Federal Court of Appeal | Cour d'appel fédérale

Date: 20200110

Docket: A-309-18

Citation: 2020 FCA 5

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

ANTON OLEYNIK

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 4, 2019.

Judgment delivered at Ottawa, Ontario, on January 10, 2020.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: RENNIE J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Introduction

[1] Dr. Anton Oleynik appeals from a judgment of the Federal Court (2018 FC 737, Heneghan J.). In its judgment, the Federal Court dismissed Dr. Oleynik's application for judicial review of a decision of an appeals committee of the Social Sciences and Humanities Research

Council. The appeals committee confirmed the decision of a SSHRC adjudication committee not to offer to Dr. Oleynik funding for which he had applied.

[2] On appeal to this Court, Dr. Oleynik submits that the Federal Court erred in two respects: first, by failing to conclude that there were unaddressed conflicts of interest affecting both the adjudication committee and the appeals committee; and second, by failing to conclude that SSHRC breached his right to procedural fairness by following a process that did not conform with its own policies, contrary to his reasonable expectations.

[3] For the reasons that follow, which differ in several ways from those of the Federal Court, I would dismiss the appeal.

II. SSHRC and its policies

[4] SSHRC is a federal Crown agent, established by the *Social Sciences and Humanities Research Council Act*, R.S.C. 1985, c. S-12, to support and promote research and scholarship in the social sciences and humanities. To fulfil its mandate, SSHRC provides funding opportunities for postsecondary-based research and research training.

[5] The Act authorizes SSHRC, subject to the approval of the Governor in Council, to make by-laws for the regulation of its proceedings and generally for the conduct of its activities. However, SSHRC has made no by-laws governing its process for deciding on applications for funding, though it has published policies setting out its process. It is also subject to the Conflict of Interest and Confidentiality Policy of the Federal Research Funding Organizations.

A. *The merit review process*

[6] According to the policies set out in SSHRC's Manual for Adjudication Committee Members at the relevant time, SSHRC assesses applications for funding using a merit review process. External reviewers provide expert assessments of applications, and adjudication committees then make funding decisions by scoring each application on a scale.

[7] A chair leads each adjudication committee, and is responsible for ensuring that the committee conducts its work with fairness, thoroughness, and integrity. Committee chairs are expected to be "broadly familiar" with the applications in the competition. They play "a vital role" in ensuring that SSHRC's policies and procedures are observed.

[8] The policies state that committee members participate in "a committee discussion of the entire set of applications submitted to the committee for consideration." (The 2019-2020 version of the Manual now qualifies this statement: it states that "[s]ome funding opportunities have a cutoff point, meaning applications must have a minimum score or rank to be eligible for funding.") After the committee discusses the applications, the committee reviews and finalizes the rank-ordered list of applications. The final list divides the adjudicated applications into those recommended for funding and those not recommended. The committee chair approves the resulting spreadsheet and the final scores.

B. *Conflicts of interest*

[9] SSHRC recognizes in the Manual that conflicts of interest can and do arise in the adjudication of applications. Participants in the merit review process are required to declare their interests when carrying out review activities, and to identify and manage any "real, perceived, or potential" conflicts.

[10] The Conflict of Interest and Confidentiality Policy of the Federal Research Funding Organizations defines "conflict of interest" as "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." The definition goes on to state that

> [t]here 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.

[11] The policy prohibits external reviewers and review committee members, including committee chairs, from involvement in the review of an application if they are in a conflict of interest.

C. *The SSHRC appeals process*

[12] Under the SSHRC policy entitled Appeals of Decisions Based on Merit Review, applicants may seek reconsideration of a funding decision only where there is evidence that an "error" has occurred during the merit review process and that this "error" resulted in a negative funding decision. According to the policy, "[e]rrors are departures from SSHRC's policies and procedures," and may include, among other things, an undeclared or unaddressed conflict of interest. The policy also states that SSHRC will not accept appeals based on, among other things, a difference in scholarly opinion between that of adjudication committee members and/or external assessors. Decisions on appeals are final.

