Federal Court  Cour fédérale

Date: 20201207

Docket: T-1189-19

Citation: 2020 FC 1127

Ottawa, Ontario, December 7, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

THE BANK OF NOVA SCOTIA

Applicant

and

MARCUS WILLIAMS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Bank of Nova Scotia brings this application for judicial review seeking to quash the Canadian Human Rights Commission's decision, made under subsection 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*], to deal with the complaint of Marcus Williams. The Bank argues the Commission reached unreasonable conclusions on whether Mr. Williams'

complaint was frivolous or vexatious, and failed to address the Bank's arguments that aspects of the complaint were out of time.

[2] At the conclusion of the Bank's submissions, I advised that I would be dismissing the application for judicial review because the application was premature, and that I would be providing reasons to follow. These are those reasons.

[3] Absent exceptional circumstances, parties to an administrative proceeding are expected to exhaust their remedies in that proceeding before pursuing recourse to the courts. This principle generally precludes as premature judicial review of interlocutory administrative decisions. Very recently, my colleague Justice Roussel applied these principles in the context of a decision to deal with a human rights complaint under subsection 41(1) of the *CHRA*, in *Laurentian Bank of Canada v Fortin*, 2020 FC 921. Justice Roussel concluded at paragraph 19 that "[a]n 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."

[4] Despite the Bank's able arguments, I am not satisfied that *Laurentian Bank* was wrongly decided, or that the circumstances of this case constitute exceptional circumstances in which this Court should hear an application for judicial review of a subsection 41(1) decision to deal with the complaint. The application for judicial review is therefore premature, and is dismissed on that basis.

II. Issue

[5] The Bank brought this application arguing, on a number of grounds, that the Commission's decision was not reasonable. These grounds were modified somewhat in the wake of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, but the Bank maintained that it was unreasonable for the Commission to (a) conclude that Mr. Williams' complaint was not frivolous; (b) disregard its objection to the complaint on timeliness grounds; and (c) deal with the complaint despite it being vexatious.

[6] Shortly after I was assigned to hear this application, and shortly before the hearing of the application, I issued a direction asking the parties to be prepared to address Justice Roussel's decision in *Laurentian Bank* and the question of whether the application was premature, an issue that had not been raised by Mr. Williams. While this did not leave a great deal of time for the parties to prepare submissions, they were able to file additional case law and academic references. The parties advised at the hearing that they had had sufficient opportunity to consider the issue of prematurity and to make argument thereon. I thank counsel for their prompt consideration and preparation on this issue.

[7] For the reasons that follow, I conclude that the question of prematurity is determinative. The only issue is therefore:

> Should this application for judicial review of the Commission's decision to deal with Mr. Williams' complaint be dismissed as premature?

III. Analysis

[8] Absent exceptional circumstances, parties must exhaust the statutory procedures governing an administrative process before they can seek administrative law remedies in the courts: *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 4, 30–31. This general principle of non-interference with ongoing administrative processes is driven by the need for litigation efficiency and respect for the legislative assignment of decision making authority to administrative deciders: *CB Powell* at para 4. It prevents fragmentation of proceedings, avoids wasting judicial resources on interlocutory decisions, and minimizes costs to parties: *CB Powell* at para 32; *Zündel v Canada (Human Rights Commission)*, [2000] 4 FC 255 (CA) at para 10.

[9] The decision at issue in this matter is of an interlocutory nature. The Canadian Human Rights Commission's decision under subsection 41(1) to deal with a complaint is one step among many in the assessment and determination of human rights complaints under the *CHRA*. Justice Roussel recently applied the general principle of non-interference to such a decision in *Laurentian Bank*. She concluded that the bank's application for judicial review was premature, and dismissed it on that basis. The Bank of Nova Scotia submits that *Laurentian Bank* was wrongly decided and inconsistent with past jurisprudence, and that it is in any event distinguishable in this case. For the following reasons, I do not agree, and similarly conclude that the Bank's application for judicial review is premature.

