

Federal Court



Cour fédérale

Date: 20180713

Docket: T-1917-16

Citation: 2018 FC 737

St. John's, Newfoundland and Labrador, July 13, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANTON OLEYNIK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Dr. Anton Oleynik (the “Applicant”) seeks judicial review of a funding decision made by the Internal Appeal Committee (the “Appeal Committee”) of the Social Sciences and Humanities Research Council of Canada (“SSHRC”) by which a “Not Offered” decision was confirmed. The decision of the Appeal Committee was made in a letter dated October 3, 2016.

[2] The Applicant, who is representing himself in this application for judicial review, set out his prayer for relief in the application for judicial review as follows:

The Applicant makes application for an order pursuant to s. 18.1 of the *Federal Courts Act*.

- a. Setting aside the 'Not Offered' funding decision regarding application No435-2016-1223;
- b. Remitting it back to SSHRC for determination with directions;
- c. Confirming that the organization of the peer review of No 435-2016-1223 and the Applicant's other submission to the SSHRC program in 2009-2016 had systemic flaws and did not meet standards of natural justice and procedural fairness, which precluded their impartial assessment;
- d. Costs of the within application;
- e. Such additional and other relief as this Honourable Court may deem just.

[3] In his Memorandum of Fact and Law, the Applicant set out the following prayer for relief:

The Applicant respectfully requests that the Honorable Court grants the following procedural remedies:

- a. The decision of the SSHRC appeals committee to uphold the 'Not Offered' decision and the 'Not Offered' funding decision made in respect of the research proposal submitted to the October 2015 Insight Grant competition (SSHRC's file No 435-2016-1223) are set aside and the matter is referred back for a proper redetermination;
- b. A detailed evaluation of SSHRC's peer-review practices by an independently constituted body empowered to make binding recommendations shall be initiated. The list of independently constituted bodies that would be able to conduct such evaluation included but is

not limited to the Canadian Association of University Teachers (CAUT), the Australian Research Integrity Committee (ARIC) and the editorial office of *Science & Engineering Ethics*, a high impact scholarly journal in this field;

c. In the alternative, cost that the Applicant reasonably incurred in preparing his research proposals in 2007-2015;

d. Costs of the within application, including the cost of cancelled research trip in April;

e. Such additional and other relief as this Honourable Court may deem just.

[4] The Attorney General of Canada represents SSHRC in this proceeding pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”) as the Respondent (the “Respondent”).

II. **BACKGROUND**

[5] The following facts are taken from the Certified Tribunal Record (the “CTR”) and the affidavits of the Applicant, affirmed on January 10, 2017 and March 8, 2017, filed in support of the within application for judicial review.

[6] The Applicant is a tenured professor of sociology at Memorial University of Newfoundland, located in St. John’s, Newfoundland and Labrador.

[7] SSHRC is the federal funding agency that promotes and supports postsecondary- based research and research training in the humanities and social sciences. It exists pursuant to the *Social Sciences and Humanities Research Council Act*, R.S.C. 1985, c. S-12 (the “Act”).

[8] SSHRC offers funding opportunities through three programs: Talent, Insight and Connection.

[9] There are three roles in the SSHRC merit review process: external assessor, committee member, and committee chair. The external assessors provide written reviews of the application and the committee members score the application on a scale. The Applicant's funding application ranked among the lowest 35% that year and was not discussed by the committee for funding.

[10] In October 2015, the Applicant applied to SSHRC for funding through the Insight Grant Competition, application number 435-2016-1223 His application was titled "Power and governance: theoretical models and comparative empirical studies". The proposal related to the field of political sociology.

[11] In 2015, 66 Insight Grants were considered by the Sociology Committee. The applications were assessed by external examiners prior to assessment by the Sociology Committee.

[12] It is the practice in relation to Insight Grant applications that applications in the lowest 35% were not discussed by the Sociology Committee in the final stage of the adjudication process.

[13] In respect of the Applicant, two external assessors, that is External Reviewer #17 and External Reviewer #20, provided individual written assessments of his application.