[13] The appeals process requires appellants to provide a "compelling demonstration that an error occurred in the review process." Appeals must be submitted in writing, and appeal letters must be no more than two pages in length. SSHRC staff communicate with appellants should additional information be required. An appeals committee will not consider supporting documents not included in the original application for funding.

[14] According to the policy, once an appeal is received, SSHRC's executive vice-president, corporate affairs, determines with the assistance of staff "whether there are grounds for appeal." Where an appeal "is allowed," it is referred to an appeals committee. The appeals committee may confirm the original recommendation of the adjudication committee, or recommend in favour of the appellant. A decision in favour of the appellant will not necessarily result in an award of funds. Whether it does is "dependent on, for example, the final ranking of the proposal."

III. Dr. Oleynik's application

[15] Dr. Oleynik, a tenured professor of sociology at Memorial University of Newfoundland, applied to SSHRC for funding in October 2015. In May 2016, he received a letter from SSHRC informing him that funding would not be offered.

[16] The letter stated that the adjudication committee reviewed each application, and then ranked the applications according to their relative merit. Enclosed with the letter were the committee evaluation form, all assessments received, and competition statistics, which included overall results as well as Dr. Oleynik's application score and ranking. The committee evaluation form stated that while Mr. Oleynik's application "received a passing score on each of the three evaluation criteria, its final ranking was not high enough to permit an award from the funds available." The form further noted that "[a]pplications initially determined by committee consensus to be ranked in the lowest 35% were not discussed by the committee during the final stage of adjudication." Dr. Oleynik's application fell into this category; it was therefore not discussed.

IV. Dr. Oleynik's internal appeal

A. *The appeal and its disposition*

[17] Dr. Oleynik appealed the negative funding decision through SSHRC's appeals process. In support of his appeal, he submitted materials that far exceeded the two-page limit. He also submitted an abridged version of his submissions that complied with the limit. In it he put forward three bases for the appeal: that (1) SSHRC failed to organize the merit review so that his

application was evaluated by peers with expertise in his field; (2) the adjudication committee chair, who is a "central figure" in the merit review process, was in a conflict of interest, one that was "neither properly declared nor managed"; and (3) an external assessor "also acted in a conflict of interest situation." He did not raise as a basis for his appeal any expectation on his part that the adjudication committee would discuss his application. Nor did he include a complaint that there were additional grounds that could have been raised but for the two-page limit, though he did complain that the limit prevented him from substantiating the first ground that he put forward.

[18] The adjudication committee chair was Dr. Kevin McQuillan, the Deputy Provost of the University of Calgary and a member of the University's senior management team. Dr. Oleynik's submission stated that before becoming Deputy Provost, Dr. McQuillan served as dean of the University's Faculty of Arts, a position whose holder also forms part of the University's senior management. From 2008 to 2014, Dr. Oleynik was a party to a legal dispute involving a member of the University's academic staff. This staff member had participated in SSHRC's evaluation of an earlier version of Dr. Oleynik's funding application, which had also been unsuccessful. (See *Oleynik v. University of Calgary*, 2011 ABCA 281, leave to appeal to S.C.C. refused, 2012 CanLII 22122; *Oleynik v. University of Calgary*, 2012 ABQB 189; *Oleynik v. University of Calgary*, 2012 ABQB 286; *Oleynik v. University of Calgary*, 2013 ABCA 105, leave to appeal to S.C.C. refused, [2013] 3 S.C.R. ix; *Oleynik v. University of Calgary*, 2013 ABCA 278; *Oleynik v University of Calgary*, 2013 ABCA 395, leave to appeal refused, 2014 ABCA 19; *Oleynik v University of Calgary*, 2013 ABCA 429.) According to Dr. Oleynik's appeal submission, the dispute caused the University to spend more than $100,000 in legal fees.

[19] Dr. Oleynik submitted that, as a member of the University's senior management team, Dr. McQuillan "must have been informed" about the legal dispute and "beyond reasonable doubt knew about the dispute." There was therefore, he submitted, a conflict between Dr. McQuillan's institutional and business interests as a member of the senior management team of the University and his responsibilities in the merit review process.

