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Docket: T-77-04
Docket: T-123-04

Citation: 2009 FC 78

Ottawa, Ontario, February 13, 2009

PRESENT: The Honourable Mr. Justice Zinn

T-77-04

BETWEEN:

NEIL MCFADYEN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

T-123-04

NEIL MCFADYEN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. McFadyen is involved in a lengthy and apparently ongoing dispute with the Canadian taxation authority regarding its tax treatment of him and others, who are spouses of Canadian

government employees living and working abroad. During the history of this dispute the name of the Canadian taxation authority has changed. It is currently the Canada Revenue Agency; its predecessors were Canada Customs and Revenue Agency and the Department of National Revenue (Taxation). For ease of reference, regardless of the proper name of the authority at the relevant point in time, I shall refer to the taxing authority throughout as CRA.

[2] These applications deal with Mr. McFadyen's two complaints to the Canadian Human Rights Commission in which he alleges that he and other spouses of Canadian government employees working abroad have been discriminated against by CRA and the Department of Finance. On consent, by Order dated March 2, 2004, Mr. McFadyen's applications for judicial review of the decisions of the Canadian Human Rights Commission to dismiss his complaints were ordered to be heard together, one immediately after the other. These reasons apply to both applications and will be filed in each of the two Court files T-77-04 and T-123-04.

[3] The human rights complaints that underlie these applications share a factual basis with the taxation dispute referenced above. Accordingly, it is necessary to set out in some detail the relevant facts of the taxation dispute.

Background

[4] In August 1992, Mr. McFadyen and his spouse left Canada for Japan. His spouse was taking a position with the Canadian government at the Canadian Embassy in Tokyo, Japan. Mr. McFadyen secured work with the Embassy in 1993 and 1994 both as an employee and as an

independent contractor. In 1994 and 1995 he was employed by a securities firm with an office in Tokyo.

The Tax Dispute

[5] CRA assessed Mr. McFadyen for the taxation years 1993, 1994 and 1995 as a resident of Canada (the "1996 assessment"). Mr. McFadyen appealed the 1996 assessment. Chief Justice Garon of the Tax Court of Canada dismissed the appeal, holding that Mr. McFadyen was a factual resident of Canada during the three years at issue and thus was ordinarily resident in Canada within the meaning of section 259(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Sup.): *McFadyen v. Canada*, [2000] 4 C.T.C. 2573, 2000 DTC 2473. Chief Justice Garon further found that if Mr. McFadyen was not a factual resident of Canada during these three years, he would be deemed by virtue of subsection 250(1)(e) of the *Income Tax Act* to be a resident of Canada. Subsection 250(1)(e) at the time deemed spouses of diplomats or other public servants of Canada to have been resident in Canada throughout the taxation year.

[6] An appeal by Mr. McFadyen to the Federal Court of Appeal was allowed but only to the extent that the Minister, when assessing Mr. McFadyen's taxes, was required to give him a foreign tax credit for taxes that he had paid to Japan: *McFadyen v. Canada*, [2002] F.C.J. No. 1756, 2002 FCA 496. An application for leave to appeal to the Supreme Court of Canada was dismissed: *McFadyen v. Canada*, [2003] S.C.C.A. No. 54.

[7] In 2003, Mr. McFadyen's taxes for 1993 to1995 were reassessed pursuant to the decision of the Federal Court of Appeal.

