

Federal Court



Cour fédérale

Date: 20171121

Docket: T-528-17

Citation: 2017 FC 1053

Toronto, Ontario, November 21, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MARY KWAN

Applicant

and

AMEX BANK OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [the Commission] communicated in a letter dated March 23, 2017, which dismissed the Applicant's complaint against the Respondent without referring it to the Canadian Human Rights Tribunal [the Decision].

[2] As explained in greater detail below, this application is dismissed, because the Applicant has not identified any reviewable errors in the Decision or the process leading thereto.

II. Background

[3] The Applicant, Ms. Mary Kwan, held a credit card issued by the Respondent, Amex Bank of Canada [Amex] between 1998 and 2011. However, she cancelled this card because she was not using it. On August 4, 2015, she contacted Amex's call centre to inquire about applying for a new card. She states that she was informed during that call that Amex would not accept a post office box as an address. On August 20, 2015, Amex contacted Ms. Kwan to ask her security questions to confirm her identity in connection with the application for the card. However, the Amex representative stated that some of her answers were incorrect. Ms. Kwan then contacted the Amex call centre on August 25, 2015, resulting in a discussion about the process to confirm her identity.

[4] Ms. Kwan was subsequently sent documentation to take to Canada Post, along with her identity documentation, as a means of confirming her identity. She attended a Canada Post office on September 10, 2015. However, she contacted Amex the next day and was advised that the identity verification process had failed, apparently as a result of an error in a barcode attached to the document that Amex had sent her to bring to Canada Post. In a subsequent call, on September 15, 2015, a representative of Amex advised Ms. Kwan that she could attend Amex's service location in Toronto to present her passport as verification of her identity. Ms. Kwan did so on September 18, 2015, following which she received her new card on or about

September 25, 2015. In October 2015, she cancelled the card because she did not wish to pay the annual fees.

[5] On February 4, 2016, Ms. Kwan filed a complaint with the Commission, alleging that Amex had delayed her application and subjected her to a lengthy process to validate her identity because of her race, her national or ethnic origin, her skin colour, and her age. On December 2, 2016, she amended her complaint to add an allegation of discrimination based on her marital status. She argues that comments made by Amex's representatives during their calls support her complaint. Amex denies the allegations, arguing that validation of her identity was in accordance with its legal obligations and was required in order to issue her with the card she requested.

[6] Ms. Kwan's complaint was referred to an assessor with the Commission [the Assessor], who reviewed the parties' positions and the documentary evidence submitted, including transcripts of Ms. Kwan's phone conversations with Amex's representatives, which Amex had provided to Ms. Kwan at her request. Amex also provided to the Assessor audio recordings of these phone conversations. The Assessor interviewed Ms. Kwan on November 28, 2016, and issued a report dated December 7, 2016 [the Assessment Report or the Report], which concluded that the evidence did not support a finding that Ms. Kwan was treated differently in the provision of a service on the basis of the grounds cited in her complaint. The Assessment Report therefore recommended, pursuant to s 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], that the Commission dismiss the complaint because further inquiry was not warranted.

[7] Following issuance of the Assessment Report to the parties, each provided submissions on the Report, and Ms. Kwan submitted a reply to Amex's submissions. The Commission subsequently issued the Decision that is the subject of this judicial review. The Commission stated that it had reviewed the Assessment Report and the submissions filed in response to the Report but that it had decided, pursuant to s 44(3)(b)(i) of the CHRA, to dismiss the complaint because, having regard to all the circumstances, further inquiry was not warranted.

III. Assessment Report and Decision

[8] The Assessment Report reviews the process followed by the Assessor, the evidence gathered, the legislative framework governing Amex's activities, and the chronology of events giving rise to Ms. Kwan's complaint. It then sets out an assessment, in which the Assessor reviews the parties' respective positions, considers the evidence, and expresses the resulting conclusion leading to the Assessor's recommendation that further inquiry was not warranted.

[9] In reviewing the applicable legislative framework, the Assessor describes Amex as a Schedule II Bank pursuant to the *Bank Act*, SC 1991, c 46, which issues credit cards to individuals and businesses in Canada. The Assessor also states that, in accordance with the "2006 PCMLTFA (Proceeds of Crime, Money Laundering and Terrorist Financing Act)" and regulatory guidance from the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and the Office of Superintendent of Financial Institutions (OSFI), credit card issuers are required to obtain a credit applicant's name and address and otherwise comply with client identification requirements and ascertain client identity. The Assessor then canvasses the various

means, as explained by Amex, which it employs to verify the identity of an applicant for a credit card.