[20] As noted above, SSHRC's appeals policy provides that the executive vice-president, corporate affairs may screen out any ground of appeal that does not come within the policy. The executive vice-president, corporate affairs, wrote to Dr. Oleynik informing him that his appeal would be "put forward to an appeals committee based on a potential conflict of interest with the chair of the committee [emphasis added]," and that the appeals committee would "determine what impact, if any, this may have had on [his] file." The letter stated, "Please also note that following the review of your file, no other conflicts of interest were identified. Additionally, a difference of scholarly opinion is not grounds for an appeal." The letter advised that the appeals committee would not consider the material submitted by Dr. Oleynik other than the two-page abridged appeal letter.

[21] Dr. Oleynik was informed in October 2016, by letter from the executive vice-president, corporate affairs, of the appeals committee's decision to recommend that the scores originally assigned to his application be upheld. The letter emphasized that the role of the appeals committee was limited to judging "what impact, if any, the identified 'error' (in this case, the real, perceived or potential conflict of interest of the Chair of the Committee) had on the file's assessment and scores assigned by the original committee."

B. *The appeals committee process*

[22] Records obtained by Dr. Oleynik following a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, included internal SSHRC documents that further illuminate the process followed in his appeal.

[23] One of these documents was a memorandum setting out the briefing to be provided to the members of the appeals committee. They were to be told to rest assured that the staff of the executive vice-president, corporate affairs, had "carried out the necessary background work and fact-finding to determine the grounds for appeal." The memorandum also explained the appeals committee's role, in these terms:

> The role of the appeals committee is not to carry out a completely new evaluation of the files – your role is, to the best of your ability, [to] judge the impact that the "error" (in other words departure from SSHRC policy or procedure) may have had (if any) on the original evaluation of the file based on the application and adjudication material […] provided.

[24] The memorandum addressed the remedies open to the committee as follows:

> One of two outcomes is possible: the original score(s) stand (i.e. you agree with the evaluation of the original committee) OR you think based on the information available to you that the score(s) should be modified. This may or may not result in funding […].

[25] After a brief statement of the background to Dr. Oleynik's appeal, the document stated that "[t]he error that is considered to have occurred is that a real, perceived [or] potential conflict of interest existed with the Chair of the committee and that the Chair did not declare or address this conflict."

[26] Another internal memorandum advised that "the Chair had no role in adjudicating the file and the file was not ranked high enough to warrant a discussion during the adjudication meeting [...]."

[27] The worksheet prepared to record the outcome of the appeals committee's deliberations stated, after describing the basis for the appeal, that "[s]ince the Chair of the committee is a member of the senior management of the University, they would have known about the legal dispute." It set out three questions for the committee to answer: (1) "To what degree do you think the error had an impact on the adjudication of this file?" (2) "Does the error warrant a change to scores?" and (3) "If a change in score(s) is warranted, what is the new score?"

[28] In the box adjacent to the first question, there is the following hand-written answer: "- discrepancy relatively normal. - No evidence that the Chair necessarily knew what was going on." In the box adjacent to the second, the handwritten answer is "- There is no evidence that a COI of the Chair would have influenced the scores + final income [sic]." The box adjacent to the third contained no new score.

[29] A briefing memorandum on the appeals committee's recommendations stated that the committee "found no evidence that a real, perceived or potential conflict of interest of the Chair influenced the scores or final outcome" of Dr. Oleynik's application. It was on that basis that the appeals committee recommended that the original scores assigned to the application be upheld.