[8] Mr. McFadyen's spouse, at the same time, was engaged in a dispute with the Ontario Ministry of Finance regarding her status for the purposes of Ontario income tax. It finally agreed with her that she was not a resident of Ontario during the relevant years under appeal and adjusted her taxes accordingly. At the same time, and for the same reasons, the Ontario Ministry of Finance acknowledged that her spouse, Mr. McFadyen, was not a resident of Ontario in taxation years 1993 to 1995. As a result, CRA in 2006 issued a reassessment to Mr. McFadyen reflecting the change in his Ontario taxes for the years 1993 to1995 (the "2006 reassessment"). Mr. McFadyen filed an appeal from the 2006 reassessment directed at the federal taxes payable, the thrust of which was that he was not a resident of Canada during the 1993 to 1995 taxation years. Chief Justice Rip of the Tax Court of Canada held that this objection was essentially the same as the issue that had been determined by the Tax Court of Canada and the Federal Court of Appeal in Mr. McFadyen's appeal of the 1996 assessment. The Tax Court of Canada, on July 31, 2008, held that the doctrine of cause of action estoppel applied to prevent Mr. McFadyen from challenging the federal tax assessments for the years 1993 to 1995, except with respect to the interest assessed under the 2006 reassessment. Mr. McFadyen filed an appeal on September 30, 2008, of that decision to the Federal Court of Appeal (Court File No. A-479-08). That appeal remains outstanding.

The Human Rights Complaints

[9] On February 23, 1999, during the course of his tax dispute with Revenue Canada and prior to the judgment of Chief Justice Garon, Mr. McFadyen filed complaints of discrimination against CRA (CHRC File #H49102) and against the Department of Finance (CHRC File #B48997).

[10] In each complaint, Mr. McFadyen states that the respondent:

> … discriminates against me and other spouses of government employees and other persons living and working outside Canada in the provision of services by treating us in an adverse differential manner because of our marital status, and/or nationality, in violation of section 5 of the *Canadian Human Rights Act.*

[11] An investigator was appointed by the Commission. In both cases the investigator's recommendation was that the complaint be dismissed. By letter dated December 15, 2003, the Commission dismissed these complaints pursuant to subsection 44(3)(b) of the Act. The Commission accepted the investigator's analysis and recommendations. The Commission writes:

> [With respect to both complaints], the complaints are dismissed because:
>
> - *the differentiation is based not on marital status, but on aggregate family income level and,*
> - *there is a bona fide justification within the meaning of section 15 of the Act.*
>
> With respect to complaint (B48997) against Finance Canada, the complaint is dismissed because:
>
> - *paragraph 250(1)(e) of the ITA was not applied in the complainant's case.*
>
> With respect to the complaint (H49102) against [CRA], the complaint is dismissed because:

> • *the evidence does not support the complainant's allegation that the respondent reassessed his income tax returns on the ground of his marital status (spouse of a Canadian government employee). The evidence indicates that the respondent reassessed the complainant's income tax returns as a factual resident of Canada because he had significant ties to Canada which he did not sever while working and living abroad.*

[12] Mr. McFadyen seeks to set aside these decisions.

Issues

[13] The issues raised by the applicant in these applications are as follows:

(a) Whether the investigator failed to conduct a thorough and neutral investigation;

(b) Whether there is a reasonable apprehension of bias;

(c) Whether the Commission made patently unreasonable findings of fact; and

(d) Whether the Commission failed to identify the legal test it used.

Motion to Adjourn

[14] These applications were originally scheduled to be heard in Ottawa on September 26, 2006, before Justice von Finckenstein. Mr. McFadyen, prior to that date, had filed his notice of objection with respect to the 2006 reassessment. There had not then been any response from CRA with respect to that objection and, as noted previously, when the negative response was received, Mr. McFadyen filed an appeal to the Tax Court of Canada and on July 31, 2008, the Tax Court granted a motion striking out Mr. McFadyen's appeal insofar as it attempted to re-litigate the issues previously determined by Chief Justice Garon which were upheld on appeal.

[15] Justice von Finckenstein ordered that these applications be adjourned *sine die*, provided that Mr. McFadyen could bring them back on two weeks notice on the later of "(i) a decision to his notice of objection dated May 24, 2006, which is not appealed, and (ii) a decision from the Tax Court of Canada on appeal from a negative decision to his notice of objection dated May 24, 2006."