A. *The Legislative Scheme of the Canadian Human Rights Act*

[10] As described at paragraph 18 of *Laurentian Bank*, the *CHRA* is designed on a "gatekeeper" model, in contrast with the "direct access" model that has been adopted in certain Canadian jurisdictions: *Human Rights Code (Ontario)*, RSO 1990, c H.19, s 34; *Human Rights Code (British Columbia)*, RSBC 1996, c 210, s 21. Under this model, a human rights complaint is filed with the Commission, which performs a screening and filtering role before a complaint may proceed to a determination before the Canadian Human Rights Tribunal: *CHRA*, ss 40–44, 49. Section 40 of the *CHRA* provides for the filing of complaints with the Commission. The *CHRA* then sets out a number of steps and a number of potential determinations that the Commission may make in respect of the complaint. For example, with section 40 itself, the Commission may refuse to deal with a complaint not filed by the victim of discrimination unless the victim consents thereto (s 40(2)), may decide to deal with similar complaints jointly (s 40(4)), and may need to determine whether the discrimination occurred in Canada or to a Canadian citizen or permanent resident (s 40(5)).

[11] Subject to these provisions, subsection 41(1) requires the Commission to "deal with" any complaint filed unless it "appears to the Commission" that one of five situations applies:

Commission to deal with complaint	**Irrecevabilité**
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41 (1)** Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	**a)** la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	**b)** la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	**c)** la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	**d)** la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.	**e)** la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[12] Given the "gatekeeping" nature of this section, this Court has held that the Commission should only decline to deal with a complaint where it is "plain and obvious" that it falls under one of the grounds for not dealing with it: *Canada Post Corporation v Canadian Human Rights Commission*, 1997 CanLII 16378 (FC), aff'd 1999 CanLII 7865 (FCA), lv to app ref'd [1999] SCCA No 323. Where required to allow the Commission to assess whether it should deal with

the complaint, the Commission sometimes prepares a "section 40/41 report" after reviewing the complaint and any submissions from the parties on section 40 and 41 issues.

[13] Where the Commission decides not to deal with a complaint, it is required to send the complainant a written notice of its decision with reasons: *CHRA*, s 42(1). Otherwise, the Commission may appoint an investigator to investigate the complaint, who is to submit a report of the findings of the investigation to the Commission: *CHRA*, ss 43, 44. While the Commission may request that the Chairperson of the Tribunal institute an inquiry into the complaint "at any stage after the filing of a complaint," this generally occurs after the Commission receives a section 43/44 investigation report: *CHRA*, 44(3)(*a*), 49(1). After an inquiry, the Tribunal may dismiss the complaint if it is not substantiated, or make an appropriate order where the complaint is substantiated: *CHRA*, s 53.

B. *The Decision at Issue*

[14] After Mr. Williams filed his complaint, the Commission concluded it would be preparing a section 40/41 report and invited submissions on paragraph 41(1)(*d*). Mr. Williams responded that the complaint was not "trivial, frivolous, vexatious or made in bad faith," and the Bank filed submissions objecting to the complaint under paragraphs 41(1)(*a*), (*b*), (*d*), and (*e*) of the *CHRA*. A Human Rights Officer prepared a section 40/41 report on March 13, 2019, recommending Mr. Williams' complaint be dismissed as frivolous under paragraph 41(1)(*d*). The Officer therefore found it unnecessary to address the Bank's allegation that the complaint was also time-barred under paragraph 41(1)(*e*) of the *CHRA*.

[15] The parties were again invited to make submissions on the section 40/41 report before the Commission made its decision whether to deal with the complaint. After receiving those submissions, the Commission made a decision on June 12, 2019, conveyed to the parties on June 24, 2019, deciding to deal with the complaint. The Commission gave brief reasons, concluding that it was not "plain and obvious" that Mr. Williams' allegations were "mere bald assertions" as the Bank had alleged. The Commission did not address other arguments made by the Bank, including its arguments regarding the impact of a hearing of Mr. Williams' complaint under the *Canada Labour Code*, RSC 1985, c L-2, and its arguments about the timeliness of the complaint.