C. *The appeals committee chair*

[30] The further documents that Dr. Oleynik obtained also disclosed that the appeals committee was chaired by Dr. Alain Verbeke, a member of the teaching faculty of the University of Calgary. Before taking on the role of chair, Dr. Verbeke was asked to confirm that he had no conflict of interest with any of the applicants, co-applicants, or collaborators involved in appeals that the committee would consider. It does not appear that he was asked about any conflict arising from his role at the University of Calgary relative to that of Dr. McQuillan, the chair of the committee whose decision was the subject of Dr. Oleynik's appeal. Nor is there anything in the record that speaks to the nature of the relationship between Dr. McQuillan and Dr. Verbeke, beyond their formal positions. The briefing memorandum reporting on the appeals committee's recommendations stated that "[t]he Chair of the [appeals] committee […] guided discussion of all committee members in order to reach a unanimous recommendation for each of the […] files." These included the file relating to Dr. Oleynik's appeal.

V. The application for judicial review

[31] Dr. Oleynik, then self-represented, applied to the Federal Court for judicial review of the appeals committee's decision. His notice of application also referred to both the initial decision to deny funding, made by the adjudication committee, and the SSHRC's organization of the review of Dr. Oleynik's research projects over a nine-year period. The relief sought included an order setting aside the decisions of the appeals committee and adjudication committee and referring his application back to SSHRC for redetermination, and an order confirming that

SSHRC's organization of the review of his applications in the period 2008 to 2016 had "systemic flaws" and did not meet standards of procedural fairness.

[32] Dr. Oleynik put forward a series of grounds for this relief. They included bias and institutional bias; failure to manage the real, perceived, or potential conflicts of interest of both the adjudication committee chair, Dr. McQuillan, and the chair of the appeals committee, Dr. Verbeke, as a subordinate to Dr. McQuillan, as well as the conflict of interest of an external reviewer; and assigning to the review of Dr. Oleynik's application an external reviewer who lacked relevant expertise. Dr. Oleynik also alleged that SSHRC had breached his right to procedural fairness and natural justice by, among other things, failing to follow its published policies and procedures. Though his application materials referred to the fact that the adjudication committee had not discussed his application, the policies and procedures that he asserted had not been followed were limited to those relating to conflicts of interest and to the selection and recruitment of external assessors.

[33] As counsel for Dr. Oleynik acknowledges, the disposition of the application was challenging given, among other things, the number and nature of the grounds put forward. In dismissing the application, the Federal Court concluded that there was no breach of procedural fairness or natural justice, and that Dr. Oleynik had been afforded the opportunity to be "heard." While the Court recognized (at paras. 101, 120) that the conflict of interest allegations raised questions of procedural fairness, it found that no conflict of interest was established within the meaning of SSHRC's appeals policy. It noted (at paras. 112-113) that the appeals policy

provided for allowing an appeal only where an error occurred in the review process, and went on to state 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 [interest]" allegation must be assessed in the context of behavior that caused an error and that such error resulted in the refusal of funding.

[34] With respect to the allegation of conflict involving Dr. McQuillan, the Court stated (at para. 115) that it was satisfied, on the basis of the evidence, that he had no involvement in the assessment of Dr. Oleynik's application, because the application was screened out in light of its low score and was not considered by the adjudication committee. As for the allegation involving Dr. Verbeke, the Court found (at para. 121) that there was no evidence that the members of the appeals committee were improperly influenced by their professional or personal relationships.

[35] The Federal Court also rejected Dr. Oleynik's other arguments, including that of institutional bias. It did not address Dr. Oleynik's legitimate expectations about whether the adjudication committee would discuss his application. As noted above, Dr. Oleynik did not raise SSHRC's failure to follow its policies and procedures in that regard as a ground for his application.

VI. The issues on appeal

[36] In his appeal to this Court, Dr. Oleynik focuses on two issues: conflict of interest relating to the roles of Dr. McQuillan and Dr. Verbeke, and SSHRC's failure, in dealing with his

application, to proceed in accordance with his reasonable expectations as to the procedure it would follow.

[37] On the first issue, he submits that the Federal Court erred in failing to treat a conflict of interest within the meaning of the policies applied by SSHRC appeals committee as equivalent to a reasonable apprehension of bias at common law, and in requiring, in effect, that Dr. Oleynik establish not merely a reasonable apprehension of bias but actual bias that affected the scoring of his application. On the second, he submits that the Federal Court erred in failing to find that SSHRC breached procedural fairness when it did not follow its own published policies relating to assessment of applications. He relies in particular on the statement in the Manual for Adjudication Committee Members that the discussion of applications by an adjudication committee will include the entire set of applications submitted to the committee for consideration.