[14] Two members of the Sociology Committee, Reader A and Reader B, assessed the Applicant's application and assigned a numerical score. Reader A assigned 11.62 out of a possible 18 points and Reader B assigned 10.38 points. The application ranked 55th out of 66 applications.

[15] The Applicant's application fell into the 5th/6th percentile group overall, that is the lowest group.

[16] According to material contained in the Applicant's Application Record, as Exhibit D to his affidavit affirmed on January 10, 2017, applications that ranked in the lowest 35% were not discussed by the Sociology Committee during the final stage of adjudication.

[17] In April 2016, this negative "Not Offered" funding response was communicated to the Applicant. He initiated an appeal of the funding decision through SSHRC's internal appeal process, on April 12, 2016, consisting of a two page letter and two attachments, totalling five pages.

[18] The Applicant filed supplementary material on June 30, 2016, consisting of a six page letter and ten attachments, totalling 37 pages.

[19] The Applicant submitted more documentary evidence on September 7, 2016, consisting of a two page letter and eleven attachments, totalling forty pages.

[20] The Applicant raised three grounds of appeal. First, he claimed that SSHRC failed to manage the real perceived or potential conflicts of interest relative to the Chair of the Insight Grant Selection Committee, that is Dr. Kevin McQuillan, Deputy Provost of the University of Calgary.

[21] Second, the Applicant alleged that there was a conflict of interest in relation to External Examiner No. 17.

[22] Third, the Applicant claimed that there was a failure to manage the peer review process since his application was assessed by political scientists rather than sociologists.

[23] The second and third grounds of appeal were struck out at the screening stage and were not considered by the Appeal Committee.

[24] The SSHRC policy on appeals provides as follows:

Objective

SSHRC is committed to the integrity of its merit review processes. As part of these processes, it has an appeal process that provides applicants with the opportunity to seek reconsideration of a funding decision where evidence suggests that an error occurred during the merit review process and that this error resulted in a negative funding decision for their application.

Policy

Negative funding decisions may be appealed only by the applicant named in the application, and only where there is evidence that an error has occurred during the merit review process managed by SSHRC.

Errors are departures from SSHRC's policies and procedures, and may include:

- an undeclared or unaddressed conflict of interest;
- a failure by SSHRC staff to provide required information to the adjudication committee; or
- an adjudication committee decision to not recommend an award based on a conclusion that is contrary to information provided by the applicant in the application.

SSHRC will not accept appeals based on:

- decisions made by SSHRC pertaining to eligibility;
- a difference in scholarly opinion between that of adjudication committee members and/or external assessors;
- disagreement over the interpretation or analysis of facts by adjudication committee members and/or external assessors;
- the number of external assessments;
- the composition of an adjudication committee; or
- the amount awarded.
- Decisions on appeals are final.

[Emphasis added]

[25] By letter dated October 3, 2016, the Applicant was informed that his appeal had been dismissed. In the letter, the Applicant was told that an appeal is not a re-evaluation of a funding application. The Appeal Committee determined that the “error” alleged, that is a real, perceived or potential conflict of interest on the part of the Chair of the Appeal Committee, had no impact on the scores given to his funding application.

[26] The Applicant responded by filing this application for judicial review on November 10, 2016.

[27] On December 6, 2016, a certified copy of the CTR was submitted to the Court. Dr. Victor Armony certified the material as being the record that was before the Appeal Committee.

[28] On January 30, 2017, the Applicant filed a notice of motion challenging the sufficiency of the CTR and seeking leave to file supplementary evidence.

[29] On February 3, 2017, the Respondent filed a notice of motion asking that confidential information that had been inadvertently released to the Applicant be subject to a confidentiality order.

[30] By Order issued on March 1, 2017, Justice McDonald denied the Applicant's motion to supplement the CTR but granted leave for him to file a supplementary affidavit, as well as leave to file a CD Rom in support of his allegations of conflict of interest on the part of one of the External Examiners who had considered his funding request. Leave was also given to have this proceeding continue as a Specially Managed Proceeding under the Rules.

[31] Justice McDonald denied the Respondent's motion for a confidentiality order.

