



JOHANNES WHEELDON

SSHRC, Post Docs, and Procedural Fairness at the Federal Court of Canada

Or how to end an academic career before it begins

I arrived early at the Supreme Court of Canada. My hearing was not for an hour but I wanted to get in, find the East courtroom, and prepare myself. I had not realized that the Federal Court held hearings at the Supreme Court and was nervous as I passed through security and into the building. I wandered around a bit and quickly realized how small the part of the building I had access to was. The East Court was directly to my right, but locked. I walked around and looked at the framed pictures of past Justices, located the bathroom, and wandered upstairs to see if I could get into the Supreme Court itself. I couldn't. As I was coming down the stairs, I turned my head and noticed the East courtroom was open. On the last step I lost my footing and half tumbled down the stairs — landing on my knee. An Officer walked over to ask if I was ok. "Well," I answered, "as long as that's the only time I trip up today, then yes, I'm fine."

I had not wanted this fight. It had started with a failed grant application, but it turned out my lack of success was hardly unique. Nearly 80% of Social Sciences and Humanities Research Council (SSHRC) Post Doctorate applications go unfunded. While the failure was disappointing, it was the total lack of information about how to improve that bothered me. I asked some questions about

the decision by email, and spoke to an officer by phone. The answers I got made no sense. I asked additional questions, requested documents, and finally filed an appeal that I eventually lost. Having exhausted all possible formal remedies provided by SSHRC, I arrived in the Federal Court of Canada (FCC). Nervous of the costs — both financial and to my career — I had also proceeded along a

separate track and tried on numerous occasions to find a way to settle the case. The reality is that even if I win this application, I will have lost time and money. More importantly, I will have devoted energy and resources better spent working with students, researching, or publishing my work. Why couldn't I let this go? In the end it is a matter of principle, and, if I am honest, a desire to contribute to the limited conversation about the future of academic research in Canada. Of course, many have suggest-

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ed this is simply sour grapes — another whiny student expecting taxpayer dollars to engage in my latest pet project on Derridean discourse or Saussurean subterfuge. As I have argued elsewhere, it is more than that.

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I contend the existing process for sorting through applicants, awarding SSHRC Post Doc grants, and handling internal appeals fails to meet the standard of procedural fairness required for the

disbursal of public funds. My position is based on existing case law. The FCC itself has stated that applicants to agencies like SSHRC, NSERC, and CIHR deserve feedback that allows them to improve for future competitions. While the type and amount of feedback varies by award and agency, at present, SSHRC's Post Doc competition only provides 2 scores based on a dozen sub criteria as outlined below in table 1.

TABLE 1 – SCORES PROVIDED TO APPLICANTS

<p>TRACK RECORD</p> <p>A. Fellowships, scholarships or other awards obtained</p> <p>B. Previous research experience and/or publications</p> <p>C. Duration of the doctoral studies</p> <hr/> <p>TOTAL 9/15</p>
<p>PROGRAM OF WORK</p> <p>D. Originality, potential significance and feasibility of the proposed program of work</p> <p>E. Comments of the referees and of the supervisor at the intended place of tenure</p> <p>F. Appropriateness of the intended place of tenure, evidenced by the institutional nomination form.</p> <hr/> <p>TOTAL 7.5/15</p>

The question is: does this provide sufficient information for applicants to understand decisions against them? While I do not object to the various criteria listed above, the ways in which they are combined and presented are problematic. According to SSHRC Vice-President, Dr. Hebert-Copley all elements are weighted equally by committee members when reviewing applications. This means, for example, that one's duration in a Doctoral program is valued the same as one's total research experience and publications. If this seems odd, what is perhaps worse is that that nowhere does SSHRC explain what constitutes a "good" amount of time in a doctoral program. Is five years good? Is seven years worse? What exactly is the standard?

