Date: 20090211

Docket: T-1078-08

Citation: 2009 FC 144

Ottawa, Ontario, February 11, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOHN DETORAKIS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] These reasons and order refer to motions by the applicant, Mr. Detorakis, heard at Fredericton, New Brunswick on February 2, 2009. Mr. Detorakis is representing himself in these judicial review proceedings. It has been determined by this Court and by the Federal Court of Appeal that he requires the guidance of a case management judge. There are, as of the date of writing, 194 recorded entries and 56 documents on the Court's file and two previous interlocutory orders that have been the subject of appeals. The matter has not, as yet, proceeded to the stage of preparation of the application record. For Mr. Detorakis' benefit and for the information of the

judges who will deal with the remaining steps in this proceeding, I will set out my reasons for disposing of the motions at some length.

Background:

[2] The underlying application is for judicial review of a decision by the Commissioner of the Public Sector Integrity Commission ("PSIC"), Mme Christiane Ouimet, in which she declined to exercise her jurisdiction to investigate Mr. Detorakis' disclosure of alleged wrongdoing by public officials and declined to provide him with funding to obtain legal advice.

[3] The disclosure was submitted by Mr. Detorakis on April 16, 2008 pursuant to section 13 of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 ("the PSDP Act") and relates to alleged actions taken by his employer, the Canadian Nuclear Safety Commission ("CNSC"), in response to his request for information concerning staff relations issues.

[4] Mr. Detorakis initially filed a complaint with CNSC management in 2003. Dissatisfied with the response, he then sought the intervention of the Office of the Privacy Commissioner ("OPC") which referred his complaint to the Office of the Information Commissioner ("OIC") as an access issue. The OIC advised Mr. Detorakis in November 2006 that he was out of time for bringing his complaint but that he could make a fresh access application to CNSC and file a new complaint should the application be refused.

[5] Mr. Detorakis contested that assessment arguing in his subsequent correspondence with the OIC, and in his April 16, 2008 disclosure to the PSIC, that the issue was not the refusal of an access request but the concealment of records and fabrication of evidence in order to deny him access to the information.

[6] Mr. Detorakis asserts that the OIC maintains an open file but has failed to investigate his allegations of criminal wrongdoing. This prompted his disclosure to PSIC. On this and other complaints, he has sought the intervention of the Minister of Labour and the Minister of Justice and Attorney General of Canada. In their replies, the former indicated he could not intervene and the latter's office suggested that if Mr. Detorakis has evidence of criminal acts, he should contact his local police.

[7] The Public Sector Integrity Commissioner's ("PSI Commissioner") decision was communicated to Mr. Detorakis in a letter signed by Mr. Wayne Watson, then Deputy Commissioner, on June 12, 2008. The letter referred to paragraph 24(1)(a) of the PSDP Act which provides that the Commissioner may refuse to deal with a disclosure if he or she is of the opinion that the subject matter has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament. The letter referred to the assessment conducted by the OIC under the *Access to Information Act*, R.S., 1985, c. A-1 as the ground for declining to act on the disclosure. Mr. Detorakis was again advised that he could address his allegations of criminal misconduct to his local police service.

[8] In his notice of application under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, filed on July 11, 2008, Mr. Detorakis seeks a writ of mandamus to compel the PSI Commissioner to accept his disclosures of wrongdoing and approve funding for legal consultation. In accordance with the procedure set out in rule 317 of the *Federal Courts Rules*, S.O.R./98-106, Mr. Detorakis requested the production of certified copies of the following materials:

> (a) All records of inquiry or investigation into the matters of the applicant's disclosures.
> (b) All records of analysis of facts, or other considerations supporting the determination by the Commissioner not to accept the disclosures and not to grant access to legal consultation.
> (c) All documents of policy or guidelines that guided the Public Service Integrity Commissioner discharging the discretion to not accept to register the applicant's disclosures about indictable offenses authorized or condoned by senior public service executives.
> (d) All documents of policy or guidelines that guided the Commissioner's discretion to not provide the applicant with legal advice in the matters of his disclosures about indictable and criminal offenses committed by senior government executives in the organization in which he is employed.
> (e) All records of precedents dealt by the Commissioner's Office where the Commissioner discharged the mandate and authority given by the PSDP Act for:
>
> - Accepting public servants' disclosures about senior government executives committing or condoning indictable offenses; and
> - Providing legal consultation to the public servants who sought to register their disclosure with the Commissioner.