[32] On March 7, 2017, the Applicant extended an offer of settlement to the Respondent by way of email. His offer to settle was based upon setting aside the "Not Offered" decision and that

a detailed evaluation of the peer-review practices of the SSHRC be conducted by an independently constituted body.

[33] The Respondent did not reply to this offer.

[34] By notice of motion filed on March 9, 2017, the Applicant sought correction or reconsideration, pursuant to the Rules, of the Order made on March 1, 2017.

[35] On April 10, 2017, Justice McDonald dismissed the Applicant's motion for reconsideration of her Order of March 1, 2017.

[36] By order dated March 15, 2017, Prothonotary Milczynski was appointed Case Management Judge for this judicial review proceeding.

[37] At the beginning of the hearing on September 20, 2017 the Applicant sought leave to introduce another twenty documents as "physical evidence" to be considered in this matter.

III. **SUBMISSIONS**

A. *The Applicant's Submissions*

[38] The Applicant challenges the decision of the Appeal Committee on grounds of procedural fairness, that is breach of conflict and institutional bias. He argues that its decision is reviewable on the standard of correctness since these allegations relate to procedural fairness.

[39] The Applicant submits that there was a conflict of interest both at the initial stage when his funding application was assessed by the Sociology Committee and at the appeal stage, that is before the Appeal Committee.

[40] The Applicant argues that a conflict of interest existed between him and the Chair of the Insight Grant Committee, Dr. Kevin McQuillan, and External Assessor #17, in assessing his application for funding. He also alleges the Program Officer was not qualified to identify qualified persons to review his funding application.

[41] The Applicant submits that Dr. Kevin McQuillan was in a conflict of interest because of his employment at the University of Calgary. The Applicant had a legal dispute with the University, over the years of 2008-2014. He imputes knowledge of this dispute and its cost, to the Chair, on the basis of his position as the Deputy Provost with the University of Calgary.

[42] The Applicant argues that External Assessor #17 was in a perceived and real conflict of interest based on his strong views of the military conflict in Russia and the Ukraine, two countries covered by the Applicant's research proposal.

[43] The Applicant submits the Program Officer does not have a background in the Applicant's field and therefore is unqualified to identify proper reviewers.

[44] The Applicant also contends that SSHRC President, Dr. Ted Hewitt, recruited his former associate, Dr. Armony, to the Appeal Committee and that this is a conflict of interest.

[45] The Applicant submits that Dr. Armony would protect SSHRC against unwanted outcomes of the appeals process because of his former association with the President of SSHRC.

[46] The Applicant further argues that another member of the Appeal Committee, Dr. Verbeke, is in a conflict of interest based on his institutional interests, that is, because he is a professional associate of the Vice-President of SSHRC and a subordinate of Dr. McQuillan.

[47] The Applicant submits that Dr. Verbeke is a professional associate of the SSHRC Vice-President and Dr. Jack Mintz, a council member.

[48] The Applicant also raises the issue of institutional bias on the part of SSHRC, based upon the manner in which it initially dealt with his funding application. He characterizes this issue as one of procedural fairness.

[49] The Applicant submits that his funding application was not reviewed by relevant academic peers and further, that, the Appeal Committee unfairly limited the evidence he could submit on his appeal.

[50] The Applicant alleges bias against the Appeal Committee, based on the conflicts of interests he perceives amongst its members.

[51] The Applicant further submits the Appeal Committee did not allow him to supply additional evidence which reduced his chances to succeed.

[52] The Applicant further submits that no reasons were provided by Appeal Committee and that this is a breach of procedural fairness.

[53] Further, he argues that the notes of the Appeal Committee were destroyed, and it is not possible to determine the basis of its decision. The Applicant submits that the decision of the Appeal Committee was not communicated to him in time to apply for the 2016-2017 round of funding. He infers that SSHRC does not want him to seek funding in the future and that he should quit his profession.

[54] The Applicant also challenges the sufficiency of the CTR and argues that the Respondent improperly failed to file an affidavit in response to his application for judicial review. He also contends that the Respondent improperly failed to cross-examine him upon the affidavits that he filed.