[10] In describing Ms. Kwan's position, the Assessment Report notes that she complains that Amex delayed her credit application by 50 days and subjected her to a lengthy process to validate her identity because of the following personal characteristics: her race, national or ethnic origin, skin colour, age, and marital status. She alleged that, during the August 25, 2015 phone call with a representative of Amex who was located at a call centre in India, the representative spoke to her in a sexist and arrogant tone of voice. Ms. Kwan expressed the opinion that India is a very sexist country. She further asserted that Amex took steps to verify her identity only or mainly because her last name has an Asian connotation. She also alleged that she was treated rudely by the representative of Amex to whom she spoke on September 11, 2015, and that the Amex representative from India with whom she had spoken on August 25, 2015, telephoned her on November 20, 2015, and passed himself off as a telemarketer working for Rogers Communications. Ms. Kwan also asserted that the transcripts of the phone conversations provided by Amex were inaccurate and fabricated.

[11] The Assessment Report summarizes Amex's position, that it was legally required to validate Ms. Kwan's identity and that any delays in issuing her a credit card were attributable to meeting this requirement and not to any prohibited grounds of discrimination. Amex submitted that the audiotapes of the conversations between its representatives and Ms. Kwan show that its representatives behaved in a reasonable and non-discriminatory manner throughout these interactions.

[12] The Assessment Report explains that, in the course of the investigative process followed by the Assessor, Ms. Kwan was provided with a verbal summary of Amex's position on November 25, 2016, and given an opportunity to provide a verbal rebuttal during an interview with the Assessor on November 28, 2016. In her rebuttal, Ms. Kwan expressed her belief that Amex is not bound by the FINTRAC requirements because it doesn't accept deposit liabilities or offer savings or chequing services or other investment accounts. She believes that, when she applied for a credit card, Amex made an assumption that the supplementary card was for a spouse, although it was actually for her brother, such that her marital status as single affected the way in which her request was processed. Ms. Kwan provided the Assessor with copies of the written transcripts of her August 20, 2015, August 25, 2015, and September 15, 2015 phone calls with Amex, which she alleges contained inaccuracies and were changed by Amex to their benefit. She also claimed that, during one of the calls with Amex's representatives, the representative told her that they target people with foreign names.

[13] In its analysis of the evidence, the Assessment Report explains that the Assessor reviewed the calls between Ms. Kwan and Amex. The Assessor begins with the call where Ms. Kwan first applied for the credit card, described by the Assessor as having occurred on August 20, 2015. The Assessor notes that, although Ms. Kwan provided a post office box as an address and stated that her previous credit card statements were sent to her post office box, Amex's representative explained that this was no longer an acceptable practice. The representative also asked questions about the supplemental cardholder proposed on the application but did not ask Ms. Kwan about her marital status.

[14] In reviewing the August 25, 2015 call, the Assessor noted that, contrary to Ms. Kwan's assertions, Amex's representative did not refer to Ms. Kwan as a "native". During that call, Amex's representative repeated and explained the security questions multiple times, and Ms. Kwan answered some of them incorrectly, as a result of which the application was not completed at that time.

[15] Although Ms. Kwan submitted a recording of a telephone interview purported to be with Amex's client ombudsman, Deogratias Niyonzima, the Assessor was unable to validate the identity of the person whose voice was on the tape or to determine the time and date of the call. However, the Assessor noted that, during the recording, this person explained to Ms. Kwan that each credit card application is processed in the same way, although a range of different ways can be used to validate the applicant's identity.

[16] The Assessor also noted that, according to the call log submitted by Amex, no one from Amex called Ms. Kwan on November 20, 2015, and that Amex's employees do not work for or represent Rogers Communications.

[17] Finally, the Assessor observed that, contrary to Ms. Kwan's allegations, there did not appear to be any discrepancies between the audio recordings and the transcripts of the various calls. The Assessor explained in the Assessment Report that, although Ms. Kwan alleged that it was not her voice on the audio recordings, Amex's representative verified at the beginning of every call that the caller was in fact Ms. Kwan by asking various security questions such as asking for her full name, address, and date of birth. The Assessor also recognized Ms. Kwan's

voice on the audiotapes from having conversed with her himself during the investigation process. The Assessor concluded that, despite Ms. Kwan's assertions to the contrary, one of the voices on the recordings was hers.