[9] On July 24, 2008 Mr. Joe Friday, counsel to the Office of the Commissioner, issued a document entitled "Certificate of Record" attached to which were papers described as true copies of "... all materials provided to the Public Sector Integrity Commissioner in the disclosure of wrongdoing made by John Detorakis...". The attached documents consisted of the decision letter together with copies of Mr. Detorakis' correspondence with OIC and PSIC staff.

[10] Mr. Detorakis took steps to determine whether any of the other materials that he had requested had been filed with the Court Registry or whether an objection to the request had been made pursuant to rule 318(2) of the *Federal Courts Rules*. On August 15, 2008 he sent a second request for production to the Office of the Commissioner asking for, among an extensive list of other items, records pertaining to alleged conflicts of interest on the part of the Commissioner and the Deputy Commissioner and any records of communications between the Commissioner and the heads of other federal administrative tribunals.

[11] By letter dated September 24, 2008 to Mr. Detorakis and copied to the Court, Mr. Friday referred to the requests for disclosure contained in the notice of application and the August 15, 2008 correspondence and wrote as follows:

> The records and materials listed above such as policy or guidelines on discharging the Commissioner's discretion concerning disclosures and the provision of legal advice, or on conflicts of interest, or on the delegation to deal with disclosures and complaints of reprisal, a declaration of conflict, or communications with Heads of other federal tribunals, etc., do not exist, as a result, are not contained in the certified record submitted on July 24, 2008. The certified record contained all the materials which were actually before the Public Sector Integrity Commissioner when a decision was made on her behalf.
>
> Since the records you are requesting do not exist we, consequently, hereby formally object to your request made under rule 317.
>
> We remain at the disposal of the Court with respect to any direction the Court may issue in dealing with this matter.

[12] Thereafter, Mr. Detorakis filed several motions including an effort to have the Commissioner, Deputy Commissioner and General Counsel brought before the Court to respond to contempt allegations for their failure to respond to his rule 317 requests. Following a hearing at Fredericton on October 6, 2008 before Justice Michael Phelan, the respondent's motion to strike the

Public Service Integrity Commissioner as the respondent and to substitute the Attorney General of Canada was granted and, on the Court's own motion, an order was issued that the application be specially case managed pursuant to rule 383. Mr. Detorakis filed appeals from these decisions and brought motions to stay the execution of the orders.

[13] The stay motions were dismissed by Justice Gilles Létourneau of the Federal Court of Appeal on November 26, 2008 with costs assessed against the applicant, payable forthwith and in any event of the cause. Justice Létourneau confirmed the view of the motions judge that the guidance of a case management judge was required. Justice Layden-Stevenson was appointed by the Chief Justice to perform that role which she has now relinquished upon her appointment to the Court of Appeal.

[14] The first of Mr. Detorakis' present motions addresses his concerns about the tribunal record and the second seeks to amend the grounds set out in his notice of application. For the sake of convenience, they are referred to here as the completeness motion and the pleadings motion.

[15] These motions were set down for hearing at the direction of the case management judge and motion records were filed by Mr. Detorakis on January 19, 2009. The respondent filed his motion records on January 28, 2009. Included in the respondent's record respecting the completeness motion is the affidavit of Ms. Erin Howland, administrative assistant at the Office of the Public Sector Integrity Commissioner, dated January 26, 2009. Ms. Howland deposes that she conducted a thorough review of the applicant's disclosure file. She describes the steps that were taken by herself

and others between the receipt of the disclosure on April 16, 2008 and the signature of the decision letter on June 12, 2008 and attaches as exhibits the contents of the disclosure file.

[16] Attached as exhibit “E” to Ms. Howland's affidavit is a three page document entitled “Analysis of Receivability” prepared by the PSIC investigator, Mr. Ronald Calvert, to whom the disclosure file had been assigned. This document, dated May 22, 2008, contains Mr. Calvert’s assessment that paragraph 24(1)(a) of the PSDP Act applied to the disclosure and his recommendation that Mr. Detorakis be informed accordingly and that he be advised to contact the local police regarding the allegations of criminal wrongdoing.