B. *The Respondent's Submissions*

[55] For her part, the Respondent submits that in essence, the Applicant is challenging the reasonableness of the decision of the Appeal Committee, in the guise of procedural fairness. She argues that the decision of the Appeal Committee is highly discretionary, and entitled to deference, relying on the decision in *Wheeldon v. Canada (Attorney General)*, 427 F.T.R. 157 (F.C.).

[56] Insofar as the Respondent addresses issues of procedural fairness, she agrees that the standard of correctness applies but argues that no such breach occurred and that the Applicant's allegations of institutional bias on the part of SSHRC are without foundation.

[57] The Respondent also submits that the Applicant has improperly introduced materials, by way of attachments to his affidavits, that were not before the Appeal Committee and that the Court should not consider these materials in disposing of this application. She notes that many of the challenged documents were retrieved by the Applicant pursuant to requests he made under the *Access to Information Act*, R.S.C. 1985, c. A-1 and are not relevant with the issues raised in this application for judicial review.

[58] The Respondent further argues that the decision of the Appeal Committee was reasonable. Appeals are governed by SSHRC policy and not by statute, therefore extensive reasons are not required. SSHRC makes clear in its guidelines that appeals of initial funding decisions are reviewed only for errors and are not a reconsideration of applications.

[59] The Respondent submits that the Appeal Committee correctly determined there was no conflict of interest in relation to Dr. Kevin McQuillan, for two reasons.

[60] First, SSHRC's appeal policy provides that an appeal can succeed when it can be shown that an error occurred that resulted in a negative funding decision. In order to grant an appeal, the Appeal Committee had to determine that a conflict of interest had a material effect on the

Applicant's score. The Respondent submits that Dr. Kevin McQuillan did not score the application and therefore was not in a position for a conflict of interest to arise.

[61] Second, the conflict of interest described by the Applicant between himself and Dr. Kevin McQuillan does not meet the definition of conflict of interest in the applicable SSHRC policy.

[62] The Respondent submits that Dr. Kevin McQuillan had no financial, institutional, personal or professional interest in whether or not the Applicant received a grant.

[63] The Respondent further argues that the allegation of conflict of interest against External Assessor #17 was not considered by the Appeal Committee as it was based on differing political views between the Assessor and the Applicant, which is not a permissible ground of appeal.

[64] The Respondent submits that the Program Officer did not evaluate the Applicant's grant proposal and was not involved in his appeal.

[65] The Respondent acknowledges that the content of the duty of fairness varies based on the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and submits that the procedural requirements in this case are on the lower end of the spectrum and that the duty of fairness was met.

[66] In response to the Applicant's procedural complaints relevant to his funding application, the Respondent provide an analysis based the factors in *Baker*:

- a. the nature of the decision and the process employed;
 - a. funding decision
 - b. Minimal content of duty of fairness
- b. the nature of the statutory scheme and the precise statutory provisions, pursuant to which the public body operates;
 - a. Beyond the duty to report to Parliament, SSHRC has the discretion to establish its own processes to achieve its mandate
 - b. Minimal content of duty of fairness
- c. the importance of the decision to the individuals affected;
 - a. The Applicant is a full professor and is not being barred from further advancement based on a lack of funding
 - b. On a sliding scale of importance, a funding decision is less than the right to stay in Canada
 - c. Minimal content of duty of fairness
- d. the legitimate expectations of the party challenging the decision;
 - a. The Applicant is familiar with SSHRC policies and served as an adjudicator for them in 2007/2008
 - b. The Applicant is aware of the highly competitive nature of the SSHRC's program
 - c. The Applicant received what he was promised: a chance to compete for an award
 - d. Minimal content of duty of fairness
- e. the nature of the deference accorded to the body
 - a. Parliament has left SSHRC the discretion to design the method of allocating grants and awards
 - b. The Supreme Court has recognized that important weight must be given to the choice of procedure made by the agency itself
 - c. Minimal level of procedural fairness

[67] The Respondent submits that when all these factors are applied to the original decision, the duty of fairness owed by SSHRC was on the lower end of the spectrum.

[68] The Respondent argues that the Applicant was given additional time to file his appeal and that his two page appeal submission was considered by the Appeal Committee.