[18] Based on the evidence, the Assessor concluded that Ms. Kwan was provided with the service in the same manner that Amex generally provides such service, that Amex provided the credit card to Ms. Kwan in a timely manner once she was able to satisfactorily confirm her identity, and that any delays in the process were not due to any of the prohibited grounds but rather were due to the fact that Ms. Kwan did not initially provide acceptable information to permit Amex to confirm her identity as required by law. The Assessor therefore recommended that the Commission dismiss the complaint pursuant to s 44(3)(b)(i) of the CHRA because, having regard to all the circumstances, further inquiry was not warranted.

[19] After the parties were given an opportunity to provide submissions on the Assessment Report, the Commission issued the Decision dismissing the complaint. The operative paragraph of the Decision states as follows:

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After having examined this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted.

IV. Issues

[20] Ms. Kwan, who is self-represented, submits that the following are the issues for the Court's consideration in this application:

- a. Whether the Commission erred in law in the way it exercised its discretion;
- b. Whether the Commission exceeded its jurisdiction;
- c. Whether the Commission erred in finding that there was no discrimination; and
- d. Whether the Commission breached its duty of fairness.

[21] Amex's position is that Ms. Kwan's arguments raise two issues:

- a. Whether the Commission acted unreasonably in exercising its discretion under s 44(3)(b)(i) of the CHRA to dismiss Ms. Kwan's complaint on the grounds the Commission was satisfied that an inquiry was not warranted; and
- b. Whether the Commission breached the duty of procedural fairness.

[22] Ms. Kwan raises a number of arguments in support of her position that the Decision should be overturned by the Court. These arguments can all be addressed in the course of considering whether the Commission breached the duty of procedural fairness and whether the Decision is substantively unreasonable. I therefore adopt, as an analytical framework, the two issues that Amex has framed.

V. Standard of Review

[23] As reflected in Amex's articulation of the first issue above, the substance of the Decision is reviewable on a standard of reasonableness. The parties are in agreement on this point, and I concur that the case law supports this position (see *Ritchie v Canada (Attorney General)*, 2017 FCA 114 [*Ritchie*] at para 16).

[24] With respect to issues of procedural fairness, Ms. Kwan's submissions state that the standard of correctness is applicable. Amex refers to authority to this effect as well, but also to the decision in *McIlvenna v Bank of Nova Scotia*, 2017 FC 699 [*McIlvenna*], involving a judicial review of a decision by the Commission to dismiss a complaint under s 44(3)(b)(i) of the CHRA following an investigation of the sort that was conducted in the case at hand. Justice Boswell referred to conflicting case law on the standard of review applicable to procedural fairness and concluded as follows at paragraph 32:

[32] I find it unnecessary in this case to determine whether a reasonableness standard of review, or a correctness standard of review with or without some degree of deference, should be applied. In my view, the essential question to address with respect to the Commission's investigation is whether the Investigator overlooked or failed to investigate "obviously crucial evidence." In *Gosal v. Canada (Attorney General)*, 2011 FC 570 at para 54, 205 ACWS (3d) 1049, this Court observed that: "the 'obviously crucial test' requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint." This is consistent with this Court's earlier decision in *Slattery* where it was found that judicial review will be warranted "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence" (at para 56).

[25] This passage from *McIlvenna* relies on the decision in *Slattery v Canada (Human Rights Commission)*, [1994] 2 FCR 574 [*Slattery*], aff'd (1996), 205 NR 383 (FCA), which is also instructive in understanding the respective roles of the investigator and the Commission and the significance of submissions provided to the Commission following receipt of an investigator's report. As will be explained later in these Reasons, the particular arguments that Ms. Kwan identifies as raising procedural fairness concerns relate to the effectiveness of her opportunity to comment on information on which the Assessor was relying, after the Assessment Report was issued and before the Commission made its Decision. I therefore consider it appropriate to adopt the standard of review as identified in *McIlvenna*, with the further benefit of the principles from *Slattery*, which are set out in the Analysis portion of these Reasons. However, as explained in that Analysis, my conclusion on the procedural fairness issues remains the same regardless of which standard of review is applied.

VI. Analysis

A. *Whether the Commission acted unreasonably in exercising its discretion under s 44(3)(b)(i) of the CHRA to dismiss Ms. Kwan's complaint on the grounds the Commission was satisfied that an inquiry was not warranted*

[26] One of Ms. Kwan's principal arguments is that the Commission dismissed her complaint without responding to her submissions and that the Decision is therefore not reasonable because it does not permit her to understand how the Commission reached its decision. The Decision does not contain any express analysis of the Assessment Report or the supplementary submissions. She also notes that, as explained in the Decision, the Commission took into account

only the Assessment Report and the subsequent written submissions. Therefore, not all the materials that were before the Assessor were before the Commission.