[17] On the last page of the document, below Mr. Calvert’s conclusion and signature, appears the sentence “I agree with the above suggestion” and lines for sign-offs by several Commission managers. It bears the initials of the Commission Registrar, Head of Legal Services (not Mr. Friday) and the Commissioner and the dates on which each initialled the document. It is not initialled by Mr. Watson, then Deputy Commissioner, or Mr. André Lefebvre, then Director General of Investigations and Inquiries, although Ms. Howland’s affidavit indicates that the document went to both of them for review and approval en route to the Commissioner. Both officials have since left PSIC along with the former Head of Legal Services, Jean-Daniel Bélanger, and the former Registrar, Manon Hardy.

[18] For the record, Mme Hardy is now the Deputy Registrar of the Public Servants Disclosure Protection Tribunal of which the undersigned is a member, appointed on June 27, 2007 for a three year term. While he was with PSIC, Mr. Bélanger participated in meetings of a consultation group

formed to assist the Tribunal to develop rules. The group also consisted of representatives of Treasury Board Legal Services, the Public Service Alliance of Canada, the Professional Institute of the Public Service of Canada and RCMP Legal Services. To date, the Commissioner has not applied to the Tribunal to decide any matters for which it was constituted under the statute.

[19] The Court was informed during the hearing that Mr. Bélanger has left the PSIC to pursue another opportunity in the public service. In any event, no issue appears to arise with respect to either Mr. Bélanger or Mme Hardy's involvement in this process. There is no indication in the record as to why Messrs Watson, Lefebvre and Calvert have left the PSIC.

[20] Mr. Detorakis contends that the departures of Mr. Watson and Mr. Lefebvre may be related to his case and that the absence of their initials on the sign-off sheet suggests that they were in disagreement with the Commissioner's decision. He submits that such information, if confirmed, would be relevant to the determination of his application.

Preliminary issues:

[21] At the outset of the hearing on February 2, 2009, Mr. Detorakis raised three preliminary matters. The first request was that he be permitted to amend the relief sought on the completeness motion to accord with the information provided in the respondent's motion record which confirmed that the decision-maker was the Commissioner and not the Deputy Commissioner, contrary to his prior understanding. That request presented no difficulty and was accepted.

[22] The second preliminary matter raised by Mr. Detorakis was an oral motion to strike three paragraphs of Ms. Howland's affidavit coupled with a request to postpone the hearing in order to allow him to cross-examine Ms. Howland on the content of the affidavit. The three paragraphs in question read as follows:

> 24. This represents the entire process followed in this case and all of the materials obtained and produced by our Office and available to the aforementioned persons from this Office who were involved in the review and in the decision-making process in this file. No other documents were obtained and no other persons were consulted in the process.
>
> 25. I can confirm that Joe Friday is no longer a lawyer acting for or in the service of the Department of Justice. I have inquired and been advised by the responsible HR officer at PSIC that Joe Friday is on secondment to PSIC from the Department of Justice.
>
> 26. To the best of my knowledge Public Sector Integrity Canada does not have, nor has it ever had, files belonging to the Department of Justice in its possession, or stored on its premises.

[23] The grounds asserted by Mr. Detorakis for this motion to strike and to cross-examine were, in essence, that these paragraphs were irrelevant and prejudicial, that Ms. Howland as an administrative assistant could not speak to the completeness of the tribunal record and could not assert with authority that Mr. Friday no longer acted for the Department of Justice nor had access to that Department's files. He wished to cross-examine Ms. Howland on these matters.

[24] After hearing submissions from Mr. Detorakis and counsel for the respondent, I denied the motion to strike the three paragraphs as I did not consider them irrelevant or prejudicial to Mr. Detorakis. They relate to matters raised by Mr. Detorakis' completeness motion. Paragraph 24 reflects Ms. Howland's review of the file and her knowledge of the steps taken with respect to the disclosure. Paragraphs 25 and 26 respond to Mr. Detorakis' submissions that Mr. Friday had access

to files in the possession of the Department of Justice pertaining to alleged reprisals and the alleged failure of the OIC to investigate the wrongdoing. Whether Mr. Friday had access or not to such records is in my view immaterial as the request to access Department of Justice files was beyond the scope of rule 317, as I will discuss below.