Another problem is that many of the listed criteria (see A-F in table 1 above) contain between one and three sub criteria. Does this mean committee members must score a prestigious fellowship exactly the same as an entrance scholarship, or some other less celebrated award? Is working in a lab somewhere valued the same as publishing in top tier journals? Does the type of lab matter? How? I asked these questions and others and, quickly realized no meaningful answers would be forthcoming. Whatever information SSHRC had, it was not the sort of intelligence I would be able to use for my future applications. After conversations with former committee members and other SSHRC staff, it began to appear as if each committee and perhaps committee member weighed these sub-criteria differently. While this may be defensible given the differences between and among disciplines, committee members are not obliged to explain how they are weighted either before or after the competition. As such, no one knows the standard that is being used to differentiate applicants, and launch academic careers. It does appear as if the process itself is *designed* to hide information from applicants.

The legal issues

Through my Application for Judicial Review, I asked the FCC whether SHHRC had the discretion to decide not only how to award grants, but also how much information should be provided about these decisions to applicants, taxpayers, and the Federal Court itself. I raised two issues. The first centred on the appeals process. Appeals can only be made on the grounds that a factual or procedural error has occurred. According to SSHRC policy, “procedural errors” include both departures from SSHRC’s policies and procedures regarding, for example, conflict of interest, and any failures by SSHRC’s staff to provide the prescribed information to the adjudication committee. “Factual errors” exist where there is compelling evidence that the adjudication committee based its decision to not recommend an award on a conclusion that is contrary to information provided by the applicant in the application. I contend, however, SSHRC failed to provide adequate information to understand how the scores were compiled, how the sub criteria

were defined, or how they were weighted. Further confusing the matter, SSHRC offered at least three different and inconsistent explanations for the scoring of my application. Unbelievably, the final explanation provided by SSHRC was delivered only after my appeal was dismissed. It is not the one currently provided on the website for future applicants. The failure to provide a consistent and coherent explanation for the award process made it impossible for me to launch an effective appeal.

The second issue flows from the first. The lack of additional information, I argued, was the result of an opaque award decision process that does not require committees to provide meaningful information to applicants. This is inconsistent with Justice Russell's stated view that in similar circumstances:

Applicants deserve feedback on failed applications for grant monies so they can position themselves and their work better to compete in future granting competitions (Justice Russell in Teitlebaum, Para 113).

In that case, Dr. Teitlebaum's application to the FCC was not successful. While irregularities were noted, the Court deferred to NSERC because throughout the appeals process Teitlebaum was provided additional information and feedback that could allow him to improve for future competitions. This did not occur in my case. Through the appeal process I only received the same two scores out of 15 that had been previously provided in the Award Decision. Consider again the table previously presented on page 139. Imagine you are attempting to assist a student, or are in fact a student yourself. Based on the criteria listed and the assigned scores, which aspect of an application do you think should be improved?

The Hearing (March 21, 2012)

I was nervous as I began to speak. Minutes before I had been fitted for a microphone and advised to speak slowly into another microphone, fixed to the podium. On the table around me were my briefs, and notes, and shiny new iPad that I convinced myself would be useful should I need to refer to specific passages in cited cases. "Justice Phelan," I began, "the case at bar concerns the amount of discretion enjoyed by a body with statutory authority to expend public funds." Because I was double microphoned there was a strange echo,

and I stopped. "I seem to be over-amplified," I said. "Yes," said Justice Phelan, "we are getting you in stereo." I smiled, and took a deep breath. I stepped back from the podium and continued. "With your permission, I will deliver a brief opening statement, present my argument, and answer any questions that arise before attempting to rebut what I believe to be the respondent's best argument. At your direction, I would like to provide a brief closing statement."

In my opening statement, I conceded that SSHRC's role must be respected and that the agency should enjoy discretion in matters in its immediate spheres of expertise. However, I argued, this discretion cannot be used to deny applicants administrative due process or to justify and excuse the expenditure of public funds inconsistent with a correct or reasonable standard of procedural fairness. In the case at bar, I suggested, my application for a grant was unsuccessful and SSHRC sent me correspondence that was inadequate for me to assess the reasons for the decision. Despite a number of requests, SSHRC did not provide adequate information to allow me to launch an appeal, nor understand how to improve or better position my work for future competitions.