[16] Mr. McFadyen, after the Order of Justice von Finckenstein, filed a notice of his intention to act in person. After the decision of the Tax Court on July 31, 2008, Mr. McFadyen wrote to the Court on August 13, 2008 as follows:

> As the Tax Court has now ruled that the Appellant has no right of appeal available in the Tax Court the Appellant wishes to set a hearing date for 1 day as soon as possible for these applications as per the Order of Justice von Finckenstein dated September 26, 2006.

In accordance with the wishes of Mr. McFadyen an Order issued August 25, 2008, at the direction of the Chief Justice, setting these applications down for hearing in Ottawa, on December 16, 2008.

[17] Mr. McFadyen took a series of steps prior to the scheduled hearing date. On November 7, 2008, the Court granted his motion, in part, permitting him to file a proposed Further Supplementary Affidavit. On December 2, 2008, the Court granted his further motion to file a proposed Third Further Supplementary Affidavit. On December 10, 2008, I issued a Direction in response to his request, directing that his new memoranda be accepted for filing.

[18] In short, the parties, and most particularly the applicant, were proceeding towards the hearing set for December 16, 2008, when, late in the morning on December 15, 2008, on the eve of

hearing, the Court received a letter from Alan Riddell, Mr. McFadyen's former counsel in these matters, advising that his firm had just been retained by the applicant to seek an order adjourning the hearings "on the basis that there is currently pending an appeal to the Federal Court of Appeal, involving the same parties, which ought to be disposed before these Judicial Review Applications are disposed of by a Judge of the Trial Division [sic]." The adjournment request was opposed by the respondent.

[19] The motion for an adjournment was heard at the commencement of the hearing on December 16, 2008, and I indicated orally that the request for an adjournment was being dismissed with reasons to follow. These are my reasons for that decision.

[20] The applicant submitted that there were three reasons why the adjournment ought to be granted. First, he submitted that a Judge of this Court, Justice von Finckenstein, had already determined that there ought to be no hearing of these applications until the tax issue raised in the applicant's notice of objection has been definitively resolved. He accepted that while the principle issue in the notice of objection had been resolved by the Tax Court, it was currently under appeal to the Federal Court of Appeal and was expected to be heard in May 2009. Thus, he argued, the situation facing the Court on December 16, 2008, was precisely that which it faced on September 26, 2006.

[21] Second, the applicant submitted that he had erred in making his request that the matter be rescheduled for hearing. He claims to have misinterpreted the Order of Justice von Finckenstein

believing that if he failed to request that these matters be rescheduled for hearing within two weeks of the decision of the Tax Court, he would be unable to ever have these matters heard.

[22] Lastly, it was submitted that if these applications are heard prior to the determination of the Federal Court of Appeal, it may result in contradictory findings. In this respect counsel submitted that the issue of whether Mr. McFadyen is estopped from arguing that subsection 250(3) of the *Income Tax Act* is discriminatory and contrary to section 5 of the *Canadian Human Rights Act* is an issue that is in dispute both before this Court and before the Federal Court of Appeal.

[23] I find that none of these submissions, in the circumstances at hand, are sufficient to warrant an exercise of my discretion under Rule 36 of the *Federal Courts Rules* to grant an adjournment. The relevant factors when considering whether to grant an adjournment include the prejudice that would be caused to one or more of the parties, the prejudice to the Court in losing a hearing date, and the public interest in a timely conclusion to litigation.

[24] But for Mr. McFadyen's request that these matters be rescheduled, the hearing on December 16, 2008, would not have been set. There are many boxes of documents that have been filed by the parties in these matters, occupying at least twelve feet of shelf space. Counsel for the respondent prepared for the hearing and had largely done so when she received verbal advice from Mr. Riddell on Sunday, December 14, 2008, that he would be writing the Court the next day seeking an adjournment. As is obvious, this is the second time counsel has had to prepare for the hearing of these matters. Further, as this date was set some four months ago, the Court has reviewed the

materials filed in order to properly prepare for the hearing. Again, this is the second time such preparation has been undertaken – by two different Judges of this Court.