[25] I also denied the request to postpone the hearing to allow for the cross-examination of Ms. Howland on her affidavit under rule 83. While the applicant had signalled prior to the hearing that he might wish to do so, no steps had been taken to arrange a cross-examination. Moreover, the subjects which Mr. Detorakis indicated he wished to explore with Ms. Howland were not, in my view, relevant to the motion. In seeking to cross-examine, the applicant sought discovery on matters beyond the scope of the motion and, indeed, beyond the scope of the underlying application. This is not a proper use of the right to cross-examine on an affidavit in a motion: *Merck & Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1994), 169 N.R. 342, 55 C.P.R. (3d) 302 (F.C.A.).

[26] While the denial of the right to cross-examine should only be done in exceptional circumstances, my conclusion that this is such a case was fortified by reading the transcript of the cross-examination of a legal assistant to counsel for the respondent conducted by Mr. Detorakis in Ottawa on September 29, 2008 and which was included in his motion record on the completeness issue. The transcript of this cross-examination reveals that Mr. Detorakis conducted an unnecessary, confusing and hectoring examination of the legal assistant on matters irrelevant to the motion. While this may be attributable to his lack of legal knowledge and experience, it cannot be condoned by the Court.

[27] The legal assistant's affidavit had been tendered in support of the motion to substitute the Attorney General of Canada as respondent, an amendment required by rule 303 and which would normally not invite any cross-examination. Indeed, Justice Phelan's order of October 7, 2008 states that the applicant's resistance to this motion was unmerited, a view shared by Justice Létourneau in dismissing Mr. Detorakis' appeal with costs. In this instance, I concluded that nothing material would be gained from allowing Mr. Detorakis to cross-examine Ms. Howland on the matters addressed in her affidavit, and in light of the prior experience, to permit it might expose her needlessly to similar treatment.

[28] The third preliminary matter raised by Mr. Detorakis was an allegation that Mr. Friday had made a false representation to the Court as the certified tribunal record of July 24, 2008 did not contain the "Analysis of Receivability" document attached as exhibit "E" to Ms. Howland's affidavit. Mr. Detorakis requested that the Court require that Mr. Friday appear to answer to contempt allegations for having certified an incomplete record and that the Court invoke the assistance of the Attorney General to conduct an investigation.

[29] Mr. Detorakis submits that exhibit "E" was not included in the certified tribunal record because it would have disclosed that the Deputy Commissioner and the Director General were not in support of Mr. Calvert's recommendation and the Commissioner's decision. He argues that this is supported by the absence of their initials on the document, by Ms. Howland's averment that the recommendation went to them for review and approval and by the fact that both officials have since left the office.

[30] It is clear from Ms. Howland's affidavit and from the face of the document itself that Mr. Calvert's analysis and recommendation was before the Commissioner when she made her decision and contained the rationale for why an investigation should not proceed.

[31] In the absence of a compelling reason not to produce the document, exhibit "E" should have been included in the tribunal record certified by Mr. Friday. If there was a reason not to produce it as part of the certified record, a timelier objection should have been made under rule 318 and the Court's directions sought as to how to proceed. In light of its production now, as part of the respondent's motion record, the Court can only conclude that there was no reason not to produce the document as part of the response to the rule 317 request.

[32] No explanation has been provided by the respondent for why the document was not included in the certified tribunal record in reply to the request in the notice of application or to Mr. Detorakis' August 15, 2008 letter. The objection in the September 24, 2008 letter from Mr. Friday pertained to Mr. Detorakis' other extraneous requests and not to documents that were actually before the Commissioner when she made her request. In fact, Mr. Friday compounded the error by stating incorrectly that "[t]he certified record contained all the materials which were actually before the Public Sector Integrity Commissioner when a decision was made on her behalf." The record was incomplete and the decision was not made "on her behalf" but rather by the Commissioner as the statute requires. As set out in paragraph 25(1)(g) of the PSDP Act, the decision to refuse to investigate is not one of the powers the Commissioner may delegate.

[33] That being said, in my view no valid purpose would be achieved at this stage of the proceedings in embarking upon an inquiry as to why the oversight occurred. The failure to comply with rule 317 is not a reviewable error but may be dealt with by an order of the Court under rule 318 to produce the documents within a specified time and to extend the time for filing application records: *Malkine v. Canada (Minister of Citizenship and Immigration)* (1999), 177 F.T.R. 200, 3 Imm. L.R. (3d) 122.