[16] This decision to deal with the complaint is the subject of the Bank's application for judicial review. In summary, the Bank argues that the decision was unreasonable both in what it did decide, and for failing to address its other arguments.

C. *The Application is Premature*

(1) *Laurentian Bank* was not wrongly decided

[17] In *Laurentian Bank,* Justice Roussel similarly had before her an application for judicial review of a decision by the Commission under subsection 41(1) to deal with a complaint. In thoughtful reasons, she considered the jurisprudence dealing with the general principle of non-interference with ongoing administrative processes, and with subsection 41(1). She noted that "[i]n 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": *Laurentian Bank* at para 18. Justice Roussel concluded that the general principle therefore applied, and that the application was premature: *Laurentian Bank* at paras 18–19, 27. In doing so, she rejected the bank's submissions that its *res judicata* argument was an "exceptional circumstance" justifying early judicial intervention, and the bank's reliance on the Commission's letter conveying the decision, which suggested that judicial review could be brought: *Laurentian Bank* at paras 20–26.

[18] The Bank of Nova Scotia argues that *Laurentian Bank* was wrongly decided since it is inconsistent with past jurisprudence of this Court exercising its authority to judicially review a subsection 41(1) decision to deal with a complaint: *Canada Post Corp v Canada (Attorney General)*, 2000 CanLII 15206 (FC) at paras 25-27; *Cameco Corporation v Maxwell*, 2007 FC 260 at para 14; *Canada (Attorney General) v Mohawks of the Bay of Quinte First Nation*, 2012 FC 105 at paras 21 and 48; *Canadian Museum of Civilization v Public Service Alliance of Canada*, 2014 FC 247 at para 95; *Canada (Attorney General) v Windsor-Brown*, 2016 FC 1201 at paras 16-33.

[19] I cannot agree. In all of the cases cited by the Bank, the issue of prematurity was not addressed by the Court, and was apparently not raised. Rather, in each case, the application was dismissed for other grounds. The cases do show that the Court has considered the merits of judicial review of a decision to deal with a complaint under subsection 41(1) in the past. However, I cannot conclude they stand for the principle that such a review is not premature when that question was not addressed. It is to be recalled that judicial review is an inherently discretionary remedy: *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 30–

31. The general principle of non-interference and the concept of prematurity are principles governing the exercise of that discretion: *Matsqui* at paras 32–37; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35–36; *CB Powell* at paras 30–31. That the Court may have exercised its discretion to hear a judicial review on the merits in other cases in which the question of prematurity was not raised does not make it incorrect to apply the principle of non-interference in declining to exercise jurisdiction in a later case, be it in *Laurentian Bank* or this case.

[20] I note, as did Justice Roussel, that *Laurentian Bank* is not the only decision that has found that judicial review of a decision under subsection 41(1) of the *CHRA* will be premature. Justice Gauthier, then of this Court, came to the same conclusion in two decisions made prior to *CB Powell*: *Canada (Attorney General) v Hotte*, 2005 FC 246 at para 39; *National Gallery of Canada v Public Service Alliance of Canada*, 2003 FC 1458 at paras 22–23; *Laurentian Bank* at para 19.

[21] In any event, the cases cited by the Bank cannot be taken to overrule the binding authority of the Federal Court of Appeal in *CB Powell*. Drawing on lengthy Supreme Court jurisprudence, Justice Stratas for the Court in that case set out with clarity the general principle of judicial non-interference with ongoing administrative processes: “[p]ut another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted”: *CB Powell* at para 31.

[22] The Bank contends that the situation in *CB Powell* was different, since the statutory scheme at issue had a statutory appeal mechanism from the Canada Border Services Agency decision at issue to the Canadian International Trade Tribunal: *CB Powell* at paras 20, 28–29. However, while the legislative framework in *CB Powell* involved a statutory appeal mechanism, the broader principle affirmed by the Court of Appeal applies well beyond that administrative context. For example, the Court of Appeal in its decision in *Wilson* confirmed the applicability of the "general rule" to the context of an adjudicator under the *Canada Labour Code*, from whom no appeal was available: *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paras 28–34, rev'd on other grounds 2016 SCC 29. *Laurentian Bank* and this case simply involve applying this binding and general principle to the particular situation of subsection 41(1).

