

Federal Court



Cour fédérale

**Date: 20200922**

**Docket: T-1674-19**

**Citation: 2020 FC 921**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, September 22, 2020**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**LAURENTIAN BANK OF CANADA**

**Applicant**

**and**

**FRANCINE FORTIN**

**Respondent**

**JUDGMENT AND REASONS**

I. Background

[1] The Laurentian Bank of Canada [Bank] is seeking judicial review of a decision by the Canadian Human Rights Commission [Commission] dated August 28, 2019, to deal with a complaint filed by the respondent, Francine Fortin.

[2] Ms. Fortin had been an employee of the Bank for a number of years. On July 13, 2017, the Bank informed her that it was terminating her employment. The dismissal letter stated that the dismissal followed two letters of suspension without pay and an incident on June 29, 2017.

[3] Through her union, Ms. Fortin filed a grievance challenging her dismissal. The grievance sought reinstatement in her employment, monetary compensation and an amount for damages.

[4] On September 26, 2017, Ms. Fortin filed a complaint with the Commission against the Bank. She alleged that she had experienced employment discrimination, in particular by reason of a physical disability.

[5] On March 4, 2019, following an initial review under paragraph 41(1)(a) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA], a human rights officer [Officer] recommended that the Commission stay the complaint because Ms. Fortin ought to exhaust grievance or review procedures otherwise available.

[6] During the same period, the Bank and the union representing Ms. Fortin were in negotiations to renew the collective agreement for all the Bank's employees. The Bank presented a final, non-negotiable offer under which the union would withdraw all active grievances, including the grievance regarding Ms. Fortin's dismissal. This condition was set out in Letter of Understanding 7, one of ten letters of understanding of the collective agreement. On March 10, 2019, the Bank's employees voted to accept the new collective agreement and letters of

understanding. On March 29, 2019, the Bank and the union entered into the collective agreement and, in particular, Letter of Understanding 7.

[7] In a letter dated April 16, 2019, the union informed Ms. Fortin that, under the agreement, it was required to withdraw all active grievances, including the one regarding her dismissal. The union also informed Ms. Fortin that she would receive compensation, which the union would ensure was reasonable.

[8] On May 8, 2019, Ms. Fortin informed the Commission that the union had withdrawn all grievances filed on behalf of employees, including the one regarding her dismissal. The Officer therefore reviewed the complaint again under paragraph 41(1)(a) of the CHRA. In a report dated June 25, 2019, the Officer recommended that the Commission deal with the complaint. The Officer found that, since the grievance had been withdrawn, Ms. Fortin no longer had another grievance procedure to deal with the issues in her complaint.

[9] Having considered the Officer's report and the parties' submissions, the Commission adopted the Officer's recommendations. In a decision dated August 28, 2019, the Commission agreed to deal with Ms. Fortin's complaint on the ground that it was not plain and obvious that another procedure was otherwise reasonably available to deal with her allegations. In that regard, the Commission referred to the Bank's allegation that Ms. Fortin had not exhausted all available procedures, since the Canada Industrial Relations Board [CIRB] had not yet dealt with an unfair labour practice complaint that Ms. Fortin had filed against her union. The Commission rejected this argument because the complaint before the CIRB alleges that the union breached its duty of

representation and does not relate to the human rights issues raised by Ms. Fortin in her complaint before the Commission. The Commission is of the opinion that Ms. Fortin no longer has another procedure to settle the human rights issues in her complaint regarding her dismissal.

[10] The Bank is seeking judicial review of this decision. It submits that the Commission's decision is unreasonable because the settlement between the Bank and the union has the force of *res judicata*, rendering Ms. Fortin's complaint inadmissible.

## II. Analysis

[11] On September 9, 2020, having reviewed the parties' records, the Court issued a direction asking the parties to make additional submissions on the matter, in particular whether the application for judicial review was premature based on the principles set out in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*]. Having reviewed the additional submissions, the Court issued a new direction on September 16, 2020, asking the parties to review four decisions from this Court (*National Gallery of Canada v Public Service Alliance of Canada*, 2003 FC 1458 [*National Gallery of Canada*]; *Canada (Attorney General) v Hotte*, 2005 FC 246 [*Hotte*]; *Corp of Lower St Lawrence Pilots v Bouchard*, 2004 FC 318; and *Canada Post Corp v Canada (Canadian Human Rights Commission)*, [1997] FCJ No 578).

[12] Having heard the parties' oral submissions, the Court finds that the application for judicial review is premature.

[13] It is settled case law that, unless exceptional circumstances exist, the parties to an administrative process must exhaust their remedies under that process before pursuing any recourse to the courts (*CB Powell* at paras 4, 30–33, 45). This rule has been described in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews (*CB Powell* at para 31). The underlying objective of this rule is to prevent fragmentation of the administrative process and reduce large costs and delays associated with premature forays to court, especially when one party may succeed at the end of the administrative process (*CB Powell* at para 32).

[14] This principle of non-interference with ongoing administrative processes has been reiterated by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35–38 [*Halifax*], and in other decisions by the Federal Court of Appeal and by this Court (*Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241 at paras 47–50, 53; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 13–16; *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paras 28–34; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paras 16–18; *Girouard v Inquiry Committee Constituted Under the Procedures for Dealing With Complaints Made to the Canadian Judicial Council About Federally Appointed Judges*, 2014 FC 1175 at paras 18–19; *Douglas v Canada (Attorney General)*, 2014 FC 299 at para 128).