VII. Standard of review

[38] On appeal from a decision of the Federal Court in an application for judicial review, this Court's role is to determine whether the Federal Court identified the correct standard of review and, if it did, whether it properly applied that standard: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47.

[39] Here, the parties agree that because the application before the Federal Court raised issues of procedural fairness, the Federal Court properly identified the standard of review that it should apply as correctness. This is consistent with the holding of this Court in *Canadian Pacific*

Railway Company v. Canada (Attorney General), 2018 FCA 69 at para. 54, that judicial review for procedural fairness is "best reflected in the correctness standard." We must therefore determine whether the Federal Court properly applied this standard.

VIII. Preliminary issue: is the appeal moot?

[40] In view of the time that has passed since the submission and consideration, in the 2015-2016 period, of Dr. Oleynik's application for funding, the Court asked the parties following the hearing to provide written submissions addressing the question whether this appeal is moot, and if it is not moot, what practical or effective remedy is available to the Court to grant in light of factors such as the passage of time and the status of the funds for which Dr. Oleynik applied.

[41] Having reviewed the submissions, I propose that the Court proceed with the disposition of the appeal on the basis that it is not moot, and that an effective remedy (if there is entitlement to a remedy) can be granted. Counsel for the Attorney General acknowledged in her submissions that funding would still be available to Dr. Oleynik, at least "theoretically," if he were to succeed in his appeal. The Attorney General did not lead evidence or make submissions that would support a conclusion along the lines of that discussed by the Federal Court in *Teitelbaum v. Canada (Attorney General)*, 2004 FC 398 at paras. 131-134. There, in somewhat similar circumstances, the Court suggested that the competitive nature of the funding process would prohibit a redetermination on directions from the Court.

[42] I therefore turn to an analysis of the issues that require consideration in this appeal.

IX. Analysis

A. *Did the Federal Court err on the issue of conflict of interest?*

[43] In considering this question, I will deal only with the claims that Dr. Oleynik continues to pursue in this Court. There are two conflict of interest claims in this category: the first relating to Dr. McQuillan's role as chair of the adjudication committee, and the second, to Dr. Verbeke's position as chair of the appeals committee.

(1) The alleged conflict of Dr. McQuillan

[44] The alleged conflict of Dr. McQuillan in his role as chair of the adjudication committee came, on its face, within the purview of the appeals committee, and was subject to SSHRC's policy on appeals of decisions made on merit review. It was also subject to the Conflict of Interest and Confidentiality Policy of the Federal Research Funding Organizations, and its definition of conflict of interest. By its terms, that policy applies to participants in the process of reviewing applications for funding and making funding decisions. As discussed above, in describing conflicts of interest SHHRC's policies use the expression "real, perceived or potential conflict of interest."

[45] I agree with Dr. Oleynik that, in applying these policies to the alleged conflict of Dr. McQuillan, the Federal Court treated the policies as requiring that the appellant establish an actual conflict of interest – one that actually affected the scoring of the appellant's application and actually resulted in the refusal of funding. This approach is reflected in the passage from paragraph 113 of the Federal Court's reasons, quoted above:

> [T]he "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 [interest]" allegation must be assessed in the context of behavior that caused an error and that such error resulted in the refusal of funding.