[27] The jurisprudence of this Court and the Federal Court of Appeal provides assistance in considering these arguments, which relate to the respective roles of the Assessor and the Commission. To begin, it is useful to note that ss 43 and 44 of the CHRA contemplate the sort of process that was undertaken in the present case. Section 43(1) empowers the Commission to designate an investigator to investigate a complaint. This is the role fulfilled by the Assessor. Following conclusion of the investigation, the investigator is required under s 44(1) to submit to the Commission a report of the findings of the investigation. Sections 44(2) to (4) then prescribe the various powers and obligations of the Commission following receipt of the report. The provision engaged in the present case is s 44(3)(b)(i), which states as follows:

Report	Rapport
44 [...]	44 [...]
Action on receipt of report	Suite à donner au rapport
[...]	[...]
(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
[...]	[...]
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié

[28] In *Sketchley v Canada (Attorney General)*, 2005 FCA 404, the Federal Court of Appeal considered the roles of the investigator and the Commission and held, at paragraph 37, that where the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the investigator's report is to be treated as constituting the Commission's reasoning for purposes of the decision under s 44(3) of the CHRA.

[29] In *Pathak v Canada (Canadian Human Rights Commission)*, [1995] 2 FC 455, the respondent was challenging a decision of the Commission under s 44(3) of the CHRA, made on the basis of an investigator's report and written submissions provided in response to the report, and sought production of documents relied on by the investigator in preparing his report. The Federal Court of Appeal held at paragraph 11 that s 44 of the CHRA contemplates that the Commission's decision be made on the basis of the investigator's report and that the law presumes that the report correctly summarizes the evidence before the investigator. In considering the respondent's production request, the Court found that there was nothing in the application for judicial review which cast doubt upon the accuracy or completeness of the investigator's report and therefore denied the request.

[30] In *Slattery*, noted earlier in these Reasons in addressing the standard of review, Justice Nadon explained that, in order for a fair basis to exist for the Commission to evaluate whether a tribunal should be appointed under s 44 of the CHRA, the investigation conducted prior to this decision must satisfy the conditions of neutrality and thoroughness. With respect to neutrality, if the Commission simply adopts an investigator's conclusions without giving reasons, and those

conclusions were made in a manner which may be characterized as biased, a reviewable error occurs.

[31] *Slattery* explains that the requirement of thoroughness of the investigation stems from the essential role that investigators play in determining the merits of particular complaints.

Deference should be given to administrative decision-makers to assess the probative value of evidence and to decide whether or not to investigate further. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Justice Nadon also explained that submissions made in response to an investigator's report may be able to compensate for minor omissions by bringing such omissions to the attention of the Commission. Judicial review would be warranted only where complainants are unable to rectify such omissions, such as in circumstances where the omission is of a fundamental nature, where fundamental evidence is inaccessible to the decision-maker because of its protected nature, or where the decision-maker expressively disregards such evidence.

[32] Applying these principles to the present case, the Commission should be regarded as having adopted the reasoning of the Assessor. Therefore, the fact that the Decision does not set out reasoning by the Commission, but rather adopts that of the Assessor, does not constitute a basis to find the Decision unreasonable. Also, the fact the Decision refers to the Commission taking into account only the Assessment Report and the subsequent written submissions, and not the underlying materials that were before the Assessor, is consistent with the statutory regime of the CHRA. The Decision is to be interpreted as demonstrating that the Commission considered

the Assessment Report and the written submissions but did not find Ms. Kwan's submissions to detract from the conclusions and recommendation in the Report.

[33] There is no basis for a conclusion that the Assessor in the present case was biased. Therefore, in assessing the reasonableness of the decision, the Court will consider whether Ms. Kwan's arguments demonstrate that there was a lack of thoroughness, i.e. that there were unreasonable omissions in the investigation, such as a failure to investigate obviously crucial evidence, or that other aspects of the Assessor's analysis fall outside the deference required to be afforded by the Court in applying the reasonableness standard.

[34] There are two errors of this sort alleged by Ms. Kwan in her Memorandum of Fact and Law. First, she asserts that the Assessor "erred by using a false Act that does not exist and false guidance from OSFI as a reasonable explanation for what happened that is not a pretext for discrimination on a prohibited ground". At the hearing, Ms. Kwan explained that her reference to a "false Act" related to the Assessor's reference to the "2006 PCMLTFA (Proceeds of Crime, Money Laundering and Terrorist Financing Act)". Her point is that there is no statute of that description dating to 2006. She is correct, as the relevant statute is the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [PCMLTFA]. However, the fact that the Assessor identified the wrong year for the statute is not a substantive error which would compromise the reasonableness of the decision.