[25] It is no answer to the loss of time and resources by respondent's counsel and the Court to say, as the applicant did, that the matter can quickly be rescheduled, again, after the decision of the Federal Court of Appeal.

[26] It is to be noted that applicant's counsel, when asked if these applications would be discontinued if the Federal Court of Appeal rejected his client's appeal, was unable to provide the Court with that assurance. Thus, it could not be said that the adjournment sought might result in a future saving of judicial resources.

[27] It is also no answer to the lost time and resources to plead that the request to reschedule was made by a self-represented party who may have misinterpreted the Court's Order. First, he was represented at the time the Order in question was made and had every opportunity then to be advised as to its meaning and application. Further, the applicant, if in doubt, could have retained counsel and sought advice, which he admits to having done only a few days prior to the hearing to assist in his preparation of oral submissions. Every litigant has a right to present his own case. There are risks associated with that manner of proceeding and the prejudice, if an imprudent decision is made, must rest upon the litigant and not upon the opposing party or the Court.

[28] Generally, the interest in avoiding conflicting judicial decisions from two Courts outweighs the public interest in bringing litigation to an end in a timely manner. However, counsel conceded that it was possible that a decision in the present applications might be made without making any determination on the issues before the Federal Court of Appeal. In fact, as will be seen in the reasons that follow I have made no decision on any issue that is now before the Court of Appeal as, in my view, it was unnecessary to do so to dispose of these applications.

[29] For these reasons I refused to grant the adjournment and the hearing continued. Prior to excusing himself, Mr. Riddell spoke to a matter that had been outstanding since September 21, 2006, a motion to strike portions of the respondent's memoranda. The original motion was brought just prior to the first scheduled hearing date and thus the applicant requested that it be dealt with by Justice von Finckenstein at the hearing. The motion to strike alleges that the impugned statements are not supported by the evidence in the record, relate to a disputed or controversial issue in the proceeding, or are prejudicial to the applicant. Needless to say, counsel for the respondent assured the Court that during the course of her submissions she would be pointing to the evidence in the record supporting the statements made in her memoranda.

[30] It became quite evident that a formal ruling on each and every one of the passages disputed by the applicant would require the better part of the day and that it would be unlikely to serve any real purpose at this point in the litigation. Any statement made by counsel, whether in a memoranda or in oral submission, must have the support of evidence in the record. Accordingly, the matter was

dealt with during the hearing by my undertaking to counsel and the parties that no submission from either party that relied on facts not in the record would be accorded any weight.

Analysis

Whether The Investigator Failed To Conduct A Thorough And Neutral Investigation

[31] Mr. McFadyen submits that the Commission breached procedural fairness in that it relied on the reports of the investigator which were neither thorough nor neutral. He raises under this heading five allegations which he says show that the investigator was not thorough as well as an allegation of impartiality that will be dealt with later.

[32] First, the applicant alleges that the investigation was not thorough as the investigator failed to investigate facts concerning his Ontario residency status. The investigator's reports are dated May 8, 2003. In paragraph 34 of his Amended New Memoranda of Argument the applicant submits that as a result of CRA, on March 6, 2006, allowing his objection and confirming that he was not a resident of Ontario at the relevant times, CRA "implicitly conceded" the inaccuracy of a number of paragraphs of the investigator's reports. While, as the applicant notes, he had advised the investigator that he had filed an objection to his 2003 Ontario residency reassessment, there had been no determination made on that objection until almost three years after the investigator concluded her reports and more than two years after the decisions under review.