In addition, I asked the court to observe that the most recent explanation provided by SSHRC was delivered only after my appeal was dismissed. The failure to provide a consistent and coherent explanation made an effective appeal impossible. I noted, that I had attempted to find an alternative remedy for more than a year, cognizant of the costs — in time and resources — associated with a Judicial Review. I stated that my concerns have been mocked, my arguments ignored, and my motives questioned. I closed by noting that even today, I am still in the dark as to rather basic information about this public grant-making process.

In the argument section of my presentation, I suggested three grounds for the court to rule in my favor. These related to the lack of additional information provided, the standard suggested by Justice Russell, and the fact that different applicants get different treatment based on the same appeal process. "Was it fair," I asked, "for paid tenure-line Professors who are unsuccessful in their grant application to get detailed and meaningful feedback at every step of the appeals process, while unpaid Post Doctoral applicants receive no information, feedback, nor explanation for how to improve?" There

was some nervous whispering from behind me, as SSHRC representatives who had gathered to watch the proceedings attempted to get their Counsel's attention. At the request of the Respondent, Justice Phelan called for a 15-minute recess. The Court officer whispered "good job" when I finished my main arguments. I was nervous when I began, but was feeling pretty good as I left the Courtroom.

We returned to the courtroom and Justice Phelan took his seat minutes later. The Respondent's Counsel raised a number of issues on behalf of SSHRC. She argued that SSHRC's award process was recognized as following best practices and highest international standards and that SSHRC's role is one of funding, not mentoring, applicants. She also argued that providing feedback to applicants beyond the two scores would be too costly, and was not required as SSHRC is allowed wide discretion to design the method of allocating grants and awards. In addition, Counsel attempted a rather technical argument that tried to limit my application to the appeals process and not the award decision. Later, she suggested that had I doubted the adequacy of SSHRC's process, I should have refused to request an appeal of the decision taken against me, and instead filed an immediate application with the Court. Justice Phelan directed a number of difficult questions to the Respondent. Are there any limits to SSHRC's discretion? Is there really no further information on this file? How can I assess whether the decision fell in the range of reasonable outcomes without more information?

We returned from another recess to conclude the hearing. I reiterated my main arguments and ended with a flourish. "SSHRC cannot use discretion as a shield to deny applicants basic information they need to launch an appeal," I argued. "SSHRC appeared to want it both ways," I continued. "On the one hand, they wanted to limit the information that provided to applicants and on the other, they wanted to use that same lack of information to argue there were no grounds for an appeal." Finally, I concluded my presentation with the following. "I concede that not only was my application the worst received in 2011, but the worst in the history of the organization. Now, how can I improve based on the limited information provided to me?"

The Order of March 26, 2012

I was shocked to see the email in my inbox. A decision already? I had been prepared to wait months. I nervously began to read.

Justice Phelan had requested more documents from SSHRC. The order required me to file a request under Rule 317 and SSHRC to provide a certified tribunal record under Rule 318 within 30 days. The issue was that although I had requested documents from SSHRC throughout their internal appeal process, I had not re-requested them for review by the Court. In my defence, I naively assumed that SSHRC would not have deliberately withheld documents central to the decision taken against me. That assumption, I discovered, was an error. It turns out, SSHRC had denied the information to me, and even suggested the information I requested did not exist. In the order, Justice Phelan noted this was a strange case, and as such required a strange remedy. This was language I had used during the hearing, and I hoped that was a good sign. Justice Phelan rejected the attempt to limit the application of judicial review to the appeals decision, and rejected some of the other arguments suggested by the Respondent. He also pointed out that recent case law in the Supreme Court of Canada had limited the need for adequate reasons by administrative decision makers like SSHRC. This challenged one of my central arguments, and had me worried. However, Phelan stated, the Supreme Court had also suggested that there was a requirement that a full record be provided, especially where reasons for a decision were sparse. The order stated that the Court would remain seized of the issue.

I did as required by the order, and less than 30 days later was sent additional documents by SSHRC. It turned out that the scores compiled by each individual did exist after all. Moreover, not only had they been retained by SSHRC, they were part of a report that staff must have known existed. The individual committee member scores are included in table 2.