[35] Ms. Kwan also takes the position that the PCMLTFA does not apply to Amex. She argues that the statute applies to a "financial entity" as defined in ss 1(2) and 45 of the *Proceeds*

of *Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 , which state as follows:

Interpretation

1 [...]

(2) The following definitions apply in these Regulations.

[...]

financial entity means a bank that is regulated by the Bank Act, an authorized foreign bank, as defined in section 2 of that Act, in respect of its business in Canada, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the Cooperative Credit Associations Act, a financial services cooperative, a credit union central, a company that is regulated by the Trust and Loan Companies Act and a trust company or loan company that is regulated by a provincial Act. It includes a department or an entity that is an agent or mandatary of Her Majesty in right of Canada or of a province when it is carrying out an activity referred to in section 45. (entité financière)

[...]

Définitions et dispositions interprétatives

1 [...]

(2) Les définitions qui suivent s'appliquent au présent règlement.

[...]

entité financière Banque régie par la Loi sur les banques, banque étrangère autorisée — au sens de l'article 2 de cette loi — dans le cadre de ses activités au Canada, coopérative de crédit, caisse d'épargne et de crédit ou caisse populaire régies par une loi provinciale, association régie par la Loi sur les associations coopératives de crédit, coopérative de services financiers, centrale de caisses de crédit, société régie par la Loi sur les sociétés de fiducie et de prêt ou société de fiducie ou de prêt régie par une loi provinciale. Y est assimilé tout ministère ou toute entité mandataire de Sa Majesté du chef du Canada ou d'une province lorsqu'il exerce l'activité visée à l'article 45. (financial entity)

[...]

**Acceptance of Deposit
Liabilities**

45 Every department and agent or mandatary of Her Majesty in right of Canada or of a province is subject to Part 1 of the Act when they accept deposit liabilities in the course of providing financial services to the public.

[Emphasis added.]

Acceptation de dépôts

45 Les ministères et mandataires de Sa Majesté du chef du Canada ou d'une province sont assujettis à la partie 1 de la Loi lorsqu'ils acceptent des dépôts dans le cadre des services financiers qu'ils fournissent au public.

[Je souligne.]

[36] Ms. Kwan submits that Amex is not subject to the identity verification requirements of Part 1 of the *PCMLTFA*, because it does not accept deposit liabilities, which she submits is required by s 45 in order for the statute to apply. I agree with the Respondent's position that Ms. Kwan has misinterpreted the application of s 45, the effect of which is that federal and provincial government departments and agencies fall within the definition of "financial entity", and are subject to the legislation, in circumstances where they accept deposit liabilities. Section 45 is irrelevant to the analysis of whether Amex is subject to the *PCMLTFA*.

[37] The Respondent submits that Amex is a Schedule II bank under the *Bank Act* and therefore subject to identity verification obligations by virtue of s 5(a) of the *PCMLTFA*, which provides that Part 1 of that statute applies to authorized foreign banks within the meaning of section 2 of the *Bank Act* in respect of their business in Canada or banks to which the *Bank Act* applies. As Ms. Kwan also states in her January 2, 2017 submissions to the Assessor that Amex is a Schedule II bank pursuant to the *Bank Act*, that point does not appear to be in dispute. She has raised no credible argument that the Assessor erred in accepting Amex's position that it was subject to the identity verification requirements in the *PCMLTFA*, and I find no merit to her

submission that Amex relied on the identity verification requirements of that legislation as a pretext for discrimination on prohibited grounds.

[38] The second error alleged by Ms. Kwan in her Memorandum of Fact and Law is that the Assessor did not include in the materials provided to the Commission the evidence of the taped conversation purportedly between Ms. Kwan and Deogratias Niyonzima, nor did the Assessor call Mr. Niyonzima to verify whether or not it was his voice on the tape. Ms. Kwan's argument that not all the materials that were before the Assessor were placed before the Commission has already been addressed. As to her argument that the Assessor should have taken further steps with respect to the tape, it is important to examine the Assessor's treatment of this evidence. The Assessor was unable to validate the identity of the person's voice on the tape or to determine the time and date of the call. However, the Assessor also stated that the person purported to be Mr. Niyonzima explained to Ms. Kwan that each credit card application is ultimately processed in the same way, although a range of different ways can be used to validate the applicant's identity. Given the Assessor's description of the substance of this evidence, which does not appear to lend any support to Ms. Kwan's complaint, I cannot conclude that this conversation represents crucial evidence that the Assessor should have investigated further.