[33] In my view, it cannot be maintained that the investigator was less than thorough by pointing to facts that were not known or in existence at the time of the investigation. Mr. McFadyen submits

that the investigator erred in failing to investigate the CRA with respect to his objection and accepted the position of CRA at face value. There are two difficulties with this position. First, there is no evidence that the investigation he suggests ought to have been undertaken would have resulted in any different conclusion. The issue of Ontario residency, as Mr. McFadyen acknowledges, is a matter for the Ontario authorities and not the CRA. Second, there had been a finding of the Tax Court, upheld by the Federal Court of Appeal, that Mr. McFadyen was assessed on the basis that he was a factual resident of Canada, not a deemed resident under subsection 250(1)(e) of the *Income Tax Act.* While Mr. McFadyen has challenged that conclusion in his objection to the 2006 reassessment, and that matter is currently before the Federal Court of Appeal, it cannot retroactively change the evidence that was before the investigator in 2003. She made her reports on the facts before her at that time. She cannot be faulted for so doing.

[34] Second, the applicant alleges that the investigation was not thorough as the investigator failed to disclose and report crucial evidence. Specifically, he submits that the investigator had evidence that his marital status was considered in rendering the 1996 assessment but this was not reflected in her reports. The particulars of the alleged omitted evidence are recited at paragraphs 41 through 45 of his Amended New Memoranda of Argument.

[35] The respondent submits that the investigator's report on the CRA complaint shows that evidence of a consideration of marital status was reflected in the report, and points to paragraphs 42 to 45 of the report on the CRA complaint and the summary of the evidence of Eliza Erskine, Senior Rulings Officer. In particular, the respondent points to the following from paragraph 42: "... the

issue is the nexus to Canada. For example, where your house is, spouse, dependants, family, social connections, provincial ties (e.g. driver's licence) and health coverage etc. is indicative of where you are based for taxation purposes." Counsel submits that contrary to the submissions of Mr. McFadyen, CRA did not deny that one's marital status or the location of one's spouse could be relevant factors in determining residency. Further, the respondent submits that the report on the CRA complaint makes it clear that marital status was a factor considered by CRA but that the mere fact that it was considered does not entail that there has been a breach of the Act. The passage at paragraphs 71 to 74 of the report on the CRA complaint supports the respondent's submissions, and, in my view, is a full and complete answer to the submissions of Mr. McFadyen:

> 71. The issue is whether the complainant's income tax returns were reassessed and he was deemed "ordinarily resident" in Canada and a "factual resident" of Ontario because he was married, specifically, to a government employee posted abroad.
>
> 72. The evidence shows that the complainant was reassessed because of numerous factors which indicated that he had significant social, personal, economic, and financial ties in Canada; thereby , making him a factual resident of Canada, and liable to pay income tax to Canada not Japan. The evidence also indicates that the respondent used the complainant's marital status, i.e., spouse of a public servant, as one such tie to Canada in determining that the complainant was a Canadian resident for tax purposes.
>
> 73. The Supreme Court of Canada stated in *Thomson v. M.N.R.* and *Beament v. M.N.R.* that marital status is one of the factors in determining whether a tax payer is a resident for the purposes of the income tax. This is due to the fact that marital status is one of the indicia of social ties to Canada for a determination of residence for tax purposes. According to the common law, had the complainant severed all his ties to Canada, he would have been assessed as a non resident despite his marital status; or had the complainant retained all of his ties to Canada, and had been

> unmarried, he would still have been assessed as a factual resident of Canada.
>
> 74. Although the respondent did not provide comparative data on how it treated non married individuals, or individuals not married to public servants, the evidence provided does not indicate that the complainant was treated in an adverse differential manner, simply because his marital status, as a spouse of a public servant, is considered by common law to be one of the factors; albeit not the only one, in determining his residency status. As indicated in paragraph 66 above, the Tribunal stated in *Menghani* and *Naqvi* that citing a number of factors, including grounds proscribed by the *CHRA* (such as marital status) in the proper case and when adequately assessed, may be a relevant consideration, and may not amount to discrimination under the *CHRA*.