[69] The Respondent rejects the assertion that the refusal to allow the Applicant to file additional materials or longer written submissions gave rise to a breach of procedural fairness.

[70] The Respondent submits that there was no breach of procedural fairness arising from limiting the Applicant's grounds of appeal to those identified in SSHRC policy.

[71] The Respondent further argues that where reasons are provided, there is no breach of procedural fairness and that more reasons should be reviewed on the standard of reasonableness.

[72] The Respondent asserts that the Applicant is complaining about the adequacy of the reasons given to him, as opposed to a lack of reasons; therefore, there is no breach of procedural fairness.

[73] The Respondent submits that the Applicant's arguments about reasonable apprehension of bias are without merit. She relies on the decision of the Supreme Court of Canada in *Committee for Justice & Liberty v. Canada (National Energy Board)* [1978] 1 S.C.R. 369 when the Court stated the test for bias at paragraph 40 as follows:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.”

[74] The Respondent argues that the Applicant has provided no evidence that would lead an informed person to conclude that External Assessor #17 did not assess his application fairly, other than the vague assertion that he holds a different political view than the Applicant. The Respondent submits that the Appeal Committee showed no bias by excluding this ground of appeal.

[75] Further, the Respondent argues that there is no evidence of institutional bias. She refers to the test in *2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool)*, [1996] 3 S.C.R. 919 at paragraph 44, that is “when a well-informed person would have a reasonable apprehension of bias in a substantial number of cases” (emphasis in original). She submits that there is no basis for such an allegation against SSHRC.

IV. **DISCUSSION and DISPOSITION**

[76] I will first address the preliminary issues raised by the parties, that is the completeness of the CTR, the absence of an affidavit on behalf of the Respondent, and the inclusion of certain materials in the Applicant’s record, as exhibits to his affidavits.

[77] As noted above, the Applicant brought a motion challenging the completeness of the CTR and seeking leave to file further evidence. The motion to supplement the CTR was dismissed but leave was granted to the Applicant to file supplementary evidence, the weight of which to be assessed by the hearings judge.

[78] The Applicant's Supplementary Affidavit contains a variety of different documents, including pleadings from cause number T-1748-02, that is and documents obtained in response to requests made to the Privacy and Information Commissioner of Ontario and pursuant to the Federal Access to Information.

[79] As for the Applicant's complaints about the failure of the Respondent to file an affidavit, I refer to Rule 307 of the Rules which provides as follows:

Respondent's affidavits

307 Within 30 days after service of the applicant's affidavits, a respondent shall serve its supporting affidavits and documentary exhibits and shall file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.

Affidavits du défendeur

307 Dans les trente jours suivant la signification des affidavits du demandeur, le défendeur signifie les affidavits et pièces documentaires qu'il entend utiliser à l'appui de sa position et dépose la preuve de signification. Ces affidavits et pièces sont dès lors réputés avoir été déposés au greffe.

[80] In my opinion, this Rule does not oblige a respondent to file an affidavit but rather creates a timeline for filing an affidavit should a respondent chose to do so.

[81] In this case, the Respondent chose not to file an affidavit. That was her choice. No negative consequences flow from that choice.

[82] I turn now to the objections raised by the Respondent about the inclusion of certain materials that were not before the Appeal Committee, as exhibits to the Applicant's affidavits. Some of the exhibits are materials that the Applicant obtained as the result of requests he made under the *Access to Information Act*, *supra* and pre-date the funding application that he made in 2015.

[83] I agree that the general rule is that only material that was before the decision maker will be considered upon an application for judicial review.

[84] Exceptions to that general rule arise when a person is raising an issue of the jurisdiction of the tribunal. I refer to the decisions in *Gitksan Treaty Society v. Hospital Employees' Union* (1999) 238 N.R. 73 (C.A.).

[85] The Respondent asks that the objectionable material be stricken out.

[86] In the exercise of my discretion, I decline to strike out the exhibits identified by the Respondent in her Memorandum of Fact and Law as being objectionable.

[87] I agree with the Respondent that the documents are not relevant to the issues raised in this application for judicial review.