[39] Ms. Kwan advanced additional arguments challenging the reasonableness of the Decision during the hearing of this judicial review application. She noted that the date on the Decision appears to have been affixed by the use of a rubber stamp, which she argues supports a conclusion that the Decision was "rubber stamped" by the Commission. I take this to be a submission that Commission simply adopted the findings of the Assessor without independent

analysis. I find no possible basis to reach such a conclusion from the fact that Commission's office used a rubber date stamp on the letter communicating the Decision.

[40] Ms. Kwan also argued that it was an error for that letter to have been signed by the Director of Registrar Services for the Commission, rather than by one of the Commissioners. I find no merit to this submission. The letter represents the means by which the Commission's decision was communicated to Ms. Kwan. The fact that the letter was signed by the Director of Registrar Services does not support a conclusion that the Decision was not duly made by the Commission itself.

[41] At the hearing, Ms. Kwan also referred the Court to the fact that, in the course of this litigation, the Commission provided two different sets of certified copies of the documentation that was before the Commission when it made its decision. The Commission first provided such documentation under cover of a letter dated May 2, 2017, and then followed up with another version on May 11, 2017. The second letter stated the following, in reference to the Commission having been alerted by Ms. Kwan to two issues with the previous version of the documentation:

- The first sentence of paragraph 43 on page 6 is missing. We apologize since an error occurred in the scanning process.
- The screenshot on page 19 is not very clear. The screenshot was originally sent by the Applicant by email to the Investigator, then printed for the file and then rescanned as part of the package of documents to be sent to the Commission for decision. What we provided to the parties on paper and what is attached, is the best we can do with the version that was before the Commission when it made its decision.

[42] The first of these two issues relates to paragraph 43 of the Assessment Report, which reads as follows:

43. The respondent points out that regardless of their race, national or ethnic origin, colour, age or marital status all applicants for a respondent credit card are asked the same types of questions and are required to satisfactorily confirm their identity before their application process can be completed. [Emphasis added]

[43] The underlined portion of paragraph 43 was omitted from the first version of the record provided by the Commission. Ms. Kwan asserts that this demonstrates that the Commission did not have a complete version of this paragraph before it when it made its Decision. I find no merit to this submission. I read the Commission's May 11, 2017 letter as explaining that the version provided to the parties in the course of the litigation was missing the first portion of paragraph 43 due to an error in the scanning process. I do not read the letter as stating that the version before the Commission contained this omission. Regardless, the omission is not sufficiently material that it could support a finding that the Commission erred in arriving at its Decision.

[44] The second of the two issues identified in the May 11, 2017 letter does appear to relate to the clarity of a document that was before the Commission. Ms. Kwan maintains that the version of this document she sent to the Assessor was clear, which the Court accepts, as the May 11 letter appears to be explaining that it was the successive printing and scanning of this document before it reached the Commission that resulted in the poor quality. The document in question, a clear copy of which is produced in Ms. Kwan's Application Record, is described in Ms. Kwan's written submissions to the Commission following receipt of the Assessment Report as a screenshot from the Amex Gold Rewards application website. Her submissions contend that the

option of using a post office box as a mailing address is still available, as the screenshot contains a field which asks “Is your mailing address a P.O. Box?”.

[45] However, as pointed out by the Respondent at the hearing, this question follows an earlier field, seeking input of a portion of the applicant’s address, which reads: “Street Name/Rural Route (No P.O. Box)”. The subsequent question “Is your mailing address a P.O. Box?” asks that an applicant tick a “Yes” or “No” box. There is no evidence before the Court as to the result if the applicant were to answer in the affirmative. I also note that the Assessor does not appear to have reached any conclusions based on this screenshot. However, given the express indication that no post office box should be provided as an address, the screenshot appears to support Amex’s position that it does not currently accept post office boxes as addresses for credit card applications, not the position taken by Ms. Kwan. Moreover, it is difficult to draw any link between this particular concern of Ms. Kwan’s, i.e. whether she should have been permitted to provide a PO Box rather than a street address, and any of the prohibited grounds of discrimination. I therefore cannot find any reviewable error arising from the fact that the Commission did not have a clear version of this screenshot when it made the Decision.