[34] In this case, the remedy that a rule 318 order would provide has already been achieved by the production of the record as an exhibit to Ms. Howland's affidavit. Moreover, the substantive content of Mr. Calvert's analysis and recommendation was conveyed to Mr. Detorakis in the decision letter and in the other documents provided on July 24, 2008.

[35] I note that to be properly introduced as evidence on the application, the tribunal record must be appended as an exhibit to an affidavit filed by the applicant as part of his record under rule 306 or by the respondent under rule 307: *Canada (Attorney General) v. Lacey*, 2008 FCA 242, 169 A.C.W.S. (3d) 939.

[36] In the circumstances of this application, it would be appropriate for the record to be introduced through an affidavit submitted by the respondent as part of his application record. Mr. Detorakis may seek to cross-examine the maker of the respondent's affidavit subject to the directions of the case management judge as to scope and the manner in which it is to be conducted. It may also be appropriate for the respondent to make available to Mr. Detorakis the present addresses of Messrs Watson and Lefebvre to assist him in preparing his application record.

The completeness motion:

[37] As set out in the notice filed initially on January 2, 2009 and re-filed on January 19, 2009 this motion was:

> 1. To find that the tribunal certificate, issued by PSIC General Counsel Joe Friday, is inaccurate and the tribunal record that was forwarded with the certificate is incomplete.
> 2. To order that the certificate, issued by PSIC General Counsel Joe Friday, be corrected to state that the decision-maker was Deputy Commissioner Wayne Watson.
> 3. To order the PSIC Commissioner to forward the tribunal material that the applicant had requested pursuant to rule 317 on July 11, 2008 and on August 15, 2008.
> 4. To order the PSIC General Counsel Joe Friday, who is a lawyer for the Department of Justice, to forward with the tribunal record the Department of Justice ministerial correspondence and other Department of Justice material pertaining to the applicant's complaint about wrongdoing in the Public Service that Mr. Friday had access at the time PSIC decided the applicant's disclosures.
> 5. Any order or direction that the case management judge finds just for the circumstances.

[38] During the course of his oral submissions and in a document tendered during the hearing, Mr. Detorakis requested that the remedy sought in the completeness motion be revised. I have consolidated his requests as follows:

> 1. To order the certificate of record, issued by PSIC General Counsel Mr. Joe Friday on July 24, 2008, be struck.
> 2. [withdrawn]
> 3. To order the Commissioner:
> i. To forward all physical and electronic documents in PSIC's files and archives including memoranda, notes of minutes, e-mails, CMS records, reports, authored or received by PSIC staff and officers, including the following individuals, C. Ouimet, W. Watson, A. Lefebvre, M. Hardy, R. Calvert, and J.P. Belanger, about:
> a. The complaint of reprisal of John Detorakis that PSIC received on May 21, 2008.
> b. The disclosure of wrongdoing from John Detorakis PSIC received on April 16, 2008.

ii. To forward all PSIC's documents describing the PSIC processes for the processing of public servants' complaints of reprisals and of public servants' disclosures of wrongdoing.
iii. To forward the records of precedents the applicant requested pursuant to rule 317 with the notice of his application.
iv. To forward the Charter of the Heads of the Federal Administrative Tribunals Forum.

4. To order the production of all material in the possession of the respondent that is relevant to the review grounds of bias.

[39] As noted above, the tribunal record will only serve as evidence on the application when it is attached as an exhibit to an affidavit tendered by one of the parties. The error by omission has been corrected. The certificate is not a pleading as defined in rule 2. A motion to strike is inappropriate.

[40] With regard to the further relief sought in the form of a production order, rule 317 does not provide a means to conduct a broad discovery of records held by a third party in a judicial review application, a procedure which is intended to be summary and expedited.

[41] The tests under rule 317 are possession and relevance. In this instance, the documents submitted to the PSIC by Mr. Detorakis in relation to the disclosure and those prepared within PSIC and which were considered by the Commissioner in arriving at her decision are relevant to the underlying application. The applicant can't use the rule 317 procedure to embark upon a "fishing" expedition to rummage through the Commission's records or those of another department: *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* (1997), 130 F.T.R. 223 (F.C.T.D.), 46 Admin. L.R. (2d) 144; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)* (1999), 247 N.R. 287 (F.C.A.), 91 A.C.W.S. (3d) 922.