[15] Very few circumstances qualify as exceptional and the threshold for exceptionality is high (*CB Powell* at para 33). The presence of a jurisdictional issue is not an exceptional circumstance

(*CB Powell* at paras 33, 39–40, 45; *Halifax* at para 38). Moreover, the fact that all parties have consented to recourse to the courts is insufficient and is not an exceptional circumstance justifying early recourse to the courts (*CB Powell* at para 33).

[16] The Bank argues that, unlike in *CB Powell*, the CHRA does not provide an internal mechanism for a respondent to seek review of a decision that a complaint is admissible under section 41 of the CHRA.

[17] The Court sees no merit in this argument.

[18] In deciding to deal with the complaint, the Commission is not rendering a final decision or deciding any substantive right of the parties. Rather, it is performing a screening and filtering role. Its decision has resulted in the designation of a person to investigate the complaint under section 43 of the CHRA. On receipt of the investigation report, the Commission has three outcomes open to it: (1) refer the complainant to the appropriate authority if the complainant ought to exhaust the procedures available or if the complaint could more appropriately be dealt with elsewhere (subsection 44(2) of the CHRA); (2) request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint if the Commission is satisfied that an inquiry into the complaint is warranted and that the complaint should not be dismissed on any ground mentioned in paragraphs 41(1)(c) to 41(1)(e) (paragraph 44(3)(a) of the CHRA); or (3) dismiss the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted or that the complaint should be dismissed on any ground mentioned in paragraphs 41(1)(c) to 41(1)(e)

(paragraph 44(3)(b) of the CHRA). During the investigation, it will be open to the Bank to submit that there is *res judicata* and the Commission will have the opportunity to decide the matter.

[19] An application for judicial review of a decision of the Commission to deal with a complaint under subsection 41(1) of the CHRA is therefore premature (*Hotte* at paras 10–12, 16; *National Gallery of Canada* at paras 22–23). The decision does not end the administrative process, and the Bank will be able to make its submissions at another stage of the investigation and ultimately, if unsuccessful, by filing an application for judicial review at the end of the administrative process. If, on the contrary, the Commission had dismissed the complaint on a ground mentioned in subsection 41(1) of the CHRA, the application for judicial review would not have been premature, since the Commission’s decision would have effectively ended the complaint. It would then be a final decision.

[20] The Bank further argues that the application of *res judicata* in this case satisfies the “exceptional circumstances” exception set out in *CB Powell*.

[21] The Court disagrees.

[22] The presence of jurisdictional issues is not an exceptional circumstance justifying early recourse to the courts (*CB Powell* at paras 33, 39–40, 45; *Halifax* at para 38), and neither is the issue of whether *res judicata* applies. The Bank’s claim that a decision at this stage would

promote the sound administration of justice and limit the costs to the parties is equally true for jurisdictional issues.

[23] Furthermore, the Court notes that the *res judicata* argument was not raised before the Commission in the course of the investigation under section 41 of the CHRA. The only argument of inadmissibility raised by the Bank was Ms. Fortin's unfair labour practice complaint against her union under the *Canada Labour Code*, RSC, 1985, c L-2. The Bank argued that Ms. Fortin's recourse before the CIRB had not yet been exhausted. It was not until the Bank received the Commission's decision that it provided the Commission with a copy of the settlement between the Bank and the union and raised for the first time the argument that *res judicata* applies.

[24] The Bank submits that the Commission should have concluded that there was *res judicata* because it had before it all the evidence to determine the application of this principle. In that regard, the Bank relies on certain passages in the Officer's report that show that she was aware that a settlement had been reached between the union and the Bank and that the settlement had resulted in the withdrawal of all employee grievances, including Ms. Fortin's. The Court cannot accept this argument. Knowledge of the existence of the settlement could also demonstrate, as the Commission held, that Ms. Fortin no longer had access to another grievance or review procedure to resolve the human rights issues in her complaint regarding her dismissal. If the Bank was of the view that the Commission should decline jurisdiction on the basis of *res judicata*, it should have articulated this clearly by showing that the three conditions necessary for *res judicata* to apply were present in Ms. Fortin's case.



[25] Given the principle that a reviewing court must refrain from ruling on issues raised for the first time on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–23), the Court is of the view that the Commission should be given the opportunity to consider the issue first and make its views known.

[26] To show that the application for judicial review is not premature, the Bank also relies on the Commission's letter informing the Bank of the decision of August 28, 2019. The letter states that [TRANSLATION] “under subsection 18.1(1) of the *Federal Courts Act*, parties to a complaint may apply to the Federal Court for a review of the Commission's decision”, that the application must be made within 30 days of receiving the Commission's decision and that the Commission cannot be the respondent in an application for judicial review of its own decision. Although the situation would have been different had the Commission dismissed Ms. Fortin's complaint, this statement in the letter does not justify the Court's use of its judicial discretion to intervene at this preliminary stage of the administrative process.

### III. Conclusion

[27] For these reasons, the application for judicial review is dismissed on the ground that it is premature, without prejudice to the Bank's right to raise the same arguments in any judicial review that may be brought after a final decision has been made on Ms. Fortin's complaint.

[28] Given the Court's ground for dismissing the application for judicial review, each party will bear its own costs.

**JUDGMENT in T-1674-19**

**THIS COURT'S JUDGMENT** is as follows:

1. The application for judicial review is dismissed on the ground that it is premature.

“Sylvie E. Roussel”

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Judge

Certified true translation

Johanna Kratz

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1674-19

**STYLE OF CAUSE:** LAURENTIAN BANK OF CANADA v  
FRANCINE FORTIN

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE AT OTTAWA,  
ONTARIO

**DATE OF HEARING:** SEPTEMBER 17, 2020

**JUDGMENT AND REASONS:** ROUSSEL J.

**DATED:** SEPTEMBER 22, 2020

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