[88] At the beginning of the hearing of this application on September 20, 2017 the Applicant sought leave to introduce more documents that he described as “physical evidence”.

[89] There were twenty documents that he divided into five groups. Groups 1 and 2 include documents that are part of the Court files in cause number T-1748-02, a judicial review application filed by Professor Hesbel Teitelbaum; see *Teitelbaum v. Canada (Attorney General)* (2004), 248 F.T.T. 283, and in this proceeding; Group 3 is the Memorandum of Fact and Law in cause number T-1748-02, Group 4 consists of documents relating to an international panel that assessed peer-review practices of SSHRC; and Group 5 was characterized by the Applicant as “fresh evidence”. This last group included material obtained by the Applicant as part of a continuing process of obtaining information from the Information and Privacy Commissioner in Ontario.

[90] The Applicant made oral submissions about the introduction of “fresh evidence”, relying on the decision, among others, in *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[91] Included in Group 5 were a “Conflict of Interest and Confidentiality Agreement” that the Applicant claims was not signed by the Chair of the Appeal Committee.

[92] Group 5 of the Applicant’s “fresh evidence” also included documents relating to the cancellation of his flight from St. John’s to Moscow in 2016. The Applicant alleges this is relevant to his claim for costs.

[93] The Applicant submits that the “fresh evidence” should be admitted because it was not available when he prepared his application record. He also argues that some of these documents are relevant for showing that the Appeal Committee was not properly constituted.

[94] In *Palmer, supra*, at page 775, the Supreme Court of Canada enunciated general principles about the introduction of “fresh evidence” as follows:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[95] The Respondent agrees that these are the relevant principles when a Court is to consider the introduction of “new evidence”.

[96] I agree with the submissions of the Respondent that proposed “new evidence” must be relevant to the issues raised in a particular proceeding.

[97] I also agree that the proposed “new evidence” sought to be introduced by the Applicant is not relevant to the subject of this application for judicial review. That is whether the Appeal

Committee breached the duty of procedural fairness owed to the Applicant or otherwise committed a reviewable error.

[98] In my opinion, the Applicant has not shown that the failure of the Appeal Committee to sign the “Conflict of Interest and Confidentiality Agreement” deprives the Appeal Committee of its authority to proceed. Otherwise, I am not persuaded that any of the so-called “physical evidence”, including the “fresh evidence”, is relevant to the issues raised in this application.

[99] The Applicant makes broad claims of conflicts of interest and institutional bias, which he submits attract the correctness standard.

[100] The Applicant raises two separate conflict of interest claims that originate at different stages of the process. First, he raised claims of conflicts of interest, in relation to his funding application, against the Committee Chair Dr. Kevin McQuillan, External Assessor #17 and the Program Officer. Second, he raised a new conflict of interest argument which deals with the constitution of the Appeal Committee itself, in particular the inclusion of Dr. Armony and Dr. Verbeke.

[101] I agree that both issues of conflict of interest and institutional bias raise questions of procedural fairness since either one of these issues has the potential to affect the fairness of the process in which the Applicant took part.

[102] The SSHRC policy defines “conflict of interest” as follows:

Conflict of Interest means a conflict between a Participant's duties and responsibilities with regard to the Review Process, and a Participant's private, professional, business or public interests. There may be a real, perceived or potential conflict of interest when the Participant:

- i. would receive professional or personal benefit resulting from the funding opportunity or application being reviewed;
- ii. has a professional or personal relationship with an Applicant or the Applicant's institution; or
- iii. has a direct or indirect financial interest in a funding opportunity or application being reviewed.

[103] The Applicant claims that a conflict of interest arose at the adjudication stage, that is upon the initial assessment of his grant application, due to the participation of Dr. McQuillan as Committee Chair, the participation of External Assessor #17 and the Program Officer who recruited External Assessors and members of the Sociology Committee.

[104] The Applicant's complaints about External Assessor #17 relate to the strong opinions expressed by that person about the military conflict in Russia and the Ukraine, two countries covered by the Applicant's research proposal.

[105] The Applicant's complaints about the Program Officer are based upon his view that that person does not have an academic background in his field and was unqualified to identify reviewers with relevant academic qualifications.