[36] Third, the applicant alleges that the investigation was not thorough as the investigator failed to obtain comparative data from CRA. On February 17, 2001, the investigator wrote to CRA with the following request: "Please provide comparative analysis btn the C and other LES not married to Can government employees (remove names just provide data) [sic]." Presumably this would provide evidence as to whether the applicant's tax status differed from other locally engaged staff who were not married to Canadian government employees. CRA responded to this request by email dated March 3, 2003, as follows:

> After looking into the matter, and discussing the matter with others, she [Ms. McKenny] has confirmed that the CCRA does not consider it feasible at this time to verify the manner in which other embassy staff were assessed. From DFAIT, it would be possible to obtain a list of Canadians employed at various embassies abroad, and then review their past files for one or more years. However, she indicates that this could take several weeks of full-time research. As well, it is likely that due to the passage of time the original records may be unavailable, although relevant details are likely retained and available in electronic or other format.

> Given the resources that would be necessary to explore the treatment of other taxpayers, the CCRA considers that not producing this limited amount of information is most compatible with your desire to complete the investigation of this file within a short time frame. I trust you are able to proceed to complete your consideration of the complaints.

The investigator summarizes this response at paragraph 26 of her report on the CRA complaint and then writes: "Because the respondent did not provide the comparative data, further investigation had to be undertaken."

[37] The respondent submits that this situation is distinguishable from that in *Charlebois v. Canada (Canadian Human Rights Commission)*, unreported, September 17, 1998, Court File T-2314-96, relied on by the applicant. In *Charlebois*, the complainant said that he believed that there was an underlying, unexpressed reason for his dismissal. The investigator initially asked the employer what the Court found to be relevant questions on this issue but rather than waiting for a response, proceeded to conclude the investigation and finalize the report. Mr. Justice Campbell found that because of this the investigation was not thorough.

[38] I agree with the submission of the respondent that *Charlebois* is distinguishable. Here the investigator did receive a response to the request for comparative data from CRA, stating that it was not considered feasible to provide the data at that time. More importantly in my view, the data asked for in this case were not pivotal to the determination the investigator was required to make; whereas in *Charlebois*, the information requested appears to be the gravamen of the complaint. Accordingly, I find no error on the part of the investigator in how she proceeded.

[39] Fourth, the applicant alleges that the investigation was not thorough as the investigator failed to investigate and thus decide on aspects of his complaints, namely, the allegation that he was discriminated against based on nationality and sex, and as the investigator failed to investigate and question CRA as to the purpose of the *Canada-Japan Income Tax Convention Act* and the *Vienna Convention on Diplomatic Relations*.

[40] In her report on the CRA complaint, the investigator writes:

> 68. The complainant includes several grounds in his complaint; namely, nationality, sex and sexual orientation.
>
> 69. A review of the particulars of his complaint indicates that only the ground of marital status is related to this human rights complaint. Accordingly, the other grounds were not investigated.
>
> 70. The complaint also includes the grounds of "citizenship "previously living in Canada" and "social status". These are not prohibited grounds under the *Canadian Human Rights Act (CHRA)*. Therefore, they were also not investigated as the Commission has no jurisdiction to deal with these grounds.

A similar conclusion was reached in the report on the Finance Department complaint.

[41] The respondent submits that, on a fair reading of the human rights complaints filed by the applicant, the investigator's conclusion that only the ground of marital status is related to his complaints was reasonable.

[42] Mr. McFadyen in his oral submissions argued that the complaint of discrimination on the basis of sex went to his allegation that CRA was engaged in systemic discrimination against women as most spouses who find themselves in the situation he himself was in, are women. Mr. McFadyen is not a member of the group which he asserts are subject to systemic discrimination. In my view, it is not unreasonable for the investigator or the Commission to refuse to investigate an allegation of systemic discrimination against a class of persons by someone who is not personally a member of that class unless there is evidence that members within that class are unable to make their own complaint.