[23] The Bank argues that the result of this approach is inherently inequitable: a complainant may judicially review a decision under subsection 41(1) not to deal with a complaint, while a respondent cannot judicially review a decision to deal with the complaint. I see no difficulty in this dichotomy. A complainant whose complaint is not dealt with under subsection 41(1) has no further opportunity to make submissions to the Commission or to the Tribunal. In comparison, the Bank could (and did) make further submissions to the Commission with respect to Mr. Williams' complaint, including on the issues raised in this application. In other words, a decision not to deal with a complaint is final, whereas a decision to deal with a complaint is interlocutory: *Laurentian Bank* at para 19. Notably, Parliament itself recognized the difference between the two situations, imposing a statutory obligation to issue a decision with reasons only where the Commission decides not to deal with a complaint: *CHRA*, s 42(1).

[24] Parliament also established a scheme in which the issues set out in subsection 41(1) are again considered by the Commission after investigation, in determining whether to refer a complaint. After receiving a section 43/44 investigation report, the Commission is called upon to decide whether a complaint should be referred to other authorities (on grounds that parallel paragraphs 41(1)(*a*) and (*b*)), or whether it should be dismissed (including on grounds mentioned in paragraphs 41(*c*) to (*e*)): *CHRA*, ss 44(2)–(3). While the Bank argues that the *CHRA* does not require the Commission to consider the same issues as those raised at the section 41 stage, a request to institute an inquiry requires the Commission to be satisfied that the complaint should not be dismissed or referred elsewhere on precisely these grounds.

[25] I also cannot accept the Bank's contention that since Parliament enacted a screening process, it did not intend complaints that fall into the categories in subsection 41(1) to move forward, and that administrative principles of legality and fairness mean that decisions to deal with complaints should be subject to judicial review to safeguard the rationality of the administrative process. While Parliament clearly created a mechanism by which non-meritorious complaints could be screened out at an early stage, this does not mean that it intended judicial oversight at every stage of the human rights complaint process. To the contrary, Parliament indicated that a decision not to deal with a complaint should only be made where it "appears to the Commission" that one of the categories applies, indicating an intention to leave the determination in the hands of the administrative decision maker.

[26] More broadly, one could theoretically apply the Bank's argument to every provision in every statute governing an administrative scheme. Parliament no doubt intended them all to be

respected. Yet if that were enough to justify judicial review of every action or interlocutory decision by any administrative actor, there would be no end to interlocutory judicial reviews. This would run directly contrary to the general principle of non-interference and the recognition that administrative processes are designed to capitalize on the expertise and efficiencies of administrative decision makers: *Vavilov* at paras 29–30.

[27] Similarly, the Bank's argument that judicial economy favours addressing the matter now, since a positive determination by the Court could prevent the Bank, and the Tribunal, from having to engage in a lengthy and potentially costly inquiry, must be rejected. The same argument could be made with respect to any potentially determinative issue raised in an administrative process. There are numerous potentially determinative issues that may arise in the course of an administrative proceeding. Yet the Courts have recognized that even such fundamental issues as jurisdiction do not render interlocutory decisions amenable to judicial review: *CB Powell* at paras 39–46; *Laurentian Bank* at para 22.

[28] I therefore conclude that *Laurentian Bank* was not wrongly decided and is consistent both with past jurisprudence interpreting subsection 41(1) of the *CHRA* and with jurisprudence applying the general principle of non-interference with ongoing administrative processes.

(2) *Laurentian Bank* is not distinguishable

[29] The Bank sought to distinguish *Laurentian Bank*, arguing that the circumstances of this case were "exceptional" so that the Court should exercise its discretion to hear the application

notwithstanding the general principle. I do not agree that the grounds it raises make this matter exceptional or distinguish it from that in *Laurentian Bank*.