TABLE 2 – TOTAL INFORMATION FOR AWARD DECISIONS

COMMITTEE MEMBER	TRACK RECORD	PROGRAM OF WORK
1	3.5	2
2	2.9	2.9
3	3.1	2.1
TOTAL	9.5	7

While there is obviously some variance among the scores provided by the three reviewers, especially related to the Program of Work, this alone would probably not be enough to win an appeal or overturn the decision. After all, reasonable people can disagree. The problem for SSHRC, however, is procedural. By failing to provide information that served as the basis of the decision against me, and even going so far as to denying it existed, SSHRC's appeal process has been shown to be seriously deficient. If applicants cannot get access to the scores upon which decisions against them are based, they cannot establish that a factual or procedural error occurred. This mocks administrative due process and is intolerable for an agency dispersing public funds.

The belatedly provided individual scores are also relevant to understand whether the process used to award grants is itself sufficient. In the first hearing, I argued that 2 scores based on a dozen sub criteria did not give applicants the sort of information they would need to improve. This argument was based on previous case law in which Justice Russell had suggested even if agencies like SSHRC must be given wide discretion in their operation, applicants did have a right to understand the decision against them and use the information to improve in the future. If two scores based on a dozen sub criteria are insufficient, are six scores based on three-dozen criteria better? Consider table 3 again. Based on the provided scores, can courts assess whether a decision was reasonable? Again, which aspect of the award criteria should failed applicants improve upon?

Where from here?

It is foolish to try and predict the ultimate outcome of a legal action based on a judicial order. Likewise the questions posed by a Justice during a hearing are not a good indicator of how the case will ultimately be decided. I would submit, however, that the failure to provide all information to me about the decision before I submitted my appeal to SSHRC is not consistent with a procedurally fair appeals process. I do believe this alone should allow my application to the court to succeed. Following the order, I once again contacted SSHRC. Was there any possibility of a mutually beneficial settlement? SSHRC appeared interested and requested a proposal. I suggested the following.

To settle *Wheeldon v SSHRC (AG) T-1287-11*, SSHRC would agree to:

1. Reimburse Johannes Wheeldon for costs incurred through his application for judicial review (up to 10k);
2. Pilot three approaches in the 2013 Post Doctoral Fellowship Competition. Designed to balance the need to provide more information to applicants and the recognition of the difficulty of the task faced by committee members, SSHRC agrees to survey reviewers and explore perceptions on the use of each model. The three models include:

2.1 Expectation Index in which committee members place an "x" in the appropriate boxes (Above expectations, At Expectations, Below Expectations). This review is made available to applicants after the competition upon request. See table 3.

TABLE 3 - EXPECTATION INDEX

<i>Please place an "x" in the appropriate box</i>			
CRITERIA	ABOVE EXPECTATIONS	AT EXPECTATIONS	BELOW EXPECTATIONS
TRACK RECORD			
Fellowships, scholarships or other awards obtained			
Previous re- search expe- rience and/or publications			
Duration of the doctoral studies			
TOTAL /15			
Program of Work			
Originality, potential sig- nificance and feasibility of the proposed pro- gram of work			
Comments of the referees and of the supervisor at the intended place of tenure			
Appropriateness of the intended place of tenure, evidenced by the institutional nomination form.			
TOTAL /15			

OUR SCHOOLS/OUR SELVES

2.2 *Weighted Competitions (Post Hoc Release)*—Each committee agrees on weighting of existing criteria before the competition. See table 4 below. In this approach, the weighting is made available to applicants after the competition, upon request.

TABLE 4 - WEIGHTED COMPETITIONS (POST HOC RELEASE)

CRITERIA	RELEVANT WEIGHT (EXAMPLE ONLY)	POSSIBLE POINTS (OUT OF 15)
TRACK RECORD		
Fellowships, scholarships or other awards obtained	30%	4.5
Previous research experience and/or publications	50%	7.5
Duration of the doctoral studies	20%	3
TOTAL /15	100%	15
Program of Work		
Originality, potential significance and feasibility of the proposed program of work	40%	6
Comments of the referees and of the supervisor at the intended place of tenure	40%	6
Appropriateness of the intended place of tenure, evidenced by the institutional nomination form.	20%	3
TOTAL /15	100%	15

2.3 *Weighted Competitions (Sustaining)*—Each committee agrees on weighting of existing criteria before the competition. See table 5 below. The weighting is made available 2 weeks before competition deadline. Previous weightings are provided to future committees. They are not binding.