[43] I also find that it was not unreasonable for the investigator to conclude that nationality was not pertinent to the complaint. I see nothing to support the submission that Mr. McFadyen's tax treatment turned on his nationality. He was taxed in Canada because of the finding that he was an ordinary resident of Canada. His nationality had no role to play in that decision and none was suggested. Those having to pay Canadian taxes come from many countries and have many nationalities. There is nothing on the record, or in the complaints, that warrants any consideration that Mr. McFadyen's tax treatment was made on the grounds of his nationality. Simply raising a ground of discrimination does not necessarily mean the allegation has any merit.

[44] As to the submission that the investigator failed to question CRA concerning the Canada-Japan tax treaty or the Vienna Convention, that is simply not borne out by the evidence. Pages 491 to 504 of the Applicant's Further Application Record, Vol. 2 of 4, is a record of the interview the

investigator had with Eliza Erskine, Senior Rulings Officer, and they show that the investigator did question her on both topics.

[45] Fifth, the applicant alleges that the investigation was not thorough as the investigator failed to interview "a number of vitally connected decision makers" at CRA. This cannot be sustained. First, I find that the investigator did question those at CRA who had been the most critical decision-makers, namely Ms. McGetchie and Ms. McKenny and, in addition, had an interview with Ms. Erskine who was a senior Rulings Officer at CRA. Justice Nadon of the Federal Court – Trial Division, as he then was, in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, at para.69, has observed that the fact that an investigator has not interviewed every witness that an applicant would have liked to be interviewed is not necessarily fatal to the validity of the report. The investigator is the master of his or her own process. The investigators are experienced and knowledgeable in this area and ought to be accorded wide latitude in how they conduct their investigations. When, as here, the key witnesses are interviewed, the Court should exercise restraint in finding that the investigation was flawed because others were not investigated, unless there is clear and cogent evidence that those not interviewed had critical evidence to offer. There is no such evidence here, and I find that the decision of the investigator as to whom she would interview was reasonable.

Whether There Is A Reasonable Apprehension Of Bias

[46] The applicant submits that the Commission's decision ought to be set aside on the basis that there is a reasonable apprehension of bias on its part. The evidence on which he relies is the refusal

of the Commission to entertain his concerns respecting errors and omissions in the investigator's reports and his concerns about possible bias on the part of the investigator. He relies, in large part, on the following passage describing a telephone conversation a representative of the Commission had with him. It is reproduced at page 516 of the Applicant's Further Application Record, Vol. 2 of 4: "I explained to the complainant that while Ms. Helgason was prepared to meet with him, she wanted him to know in advance that she was not prepared to change the investigation report and that the correct procedure at this point was for him to make a written submission." The applicant asserts that this is proof of the closed-mind of the Commission and thus its bias.

[47] The respondent submits, correctly, that the test is whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the Commission has been predetermined: See *Zündel v. Canada (Attorney General)*, [1999] F.C.J. No. 964, 175 D.L.R. (4th) 512. I am satisfied that the Commission had not predetermined the matter and thus hold that there is no bias shown. It is clear from the entirety of the written summary of the telephone conversation that the Commission was prepared to hear or read what Mr. McFadyen had to say and that it would engage in a further investigation if it felt that it was warranted. What it was not prepared to do was to change the reports. If a further investigation had been warranted no doubt there would have been addenda or further reports for the Commission's consideration in addition to the written submissions of both parties on the reports. The Commission had not determined at that point what its decision on the reports and the submissions of the parties would be. As such there was no predetermination.

[48] It is also claimed by Mr. McFadyen that he had a reasonable apprehension of bias on the part of the investigator because she accepted the statements of CRA at face value, failed to seek support for those statements, availed herself of a CRA official as an expert and refused to consider the report by the applicant's expert, and refused to take any action as a result of the applicant pointing out deficiencies in her reports.