[46] Dr. Oleynik submits that this interpretation was in error. He further submits that the appropriate way to address the error is for this Court to read the test for conflict of interest under the policies as equivalent to the test for reasonable apprehension of bias at common law. As Dr. Oleynik submits, the most commonly applied statement of that test was set out by Justice de Grandpré in dissent in *Committee for Justice and Liberty et al. v. National Energy Board et al*., [1978] 1 S.C.R. 369 at 394, 68 D.L.R. (3d) 716:

> [T]he 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… [The 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 [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[47] In making this submission, Dr. Oleynik relies on decisions of this Court holding that, as used in conflict of interest codes and guidelines, expressions similar to the term "perceived conflict of interest" found in the applicable policies here – "appearance of conflict of interest" and "apparent conflict of interest" – are analogous to, and call for application of the same test as, reasonable apprehension of bias: *Threader v. Canada (Treasury Board)* (1986), [1987] 1 F.C. 41 at 56-57, 68 N.R. 143 (C.A.); *Gauthier v. Canada (Attorney General)*, 2008 FCA 75 at para. 45; see also *Sparkes v. Enterprise Newfoundland & Labrador Corp.*, 167 Nfld. & P.E.I.R. 218 at para. 46, 1998 CanLII 18005 (NL CA).

[48] However, I disagree with Dr. Oleynik that the Federal Court's treatment of the policies was itself in error and that the appropriate solution is to apply through the policies the common law test for reasonable apprehension of bias. I do so for several reasons.

[49] First, in my view, the Federal Court's approach to the policies is faithful to their terms. The Federal Court accurately pointed out at paragraph 113 of its reasons that the focus of the policies is on "errors" that result in negative funding decisions. There is no suggestion that this focus reflects anything other than a deliberate choice by SSHRC – a choice that, in principle, the Court should respect.

[50] Second, on the record before us it is not apparent which of the three categories referred to in the definition in the policies – real, perceived, or potential conflict of interest – the SSHRC executive vice-president, corporate affairs, concluded was made out, and the appeals committee then considered. While the executive vice-president, corporate affairs, told Dr. Oleynik that his application would be put to an appeals committee based on a "potential conflict of interest," he also advised Dr. Oleynik that the "error" the appeals committee considered was the "real, perceived or potential conflict of interest" of the Chair (emphasis added). The memorandum setting out the briefing to be provided to the appeals committee similarly stated, as set out above, that "[t]he error that is considered to have occurred is that a real, perceived [or] potential conflict of interest existed with the Chair of the committee." There was no specification of which of the three elements of the definition of conflict had been "considered to have occurred." If what was in issue was only a "potential conflict of interest," it is not clear that it could be sufficiently serious to come within the common law test for reasonable apprehension of bias.

[51] Third, at common law the ordinary consequence of a finding of reasonable apprehension of bias is that the decision under review is set aside. “It is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established”: Guy Régimbald, *Canadian Administrative Law*, 2nd ed. (Markham, Ontario: LexisNexis, 2015) at 425-426, citing *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 661, 24 D.L.R. (4th) 44.

[52] But here, under the terms of the policies, a finding that a reasonable apprehension of bias was made out under the definition read into the policies would be of no consequence unless the appeals committee adjusted the scores in light of it so as to produce a different result. For the Court to render the position under the policies truly analogous to the common law position would therefore require further rewriting of the policies. Even if this was open to the Court – a point that we need not decide – it was not the relief sought in the Federal Court and is not the relief sought here.

[53] In my view, the more straightforward and more appropriate way for this Court to proceed is to recognize the limits of SSHRC’s policies and to apply the common law in addition, in its own right. I see Dr. Oleynik’s application and appeal material as putting in play, in relation to the role of Dr. McQuillan, compliance not only with the policies but also with the requirements of the common law of procedural fairness. Even if Dr. Oleynik’s appeal fails to the extent it relies on the policies, this Court can and should consider his further claim of a breach of common law fairness.

[54] It is axiomatic that at common law, anyone whose rights, privileges, or interests are affected by an administrative decision is, absent valid legislation to the contrary, entitled to procedural fairness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 20, 174 D.L.R. (4th) 193; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras. 21-24. Procedural fairness includes the right to a decision made by an impartial decision-maker, free from a reasonable apprehension of bias: *Baker* at para. 45. It is through the concept of reasonable apprehension of bias that the common law of procedural fairness addresses alleged conflicts of interest.