TABLE 5 - WEIGHTED COMPETITIONS (SUSTAINING)

CRITERIA	RELEVANT WEIGHT (EXAMPLE ONLY)	POSSIBLE POINTS (OUT OF 15)
TRACK RECORD		
Fellowships, scholarships or other awards obtained	40%	6
Previous research experience and/or publications	40%	6
Duration of the doctoral studies	20%	3
TOTAL /15	100%	15
Program of Work		
Originality, potential significance and feasibility of the proposed program of work	40%	6
Comments of the referees and of the supervisor at the intended place of tenure	50%	7.5
Appropriateness of the intended place of tenure, evidenced by the institutional nomination form.	10%	1.5
TOTAL /15	100%	15

3. Fund a well advertised SSHRC-organized conference (Spring 2013) focused on how to improve innovation for the next generation of social science researchers. In line with recent federal governmental policy and budgetary allocations, the conference will report on: a) Results of online feedback process whereby participants from Canadian academia offer suggestions to improve support to the next generation of social science researchers; b) Present findings and promote debate and discussion on the above funding models and perceptions of reviewers based on the piloted approaches from the 2013 competition.

Finally, while SSHRC would not be bound to any conference outcome, they would agree to publish the results as conference proceedings. This would include a section from senior personnel to address common findings, suggested reforms, and possible impediments to implementation. Two weeks after I sent my proposal I was informed that SSHRC had studied my proposal in detail, but would not accept it. Further, they did not wish to make a counter-proposal. So another hearing, and another trip back east.

What have I learned to date?

First, there are more documents available to applicants than SSHRC provides. In my case documents were denied to me even when I requested a formal appeal, and even when I specifically request them. It is essential applicants get these documents if they to be allowed to try and uncover that a factual or procedural error occurred. As they are the sum total for the decision to award or not to award a research grant, failing to provide them is unacceptable. Through this process, I have unfortunately also come to the conclusion that SSHRC needs more oversight. The number of errors, misstatements, omissions, and outright misrepresentations by junior and senior staff is distressing. The unwillingness to at least attempt to negotiate a settlement suggests to me an agency which is lost and either unaware or deliberately unwilling to confront the untenable position of the vast majority of Post Docs in Canada.

Unfortunately I have also learned the costs of speaking out. While I was warned by some at the beginning of this process that I was

playing a dangerous game, others assured me that standing up to SSHRC would not harm my career. Recent events however, have me worried. Will my past decision to pursue an action brand me as difficult, or a troublemaker? In the academic world where informal rules and unspoken practices often outweigh formal university regulations, I do worry this case may be used to undermine my goal of a Canadian academic career. Will my publications, grants, teaching record, and years of service to the academic institutions with which I have worked in the past be discounted because I dared to rock the boat? While I suspect it has, I remain hopeful. Academia is only as good

Academia is only as good as those who work within its expanse and there are many of integrity who understand the limitations of the existing granting system. Some continue to work toward making the process better for applicants and reviewers alike.

as those who work within its expanse and there are many of integrity who understand the limitations of the existing granting system. Some continue to work toward making the process better for applicants and reviewers alike.

I hope the models I designed to provide more feedback, as presented above, will be of interest to Canadian academics who are asked to evaluate Post Doc applications in future. If SSHRC will not practice the standards it requires of funded social science researchers, perhaps Canadian researchers and educators who are asked to serve this broken process will. These are not the only models that would be useful, but I contend the duty to be more transparent about how public funds are spent is not just a matter of academic credibility. There are legal duties and expectations that cannot be swept under the rug. If nothing else, this case will assist to understand what sort of information future Post Doc applicants deserve. Perhaps it will also serve as a reminder that being entrusted to disburse public funds to support research is both an honour and a responsibility.

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