[42] As was stated by the Supreme Court of Canada in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, in the administrative law context the duty of procedural fairness generally requires that the decision-maker disclose the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. That doesn't require disclosure of all records related to an investigation: *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*, 83 F.T.R. 2, 170 N.R. 360 (F.C.A.); *Canada (Director of Investigations and Research, Competition Act) v. D & B Companies of Canada Ltd.* (1994), 176 N.R. 62, 58 C.P.R. (3d) 353 (F.C.A.).

[43] In my view, the further records Mr. Detorakis seeks are not relevant to a determination of the merits of the underlying application, that is whether the Commissioner erred in making the decision not to investigate because of the assessment conducted by the OIC. Accordingly, the motion is dismissed.

The pleadings motion:

[44] In his second motion, Mr. Detorakis seeks leave to file an amended notice of application pursuant to rule 75 to expand the grounds to include (a) the claim that he had a legitimate expectation that he would be provided a reasonable opportunity to put forward his case and, (b) the allegation that the PSI Commissioner was biased or that a reasonable apprehension of bias arises from her association with the former Commissioner of the Canadian Nuclear Safety Commission.

[45] At the hearing, Mr. Detorakis abandoned the claim in his written representations that a reasonable apprehension of bias arose from the prior employment of then PSI Deputy Commissioner, Mr. Watson, at the Office of the Privacy Commissioner when his initial complaint was made to that office in 2006 prior to it being redirected to the OIC.

[46] The principal grounds for judicial review set out in the notice of application filed on July 11, 2008 are:

> (a) that the Commissioner based her decision not to accept the disclosure on the erroneous finding that the Information Commissioner had dealt with the disclosure; and
> (b) that the Commissioner failed to observe principles of natural justice and procedural fairness by not providing the applicant with a reasonable opportunity to put his case or to show cause why the decision to decline to investigate should not be taken.

[47] As submitted by the respondent, legitimate expectation is an aspect of procedural fairness. This principle affords a party affected by the decision of a public official an opportunity to make representations in circumstances where, based on the conduct of the public official, the party has been led to believe that his or her rights would not be affected without consultation: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at 1203-1204, 75 D.L.R. (4th) 385. There is no obstacle to the applicant pleading this principle as an element of his case as it is presently framed in the notice of application and, therefore, no need for an amendment for that reason.

[48] The allegation of bias or of a reasonable apprehension of bias is more problematic. The respondent opposes this amendment and submits that it is appropriate for the Court to determine whether there is a “triable issue” and, if satisfied that there is none, to dismiss the motion: *Charette*

v. Delta Controls, 2003 FCA 425, 312 N.R. 295. Even if the facts as asserted by the applicants are accepted as is the practice on motions to amend, the respondent argues that there is no *prima facie* case for bias or a reasonable apprehension of bias.

[49] The applicant relies on the statement of Justice Douglas Campbell in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)*, 2004 FC 658 at paragraph 21, 251 F.T.R. 155 that,

> (…) an amendment should be allowed at any stage of an action for the purpose of determining the real questions in a controversy between the parties, provided that it will not result in an injustice to the other party not capable of being compensated through costs, and provided that it would serve the interests of justice.

[50] As far as I am able to determine from the applicant's written representations and oral submissions, Mr. Detorakis seeks to try to establish that the PSI Commissioner declined to investigate his disclosure because of a collegial association with Ms. Linda Keen, the former CNSC Commissioner. He asserts that Ms. Keen was active in a network entitled the Heads of Federal Administrative Tribunals Forum or in other meetings of senior public servants in which Mme Ouimet participated, and that as a consequence, Mme Ouimet did not wish to embarrass Ms. Keen by opening an investigation into CNSC management actions.

[51] I stress that no evidence to support the asserted facts has thus far been put forward by Mr. Detorakis, but in considering whether to allow an amendment, I must assume that the asserted facts are true: *VISX Inc. v. Nidek Co*. (1996), 209 N.R. 342, 72 C.P.R. (3d) 19 (F.C.A.).