[55] The Attorney General does not dispute that Dr. Oleynik was entitled to procedural fairness in relation to his application for funding. Nor do any statutory limits apply that would oust the application of the common law under the principle discussed in *Ocean Port* at paragraphs 21-24. As noted earlier, the policies bearing on conflicts of interest are not set out in by-laws authorized by statute; they do not have the force of law. See, by contrast, *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 at paras. 52-55.

[56] Applying the common law, the test, again, is

> [W]hat 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 [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[57] In setting out this test in *Committee for Justice and Liberty* at 394, Justice de Grandpré was careful to state that the grounds for the apprehension must be “substantial.” He also agreed

that the test – what would a reasonable, informed person think – cannot be related to the "very sensitive or scrupulous conscience." In other words, the threshold for a finding of a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high: see *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 25-26.

[58] What information concerning Dr. McQuillan would the reasonable, informed person have in this case? Based on the record, that information would include information that there was hard-fought litigation between Dr. Oleynik and a member of the academic staff of the University of Calgary, where Dr. McQuillan continues to be a member of the University's senior management team, and that this litigation ended in 2014. It would include information from Dr. Oleynik that the litigation cost the University more than $100,000 in legal fees, and Dr. Oleynik's surmise that Dr. McQuillan must have been aware of the litigation. It would not include, because there is nothing in the record on the subject, any information as to Dr. McQuillan's role, if any, in managing the litigation.

[59] The information concerning Dr. McQuillan would, however, also include at least some information concerning the functioning of the adjudication committee of which he was chair, and concerning the role of the chair. This would include information that Dr. Oleynik's application was not discussed in the committee, because it was scored too low, and that as a result Dr. McQuillan did not participate in that element of its adjudication. There would also be information as to the importance ascribed in SSHRC's policies to the role of an adjudication committee chair in "taking on the responsibility of ensuring that the committee carries out its

work with fairness, thoroughness and integrity, while ensuring that SSHRC's policies and procedures are observed." There would be information in addition concerning the duties that the chair is to discharge, including the approval of the spreadsheet and the final scores. But again, there is nothing in the record to shed light on what this approval entailed – whether, for example, it was a pure formality – or even on whether Dr. McQuillan actually provided his approval.

[60] Finally, the information known to the informed person would include information that SSHRC's executive vice-president, corporate affairs, had apparently concluded that a conflict of interest, as defined in the applicable policies, was made out, and therefore referred the matter to an appeals committee. But as already noted, the record does not clarify which element or elements of the definition of conflict of interest the executive vice-president, corporate affairs, considered, and there is also nothing in the record concerning the basis for his conclusion. It does not seem appropriate, therefore, to ascribe any specific knowledge on this point to the informed person.

[61] As the Court of Appeal for Ontario has observed, determining whether a reasonable apprehension of bias exists is "highly dependent on the factual circumstances. This is particularly true with respect to administrative tribunals which are based on unique statutory schemes and normative contexts": *Austin v. Ontario Racing Commission*, 2007 ONCA 587 at para. 37.

[62] Here, reflecting on what, objectively, a reasonable, informed person would think, particularly given the limits of Dr. McQuillan's role in the merit review process and the

information gaps in the record before the Court, I conclude that Dr. Oleynik has not met his burden of establishing a reasonable apprehension of bias in relation to the role of Dr. McQuillan.

(2) The alleged conflict of Dr. Verbeke

[63] To repeat, this alleged conflict relates to the composition of the appeals committee itself, and Dr. Verbeke's position as its chair. It is therefore not a conflict that is subject to the SSHRC appeals process, because that process applies only to alleged errors that occur during the process of merit review. Nor does the definition of conflict of interest in the Federal Research Funding Organizations policy appear to apply, since that policy, as already mentioned, applies only to participants in the process of funding review. In my view, therefore, the alleged conflict relating to Dr. Verbeke is reviewable solely under the common law of procedural fairness.

[64] The Federal Court dismissed this claim (at para. 121 of its reasons) on the basis that Dr. Verbeke's role did not deprive Dr. Oleynik of the opportunity to be "heard," and that there was "no evidence that the Members of the Appeal Committee were improperly influenced by their professional or personal relationships."

