process does not allow the CSC to verify whether an employee’s claim to be Indigenous is legitimate. Into this narrative, he weaves a broad range of allegations with respect to his experience as an Anishinaabe man working for the CSC, the experience of other Indigenous staff and inmates, and the general failure, as he puts it, of the CSC to live up to the Truth and Reconciliation Commission’s 94 Calls to Action.

[123] Unfortunately for the case that the complainant wants to place before the Board, it is without jurisdiction to address these allegations. For the reasons already provided, the Board cannot intervene in a respondent’s area-of-selection decision.

[124] As for the remainder of his allegations, which are lengthy, voluminous, and complex, none of them are tied to this particular staffing action in ways that are under the Board's jurisdiction, in a manner pursuant to s. 77(1) of the *PSEA*. Without a direct link to a substantiated staffing complaint, it is not up to the Board to consider those general allegations, rule on them, or provide recourse in relation to them.

[125] The Board's jurisdiction flows from the enabling legislation that provides it with decision-making powers. For an elaboration of this principle, see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 108.

[126] For the Board, this restriction is also provided for by statute at s. 19 of the *Board Act*, which reads as follows:

***Powers, duties and functions***

***19 The Board is to exercise the powers and perform the duties and functions that are conferred or imposed on it by this Act or any other Act of Parliament.***

***Attributions***

***19 La Commission exerce les attributions que lui confère la présente loi ou toute autre loi fédérale.***

[127] Under the *PSEA*, the Board has jurisdiction to render decisions only on complaints clearly enumerated, such as those at s. 77(1). Furthermore, the Board's jurisdiction to hear violations of the *CHRA* in a staffing complaint flows from s. 65(7) of the *PSEA*, which reads as follows:

***65 (7) In considering whether a complaint is substantiated, the Board may interpret and apply the Canadian Human Rights Act, other than its provisions relating to the right to equal pay for work of equal value.***

***65 (7) Lorsqu'elle décide si la plainte est fondée, la Commission des relations de travail et de l'emploi peut interpréter et appliquer la Loi canadienne sur les droits de la personne, sauf les dispositions de celle-ci sur le droit à la parité salariale pour l'exécution de fonctions équivalentes.***

[128] When raising issues of discrimination under the *CHRA*, the complainant must tie them to an issue that falls within the Board's jurisdiction, in relation to a matter that is properly before the Board. For elaborations of this principle, see *Chamberlain v. Canada (Attorney General)*, 2015 FC 50 at para. 41, *Rehibi v. Deputy Head (Department*

*of Employment and Social Development*, 2024 FPSLREB 47 at para. 309, and *Mar v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 25 at para 41.

[129] The limits on the Board's jurisdiction were clearly stated in *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17, which said the following at paragraph 340, in reference to grievances filed under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act"):

*340 The Board is a creature of statute and not a court with inherent jurisdiction. The parties cannot give it jurisdiction where it has none. For the actions the grievor complained about to come within the Board's jurisdiction, they must fall within the matters set out in s. 209 of the Act....*

[130] For other reflections on this principle, see also *Serediuk v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2023 FPSLREB 71 at para. 51, and *Killips v. Treasury Board (Public Service Commission)*, 2024 FPSLREB 97 at paras. 70 to 75.

[131] Whether the CSC ought to have required that the appointee be Indigenous is not for the Board to answer.

[132] Ought the CSC to have a more rigorous process for determining a candidate's Indigeneity than the self-identification declaration process that it uses? Given the facts of this case, this is not a question for me to answer, even if such a question were to be found to be within the Board's jurisdiction.

[133] The complainant made several submissions about the general experience of Indigenous employees within the CSC, in particular through the content of his notice to the CHRC. These submissions raise issues of fairness, equity, discrimination, and systemic racism. Among other allegations, he said that Indigenous employees face threats of violence, bullying, and harassment. He said that Indigenous voices are marginalized.

[134] These are serious allegations, but a staffing complaint before the Board is not the appropriate forum to address them. Some might have been addressed through grievances and others through workplace-violence complaints or complaints under the CHRA. Accordingly, the Board does not have the jurisdiction to hear them.



**V. Conclusion**

[135] The process followed by the Board to adjudicate this complaint gave the complainant ample opportunity to provide his version of facts, supported by documents. For the most part, he declined to, rendering his diverse and broad allegations unsubstantiated. I understand the complainant feels that the CSC was a hard place for him to work in as an Anishinaabe man. However, within the limits of what the Board can address under the staffing-complaint regime in the *PSEA*, he has not demonstrated that the respondent abused its authority in the appointment process in question. I find it was appropriate to decide the complaint without an oral hearing, particularly with the complainant seeking to call some seven witnesses to testify about matters outside the Board's jurisdiction.

[136] For all the above reasons, I have used the authority granted the Board under s. 22 of the *Board Act* to decide this matter without holding an oral hearing and dismiss the complaints.

[137] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

**VI. Order**

[138] The complaints are dismissed.

March 17, 2025.

**David Orfald,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**