[30] The Bank first argues that the Commission's decision was, in this case, a final determination with respect to whether the complaint is "frivolous" under paragraph 41(1)(*d*). It points to the Commission's ultimate decision made under section 44 asking the Tribunal to institute an inquiry into Mr. Williams' complaint. That decision, made on November 4, 2020, did not revisit the findings in the earlier section 41 decision with respect to the allegation of frivolousness. The Bank argues that the section 41 decision was therefore final on this issue, and had the potential to be final with respect to other issues.

[31] I cannot accept this argument, for three reasons. First, on judicial review, the section 41 decision is to be assessed on its face and at the time it was made. The merits of a subsequent decision by the Commission cannot affect the nature of its earlier decision. The Bank itself clearly did not consider the Commission's section 41 decision "final" on these issues at the time, as it continued to make submissions on the issues to the Commission after the section 41 decision and after the section 43/44 investigation report.

[32] Second, the Commission's decision under section 44 itself by definition incorporated, implicitly or explicitly, its determinations under subsections 44(2) and (3), and thus the same issues identified in subsection 41(1). As the Bank conceded, the Commission implicitly adopted its earlier determination on the frivolousness issue in referring the matter to the Tribunal. If the Bank were able to seek judicial review of both the section 41 decision and the section 44

decision, as it contends, this could lead to two separate opportunities to seek challenge the Commission decisions on the same issue, even before addressing any determination by the Tribunal.

[33] Third, and more broadly, the fact that a decision may determine a particular issue does not necessarily make it "final" for the purposes of judicial review. Numerous interlocutory determinations, including evidentiary and procedural rulings, may be determinative of that particular issue and not subject to further decision by the administrative decision maker, but that does not make them "final" and amenable to judicial review. To the contrary, the Court of Appeal has confirmed that judicial review should not be undertaken until after "the administrative process has run its course": *CB Powell* at para 31.

[34] The Bank also seeks to distinguish this case from that in *Laurentian Bank* since this application was subject to ongoing case management, during which the issue of prematurity was never raised by either Mr. Williams or the Court. It submits that the integrity of the Federal Court's case management process would be undermined if the Court were to dismiss this application on the grounds of prematurity at this point in the proceedings. This argument is without merit. The case management process that the parties engaged in prior to the hearing dealt with procedural not substantive issues. No order was made by the case management judge foreclosing or even pertaining to the issue of prematurity. The fact that the parties engaged in case management proceedings is not a sufficiently exceptional circumstance to warrant that the Court exercise its limited discretion to interfere with an ongoing administrative process: *CB Powell* at para 33.

IV. Conclusion

[35] In light of the principle of non-interference with ongoing administrative processes, I conclude that applications for judicial review of a decision of the Commission under subsection 41(1) of the *CHRA* to deal with a complaint will be premature absent exceptional circumstances. I find that there are no exceptional circumstances in this case. Therefore, this application for judicial review is dismissed on the ground that it is premature. As a necessary corollary, as was the case in *Laurentian Bank*, this judgment is without prejudice to the Bank's right to raise the same arguments in a subsequent judicial review in respect of Mr. Williams' complaint that is not premature.

[36] Mr. Williams sought costs of the application in the all-inclusive amount of $5,000. The Bank agreed that this was an appropriate disposition of costs and I so order.

[37] Finally, as I advised the parties at the hearing, I consider my judgment in this matter to be pronounced, as that term is used in subsection 27(2) of the *Federal Courts Act*, RSC 1985, c F-7, as of the date of this Judgment and Reasons, and not on the date of hearing when I advised the parties of my intention to dismiss the application with reasons to follow.

JUDGMENT IN T-1189-19

THIS COURT'S JUDGMENT is that

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

2. Mr. Williams is awarded his costs of this application, which are fixed at $5,000.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1189-19
STYLE OF CAUSE:	THE BANK OF NOVA SCOTIA v MARCUS WILLIAMS

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 23, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 7, 2020

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