[65] I agree with Dr. Oleynik that this conclusion, too, appears directed to whether there was actual bias rather than a reasonable apprehension of bias. In this context, as in relation to Dr. McQuillan's position at common law, the relevant question is instead

> [W]hat 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 [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[66] Applying this test, I would not give effect to the ground of appeal challenging Dr. Verbeke's role as chair of the appeals committee.

[67] In his submissions on this point, Dr. Oleynik relies on the case law holding that a reasonable apprehension of bias may arise from the relationship between a subordinate and a superior: see, for example, *Lee v. Canada (Deputy Commissioner, Correctional Service, Pacific Region)*, [1994] 3 F.C. 629 at 643, 1994 CanLII 3500 (F.C.); *Cheney v. Canada (Attorney General)*, 2005 FC 1590 at paras. 27, 29, 35.

[68] But all that the record here discloses about the relationship between Dr. Verbeke and Dr. McQuillan is that the former is a member of the teaching faculty of the University of Calgary and the latter is Deputy Provost, a senior management position. There is nothing that fleshes out the nature of their relationship or establishes that it is truly one of subordinate to superior, in any meaningful sense. In my view, a reasonable person would need to know more before he or she could conclude that the relationship gives rise to a reasonable apprehension of bias.

B. *Did the Federal Court err on the issue of legitimate expectations?*

[69] As discussed above, Dr. Oleynik's argument in this Court on legitimate expectations is directed to his expectation that, consistent with the statement at the relevant time in SSHRC's Manual for Adjudication Committee Members, the adjudication committee that considered his application would discuss "the entire set of applications submitted to the committee for consideration," including his. As also discussed above, this did not occur: the score assigned to

his application fell below the threshold adopted by the committee to identify applications warranting discussion.

[70] In my view, it would not be appropriate for this Court to consider this ground of appeal. It was not a ground raised either with the appeals committee or before the Federal Court. There is, accordingly, no decision on the issue for this Court to review on appeal.

[71] As a general rule, a court will not consider an issue on judicial review where the issue could have been but was not raised before the administrative decision-maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 21-26; *Canada (Attorney General) v. Valcom Consulting Group Inc*., 2019 FCA 1 at para. 36. The reasons for the rule include the risk of prejudice to the responding party, and the potential to deny the reviewing court an adequate evidentiary record: *Alberta Teachers'* at paras. 24-26.

[72] Similarly, an appellate court will ordinarily not consider on appeal an issue that was not raised in the court of first instance. The rationales for this rule also include the concern that the factual record bearing on the issue will not be complete, as well as the concern that the appellate court will not have the benefit of the views on the issue of the court from which the appeal is taken: *Eli Lily Canada Inc. v. Teva Canada Limited*, 2018 FCA 53 at paras. 44-45, leave to appeal to S.C.C. refused, [2018] 3 S.C.R. vi.

[73] I agree with counsel for the Attorney General that this Court should not now consider the issue of Dr. Oleynik's legitimate expectations concerning the adjudication committee's discussion of his application. This issue could have been raised in his SSHRC appeal, even given the two-page limit. As Dr. Oleynik was aware, departures from SSHRC's policies and procedures are appealable errors under SSHRC's policies governing appeals. If this issue had been raised, its disposition by the appeals committee would then be part of the evidentiary record. The issue could then have been raised in, and reflected in the record before, the Federal Court, which could then have addressed it. While self-represented parties may sometimes be given leeway in meeting the requirements for the proper constitution of an application for judicial review, Dr. Oleynik, as his materials disclose, is not an inexperienced litigant.

[74] For these reasons, I would not consider further the ground of appeal relating to legitimate expectations.

X. Proposed disposition

[75] I would dismiss the appeal with costs.

"J.B. Laskin"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-309-18
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE HENEGHAN DATED JULY 13, 2018, DOCKET NUMBER: T-1917-16)	
STYLE OF CAUSE:	ANTON OLEYNIK v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 4, 2019
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	RENNIE J.A. WOODS J.A.
DATED:	JANUARY 10, 2020

APPEARANCES:

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