[49] I find that none of these claims are supported by the evidence and thus there can be no finding of bias as described in *Zündel,* above. The investigator conducted a detailed and thorough examination of the fundamentals of the applicant's complaints. She recites the evidence she obtained both from the applicant and the respondents. She is permitted wide latitude as to how she conducts her investigation. There is nothing in the reports or her actions that suggests that she favoured one party over the other. She accepted no expert from either party, but indicated that if an expert was needed the Commission would retain its own and not rely on either party's proposed expert. In short, her actions were even-handed and appropriate.

Whether The Commission Made Patently Unreasonable Findings Of Fact

[50] The applicant submits that the Commission, in accepting the investigator's reports, made a patently unreasonable finding of fact. He submits that there is a clear contradiction between the investigator's findings that the respondent based its decision on his marital status and the Commission's conclusion that it did not. The passages he claims to be contradictory are as follows:

> The evidence also indicates that the Respondent used the Complainant's marital status, i.e. spouse of a public servant, as one

> such tie to Canada in determining that the complainant was a Canadian resident for tax purposes.

and

> The evidence does not support the Complainant's allegation that the Respondent reassessed his income tax returns on the ground of his marital status (spouse of a Canadian government employee). The evidence indicates that the Respondent reassessed the complainant's income tax returns as a factual resident of Canada because he had significant ties to Canada which he did not sever while working and living abroad.

[51] The applicant's contention that these are directly contradictory is flawed. There is a substantial difference between saying, as the investigator did, that one factor looked at in determining the applicant's ties to Canada was his marital status, and saying, as the Commission did, that his income tax was not reassessed on the grounds of his marital status.

Whether The Commission Failed to Identify The Legal Test It Used

[52] The applicant submits that it is not clear from the record what test the Commission used to conclude that marital status was not used in determining his tax status. Again, in my view this submission is based on a flawed understanding of the decision of the Commission. The investigator's reports indicate, as the CRA admitted, that marital status is one of the factors that it may consider when determining whether a taxpayer is ordinarily resident in Canada – that alone does not necessarily result in a finding that there has been discriminatory conduct. Here the Commission found that subsection 250(1)(e) of the *Income Tax Act* was not applied to Mr. McFadyen, with the result that he was not deemed resident solely on the grounds of his marriage to a government employee working abroad. As a consequence, there was no possible finding that

there had been a *prima facie* case of discrimination, as has been asserted by Mr. McFadyen. I conclude from my reading of the reports and the decisions of the Commission that it was satisfied that there was no evidence that Mr. McFadyen was discriminated against in his tax treatment because of or on the grounds of marital status. That, in my view, was a reasonable conclusion to have reached based on the totality of the evidence.

Conclusion

[53] These applications must be dismissed. Neither the Commission nor the investigator breached procedural fairness and the decision of the Commission to dismiss the applicant's complaints was reasonable based on the evidence before it.

[54] The respondent asks for costs in these matters and I see no reason why it should not be awarded its costs. However, while the respondent will be entitled to its disbursements in each application, much of the legal work done was incurred for both matters, e.g. memoranda were duplicated, etc. Accordingly, the respondent shall be entitled to its fees in Court File No.T-77-04 but shall only be entitled to its fees in Court File No.T-123-04 for legal work that was performed uniquely for that application. In this way, the respondent will not be unjustly awarded fees in the second application for work in the first application which was largely reproduced in the second application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The motion to adjourn the hearing is dismissed;

2. The applications for judicial review are dismissed; and

3. The respondent is to have its costs in accordance with these Reasons.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-77-04
STYLE OF CAUSE:	NEIL MCFADYEN v. THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-123-04
STYLE OF CAUSE:	NEIL MCFADYEN v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 16, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Zinn J
DATED:	February 13, 2009

APPEARANCES:

Alan Riddell	FOR THE APPLICANT (T-77-04 / Motion Doc. No. 90) (T-123-04 / Motion Doc. No. 75)
Neil McFadyen	APPLICANT On his Own Behalf
Tatiana Sandler	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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