[52] The test for disqualifying bias or perceived bias is well established in law. The Supreme Court of Canada has laid out the relevant considerations to take into account when dealing with

such allegations in a number of decisions, starting with *Committee for Justice and Liberty et al v. National Energy Board et al.*, [1978] 1 S.C.R. 369, followed by *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 and *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259. A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly.

[53] Allegations of bias are very serious matters. They call into question the integrity of the decision maker. The burden of demonstrating a reasonable apprehension of bias rests with the party arguing for disqualification. Moreover, the inquiry that must be conducted is very fact-specific and there can be no "shortcuts" in the reasoning that supports the allegation: *Wewaykum*, above at paras. 59 and 77.

[54] The presumption is that a board or tribunal is impartial. The grounds must be substantial. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough. It is the informed person's perception that counts, not uniformed speculation. Delay in raising an apprehension of bias can be indicative that the grounds lack substance.

[55] Mere membership in an organization or association with a group will not normally be sufficient to satisfy the test unless statements or actions by that organization or group demonstrating bias may fairly be attributed to the decision maker: see for example, *Helow (Fatima) v. Secretary of State For The Home Department and Another*, [2008] UKHL 62 (H.L.).

[56] Mr. Detorakis submits that he should be allowed to plead that Mme Ouimet's association with or link to Ms. Keen, the former CNSC Commissioner, is grounds for a reasonable apprehension of bias. However, he has not put forward any assertions of fact in support of this beyond Mme Ouimet's possible participation in the networks of senior federal public servants. That is not sufficient, in my view, to base a claim of bias or perceived bias and is the type of "shortcut" in reasoning against which the jurisprudence cautions.

[57] The inference of a lack of impartiality which Mr. Detorakis wishes the Court to draw is based on mere speculation. Even assuming that the asserted facts are true, the applicant has not established that there is a triable issue to be determined with respect to bias or apprehended bias in this matter. To allow the amendment would cause prejudice to the respondent who would be required to defend this application on an entirely different basis than had been set out in the notice. While that may be compensable through an award of costs, the potential injury to personal reputations occasioned by unsubstantiated allegations is not as easily remedied. In the circumstances, I am not satisfied that the amendment would be in the interests of justice.

[58] I am also mindful of the statutory imperative set out in subsection 18.4(1) of the *Federal Courts Act* that applications for judicial review be heard without delay and in a summary way. The requested amendment would significantly contribute to further delay without materially advancing the hearing of the application. In the result, the motion is dismissed.

Costs:

[59] The respondent has sought his costs on the completeness motion and submits that the motion has caused unnecessary delay in the hearing of the application on the merits and that the respondent will be prejudiced by the delay with the departure of witnesses from the PSIC. No separate claim of costs has been made for the amendment motion. The applicant seeks his travel and accommodation costs and disbursements for copying documents.

[60] In advance of the hearing, counsel for the respondent offered not to seek costs if the applicant agreed to request leave to proceed with the motions in writing under rule 369. The applicant declined to do so in the apparent belief that the completeness motion had to be heard orally as it had been set down for hearing by the case management judge. He also declined to proceed in writing on the amendment motion unless the respondent first disclosed his reasons for opposing the motion, an unreasonable precondition in my view.

[61] An award of costs would normally follow the outcome of the motion. However, the practical effect in this instance was the production of the “Analysis of Receivability”. In the result, success was divided and the parties should bear their own costs. The parties should now proceed with the preparation of their application records and avoid further procedural steps that will delay the hearing of the application.

ORDER

THIS COURT ORDERS that:

1. the applicant's motion filed January 19, 2009 for leave to amend his notice of application filed July 11, 2008 is dismissed;

2. for greater certainty and notwithstanding paragraph 1, the applicant may allege a denial of procedural fairness in his application record on the ground that he had a legitimate expectation that he would be consulted before the decision under review was made;

3. the applicant's motion filed January 19, 2009 for an order to find that the tribunal certificate is incomplete and for related relief, is dismissed;

4. the parties shall bear their own costs of these motions in any event of the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1078-08
STYLE OF CAUSE:	JOHN DETORAKIS and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	February 2, 2009
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	February 11, 2009

APPEARANCES:

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