[106] I am not persuaded that the evidence submitted by the Applicant substantiates a "conflict of interest" within the meaning of that term as defined in the SSHRC policy.

[107] Dr. McQuillan did not participate in the “not offered” decision since the Applicant’s funding application was screened out and not considered by the Selection Committee.

[108] The allegation of conflict of interest against External Examiner #17 was not considered by the Appeal Committee, because this ground had been screened out.

[109] The Respondent argues that the alleged conflict of interest relative to External Examiner #17 falls within an excluded ground of appeal, that is on the existence of differing political views of the Assessor and the Applicant.

[110] The SSHRC appeal policy, as posted on its website provides that the following matters are not grounds for appeal:

- decisions made by SSHRC pertaining to eligibility;
- a difference in scholarly opinion between that of adjudication committee members and/or external assessors;
- disagreement over the interpretation or analysis of facts by adjudication committee members and/or external assessors;
- the number of external assessments;
- the composition of an adjudication committee; or
- the composition of an adjudication committee; or
- the amount awarded.

[111] The SSHRC appeals policy is not detailed but it provides that an appeal “should be based on a compelling demonstration that an error occurred in the review process.”

[112] In light of the definition of “conflict of interest” and the grounds for appeal set out in the SSHRC policy, I agree with the Respondent’s submissions and find that no conflict of interest has been established. I also find that no “error occurred in the review process”, that is the basis identified in the SSHRC appeal policy for allowing an appeal.

[113] I note that the “conflict of interest” defined in the SSHRC appeals policy has a specific focus. The appeal process is focused upon whether an error occurred during the review process and whether the error led to a negative funding decision. It seems to me that the “conflict of issue” allegation must be assessed in the context of behavior that caused an error and that such error resulted in the refusal of funding.

[114] I also agree with the submissions of the Respondent that no conflict of interest, within the meaning of the policy, has been shown in relation to the Program Officer. The Program Officer did not assess the Applicant’s application.

[115] On the basis of the evidence, I am satisfied that Dr. McQuillan had no involvement in the assessment of Applicant’s funding application. His application was screened out and was not considered by the Sociology Committee.

[116] The Act is not detailed. It grants SSHRC the power to govern its daily affairs. It does not provide a statutory right of appeal; the appeal process exists according to the policy established by SSHRC.

[117] I agree with the Respondent that the qualifications of the Program Officer are irrelevant, and that the Officer did not evaluate the original application or participate in the appeal. In my opinion, this claim falls within Applicant's concern about the structure of peer review at SSHRC, which is beyond the scope of this application for judicial review.

[118] The second conflict of interest claim relates to the process followed by the Appeal Committee. The Respondent did not address this issue in her Memorandum of Fact and Law, nor in oral submissions.

[119] The Applicant alleges that a conflict of interest arose in the composition of the Appeal Committee, on the basis of personal relationship between Dr. Armony and Dr. Hewitt. He raises the allegation of conflict of interest arising from a professional relationship between Dr. McQuillan and Dr. Verbeke.

[120] I accept that an allegation of conflict of interest may give rise to a breach of procedural fairness. It is unclear to me if the Applicant is alleging a conflict of interest "at large" or relying on the definition of "conflict of interest" in the SSHRC Policy. However, it may not matter.

[121] In this present case, I am satisfied that the Applicant had the opportunity to be "heard" by the Appeal Committee. There is no evidence that the Members of the Appeal Committee were improperly influenced by their professional or personal relationships. The Applicant has not substantiated any reviewable error in this regard.

[122] There is no evidence that the Appeal Committee, as constituted, breached any principles of natural justice or procedural fairness in respect of the Applicant.

[123] The essence of natural justice relative to an administrative decision-making process is the “right to be heard”, see the decision *Beno v. Canada (Attorney General)* (2002), 216 F.T.R. 45.

[124] The Applicant also alleges that the results of the assessment of his funding application were pre-determined and that there is an institutional bias on the part of SSHRC, insofar as he is not aware that any appeal under the appeal policy was successful.

[125] I see no evidence in the CTR to support any allegation that the outcome of the Applicant’s funding application was pre-determined.