[46] Turning to another argument, Ms. Kwan refers the Court to an error in Amex’s written submissions made during the course of the Assessor’s investigation, in that the submissions referred to Ms. Kwan’s initial contact with Amex to apply for a credit card having been on August 24, 2015. Her evidence is that this call took place on August 4, 2015, and she submits that the error in Amex’s submissions demonstrates it was attempting to mislead the Assessor by suggesting that the time period between her application and her receipt of the card was shorter

than it actually was. The Respondent replies that this is obviously a typographical error, not an attempt to mislead, as the next event identified in Amex's submissions is the August 20, 2015 call from its customer service representative to attempt to confirm her identity, which could not have taken place before Ms. Kwan applied for the card.

[47] The Assessor appears to have made an error on this particular point as well, as the Assessment Report identifies August 20, 2015, as the date on which Ms. Kwan applied for the card. However, this appears to have resulted from the Assessor overlooking the first call, made on August 4, and interpreting the August 20 call as the first contact between the parties. I see no correlation between the error in Amex's submissions, describing the first contact as occurring on August 24, and this error by the Assessor. I also find that this error by the Assessor does not undermine the reasonableness of the Decision. While one of the Assessor's conclusions was that Ms. Kwan was issued a card in a timely manner once her identity was confirmed, I do not read this conclusion, or the other conclusions and recommendation in the Assessment Report, as turning on the precise length of time between Ms. Kwan's application for and receipt of the card.

[48] Finally, when asked by the Court to identify the procedural fairness concerns that she considered to have arisen during the investigation of her complaint, Ms. Kwan's response included an argument that the Assessor relied on false information in arriving at the conclusions in the Assessment Report. She referred in particular to her position that she answered correctly all the identification questions posed to her on the telephone and correctly followed the process for verification of her identity at Canada Post. She argues that the Assessor therefore erred in reaching conclusions to the contrary, including accepting the recorded evidence of the Amex

representative who stated that Ms. Kwan had provided incorrect answers. There is an aspect of this argument which does raise a procedural fairness question for the Court's consideration and will be addressed below. However, principally this argument represents a challenge to the reasonableness of the decision and amounts to a request that the Court reweigh the evidence. As emphasized by the Federal Court of Appeal in *Ritchie* at paragraph 42, this is not the Court's role in judicial review.

[49] I find that none of Ms. Kwan's arguments have identified a basis for the Court to conclude that the Decision is unreasonable.

B. *Whether the Commission breached the duty of procedural fairness*

[50] In raising her concern that the Assessor relied upon false information in the Assessment Report, Ms. Kwan takes issue with the fact that this information resulted in the conclusion and recommendation expressed in the report before she had an opportunity to comment on the information. She also notes that the Assessment Report referred to the Respondent's assertion that it was unable to validate Ms. Kwan's identity using publicly available information such as the Canada 411 website, noting that the Respondent provided copies of their search on this website which did not indicate any listings for Ms. Kwan. She submits that Amex should not have relied on the 411 website, as she understands it is not intended to be used for commercial purposes, and submits that Amex lied to the Assessor in asserting that it could not identify her through their search. Ms. Kwan argues that she was not aware that the Assessor was going to rely on this information surrounding the use of the 411 website until she received a copy of the

Assessment Report and that, by the time she provided her written submissions in response to the Report, it was too late to affect the outcome of her complaint.

[51] In considering this argument, I return to the standard of review identified in *McIlvenna*, i.e. whether the investigator overlooked or failed to investigate any obviously crucial evidence, and the decision in *Slattery*, which explains the role of submissions in response to an investigator's report in achieving procedural fairness prior to a decision by the Commission under s 44 of the CHRA. It would be inconsistent with the jurisprudence to conclude that, once an investigator's report has been submitted, it is too late for a claimant through further submissions to affect the outcome of the decision by the Commission. As noted in *Slattery*, judicial review would be warranted only where the opportunity for submissions following receipt of an investigator's report cannot compensate for an investigator's omission, such as where there is an omission of a fundamental nature. Ms. Kwan's procedural fairness arguments do not identify any obviously crucial evidence that was overlooked by the Assessor. There is no basis for a conclusion that Ms. Kwan was not afforded procedural fairness through the process followed by the Assessor and the Commission.