[126] As for the claim of institutional bias, I refer to the decision in *2747-2174 Quebec Inc.*, *supra* when the Supreme Court, relying on the decision in *Committee for Justice and Liberty*, *supra* observed that the “determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias *in a substantial number of cases*” (emphasis in original).

[127] I refer to the decision in *Teitelbaum*, *supra*, where the Court said the following at paragraph 60:

On the bias issues, I have taken the position that any reasonable apprehension of bias would be grounds for invalidating the decisions for a lack of procedural fairness...

[128] As noted earlier, bias is indeed an argument of procedural fairness, subject to review on the standard of correctness.

[129] However, I am not persuaded that there is any evidence of bias either on a personal level or on an institutional level between members of the Appeal Committee or anyone else involved in the assessment of the Applicant's funding application.

[130] The fact that no appeals have succeeded may invite inquiry as to the practicality of the appeal process but that is not a matter for this Court in an application for judicial review.

[131] I agree with the Respondent that there is no evidence of institutional bias in this case. The threshold for bias claims is high and none of the evidence provided supports this claims. Many of the Applicant's assertions are based on inferences and imputed knowledge.

[132] The Applicant's appeal was for the purpose of obtaining review of the original "Not Offered" decision. The purpose of this judicial review is for the Court to review the process followed by the Appeal Committee in deciding the Applicant's appeal.

[133] I see no foundation for the allegation of bias.

[134] The Applicant complains that the destruction of notes by the Appeal Committee is another breach of procedural fairness.

[135] The Respondent disagrees, relying on the decision in *Maax Bath Inc. v. Almag Aluminum Inc.*, 392 N.R. 219 where the Court said the following at paragraph 14:

14 There can be little question here that the applicant is seeking access to documents consulted by or prepared for the Tribunal members as they were engaged in their deliberative role to determine how and why the members reached the impugned conclusions. I agree with the respondent that this is a matter of privilege going to judicial impartiality in adjudication (*Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.)).

[136] Notes of a decision-maker are not always relevant. The decision of a decision-maker is the operative document. Appeals and judicial review lie against a decision not against reasons.

[137] The Applicant pleads that no reasons were given for the withdrawal of two of his grounds for appeal.

[138] The SSHRC policy says nothing about the exclusion of grounds of appeal.

[139] The Respondent submits that grounds two and three were properly excluded since they did not fall within grounds of appeal set out in the SSHRC policy.

[140] In my opinion, the elimination of two grounds of appeal is not fatal to the appeal process sought by the Applicant. That apparently was an administrative decision. It is open to the Appeal

Committee to control its processes. No reviewable error arises from the lack of reasons in this regard.

[141] As for the reasons for the decision of the Appeal Committee, I am satisfied that these reasons meet the standard of adequacy as addressed by the Supreme Court of Canada in *Newfoundland and Labrador Nurses Union (Treasury Board)*, [2011] 3 S.C.R. 708. The reasons are sufficient to explain the basis of the decision of the Appeal Committee.

[142] To the extent that it is necessary to consider the merits of the decision of the Appeal Committee, the standard of reasonableness applies; see the decision in *Wheeldon, supra*.

[143] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of reasonableness requires that a decision be transparent, justifiable and intelligible, falling within a range of possible, acceptable outcomes that is defensible on the law and the facts.

[144] I am satisfied that the decision of the Appeal Committee meets this standard.

V. CONCLUSION

[145] In the result, this application for judicial review is dismissed.

[146] The Applicant has not shown a breach of procedural fairness or any other reviewable error on the part of the Appeal Committee. There is no basis for judicial intervention.

[147] The question of costs is reserved, pending review of submissions from the parties and a further Order will issue in that regard.

JUDGMENT in T-1917-16

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, question of costs is reserved pending further submissions from the parties.

"E.Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1917-16

STYLE OF CAUSE: ANTON OLEYNIK v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND

DATES OF HEARING: SEPTEMBER 20, 2017 AND NOVEMBER 29, 2017

JUDGMENT AND REASONS: HENEGHAN J.

DATED: JULY 13, 2018

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