[52] Before leaving the issue of procedural fairness, I wish to address an argument raised by Ms. Kwan at the hearing of this application, surrounding the audiotapes of the calls between her and Amex's representatives. While neither of the parties characterized this as a procedural fairness question, in my view this is the appropriate framework within which to consider the point. As will be apparent from the summary of the Assessment Report earlier in these Reasons, the Assessor's conclusion, that Ms. Kwan was not treated differently on the basis of prohibited

grounds, turned significantly on the Assessor's consideration of the transcripts and recordings of the calls between the parties. The Assessment Report identifies that Ms. Kwan asserted that there were discrepancies between the transcripts and audio recordings of these calls and that it was not her voice on the audio recordings. The Assessor found that there were no such discrepancies and that it was indeed her voice, based on security questions asked by Amex at the beginning of each call and based on the Assessor's familiarity with her voice from interviewing her during the investigation.

[53] Ms. Kwan had copies of the transcripts during the investigation. Indeed, the Assessment Report indicates that she obtained these from Amex and provided them to the Assessor. She did not have copies of the recordings during the investigation, although the Respondent's counsel advised during the hearing that she was provided with such copies in the course of this litigation.

[54] In her first set of written submissions following receipt of the Report, Ms. Kwan stated that she did not listen to the audio recordings and that, if there were no discrepancies between the recordings and the transcripts, she would think that people were impersonating her at Amex. She also stated that she had advised the Assessor about these concerns. Following receipt of Amex's written submissions, Ms. Kwan again raised the subject. She questioned the Assessor's conclusion that verification of her identity at the beginning of each call meant it was her voice throughout the entire recording. She also noted that she had requested a copy of the recordings from the Assessor, who directed her to make that request of Amex, and stated that Amex's counsel advised he could not provide her with a copy because there was a legal proceeding.

[55] At the hearing of this application, Ms. Kwan maintained the position that the transcripts and recordings of her calls with Amex were inconsistent. Despite questions posed by the Court, it remains unclear whether she was taking the position that the transcript and recordings were inconsistent with each other, inconsistent with her memory of the conversations, or both. For purposes of this analysis, I will assume she is asserting both sorts of inconsistency. The question this raises is whether there was a procedural fairness error attributable to the fact that Ms. Kwan was not provided with copies of the audio recordings prior to the issuance of the Commission's Decision.

[56] My conclusion is that there is no such error that would justify the Court interfering with the Decision. Certainly, there is no basis to conclude that the Assessor overlooked or failed to investigate any obviously crucial evidence related to this issue. The Assessor considered Ms. Kwan's assertions, reviewed both the transcript and recordings, and found her assertions to be without merit. I also consider it significant that the Respondent provided Ms. Kwan with copies of the recordings during the course of this litigation. The Court was not advised precisely when this disclosure occurred, and I recognize that that it may have taken place after the Applicant's Record was filed. I also appreciate that Ms. Kwan is self-represented. However, Rule 312 of the *Federal Courts Rules*, SOR/98-106 provides that, with leave of the Court, a party may file additional affidavit and a supplementary record. As submitted by the Respondent, there was no evidence before the Court related to the audio recordings, other than the findings of the Assessor. If, having received copies of the recordings, Ms. Kwan had identified specific discrepancies between them and the transcripts which would support her position, or otherwise

identified aspects of the recordings which impugned their authenticity, I would have expected an effort on her part to add that evidence to the record before the Court.

[57] In the absence of any evidentiary basis to conclude either that the transcripts and recordings do not match each other, or that they are inconsistent with what was said during the calls, I do not find the fact that the recordings were not provided to Ms. Kwan during the investigation to represent a basis for judicial review.

[58] Finally, returning to the subject of the standard of review, I note that, if I were to examine the above procedural fairness issues employing the traditional standard of correctness, I would reach the same conclusions as above. Without affording any deference to the decision-maker on these issues, I would find no basis to interfere with the Decision.

Costs

[59] Each of the parties claims costs. At the hearing, the Respondent requested an opportunity to make written submissions on costs following receipt of the Court's decision on the merits of the application. As the Respondent has prevailed in this application, my Judgment will afford the Respondent seven days from the date of the Judgment to serve and file up to three pages of written submissions on costs. The Applicant will then have an opportunity within seven days following service of the Respondent's submissions to provide her written submissions on costs, again limited to three pages in length, in response to the written submissions of the Respondent.

JUDGMENT in T-528-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. The Respondent shall serve and file up to three pages of written submissions on costs, within seven days of the date of this Judgment.
3. The Applicant shall serve and file up to three pages of written submissions on costs, within seven days of service upon her of the Respondent's written submissions.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: MARY KWAN V AMEX BANK OF CANADA

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DATED: NOVEMBER 21 , 2017

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