

Federal Court



Cour fédérale

Date: 20250131

Docket: T-208-19

Citation: 2025 FC 207

Toronto, Ontario, January 31, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

GARY CURTIS

Applicant

and

THE BANK OF NOVA SCOTIA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Gary Curtis, seeks judicial review of a January 2, 2019 decision by the Canadian Human Rights Commission (Commission) that dismissed his human rights complaint at the screening stage. Mr. Curtis filed his complaint in 2013. The complaint alleged that his former employer, Bank of Nova Scotia (BNS), discriminated against him based on race and colour, contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[2] According to Mr. Curtis's complaint form, the discrimination started in November 2008 and was ongoing; however, the allegations of discrimination refer to events beginning one year earlier, in November 2007.

[3] The Commission decided that Mr. Curtis's allegations of discrimination spanning the period November 2007 to August 2011 were distinct from his allegations about later events, and did not form a continuous pattern of discrimination. The Commission decided not to deal with the earlier allegations, dismissing them on the basis that the complaint was filed more than one year after the events occurred, and out of time according to the limitation period in paragraph 41(1)(e) of the *CHRA*. The remaining allegations related to events after August 2011. The Commission dismissed the later allegations pursuant to subparagraph 44(3)(b)(i) of the *CHRA*, on the basis that further inquiry by the Canadian Human Rights Tribunal (Tribunal) was not warranted.

[4] Mr. Curtis submits the Commission breached the duty of procedural fairness and its decision was unreasonable. He argues the Commission erred in a number of ways, including because it failed to conduct a proper investigation, failed or refused to investigate all of the allegations in his complaint (including allegations that BNS terminated his employment by suspending him based on a discriminatory use of its policies and practices), ignored evidence that BNS engaged in discriminatory practices, improperly refused an amendment to his complaint and ignored his submissions, improperly severed the earlier allegations by wrongly concluding that BNS's actions did not form a continuous pattern of discrimination, made several errors of fact and law, and showed bias. Mr. Curtis contends the Commission should have found that BNS violated multiple sections of the *CHRA* and should have referred his complaint to the

Tribunal. According to Mr. Curtis, the Commission's errors allowed BNS to continue a pattern of discrimination that remains unresolved after 12 years.

[5] BNS submits Mr. Curtis was afforded a high degree of procedural fairness and the Commission's decision was reasonable. The Commission conducted an in-depth analysis of Mr. Curtis's allegations, provided a comprehensive explanation as to why the first set of allegations were untimely, and provided a detailed examination of the evidence, leading to the determination that the evidence did not support a link between the allegations and Mr. Curtis's race or colour. BNS contends the Commission based its decision to dismiss the earlier allegations on an internally coherent and rational chain of analysis, and reasonably dismissed the remainder of the complaint because the requirements of *CHRA* subparagraph 44(3)(b)(i) were met. According to BNS, Mr. Curtis is unhappy with the Commission's decision, but he has not established a reviewable error and there is no basis for the Court to intervene.

[6] For the reasons that follow, Mr. Curtis has established that the Commission's decision should be set aside. I find that the Commission breached procedural fairness and its decision was unreasonable, principally because the investigation did not adequately address core aspects of Mr. Curtis's complaint. The complaint will be remitted to the Commission for reinvestigation by a different investigator, and on completion, a fresh consideration of whether the complaint should proceed to an inquiry before the Tribunal.

II. Standard of Review

[7] Mr. Curtis's allegations of procedural unfairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69

at para 54 [*Canadian Pacific Railway*]; see also *Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 45. These include Mr. Curtis’s allegations that the Commission showed bias and failed to investigate his complaint in a thorough manner: *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6. The duty of procedural fairness is “eminently variable”, inherently flexible, and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*], citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-23 [*Baker*], among other cases. An applicant must have had a meaningful opportunity to present their case and to have it fully and fairly considered: *Baker* at para 32. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[8] The reasonableness standard of review applies to the Court’s review of the merits of the Commission’s decision. This is a deferential but robust form of review that considers whether the decision, including the reasoning process and the outcome, is transparent, intelligible, and justified: *Vavilov* at paras 13, 99. A reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker: *Vavilov* at para 125.

[9] Mr. Curtis’s submissions do not clearly separate arguments of procedural unfairness from arguments about whether the Commission’s decision was unreasonable on the merits. In the analysis, I attempt to summarize and categorize the submissions, as I understand them.

[10] Before turning to the main issues, I will address a number of preliminary matters that the parties raised.

III. **Preliminary Matters**

[11] At the outset of the hearing, Mr. Curtis provided BNS and the Court with (i) an Amended Amended Notice of Application, (ii) missing pages from Volume 2 of the Applicant's Record, (iii) a Supplemental Book of Authorities, and (iv) an Amended Memorandum of Fact and Law. Mr. Curtis stated that the new versions of documents were being provided to correct clerical errors. He also informed the Court of clerical errors in the table of contents of the Applicant's Record, and in his affidavit that was filed as part of the Applicant's Record.

[12] BNS did not object to (i) the Amended Amended Notice of Application, (iii) the Supplemental Book of Authorities, and (iv) the Amended Memorandum of Fact and Law. At the hearing, I accepted the Amended Amended Notice of Application and Supplemental Book of Authorities for filing. The Amended Memorandum of Fact and Law was conditionally accepted for filing, based on Mr. Curtis's representation that the only amendments were to correct spelling mistakes and add pinpoint citations to pages in the supplementary certified tribunal record (CTR) transmitted by the Commission to the Court (the citations in his original memorandum of fact and law only referenced pages in the Applicant's Record). While the Amended Memorandum of Fact and Law includes other changes, the changes are minor—they do not alter the substance of Mr. Curtis's arguments, and in my view, they were unnecessary. Since the only change of consequence is the addition of CTR pinpoint citations, the Amended Memorandum of Fact and Law is accepted for filing.

[13] With respect to (ii) the missing pages from Volume 2 of the Applicant's Record, BNS initially objected on the basis that the documents were not before the Commission or in the CTR.

BNS later withdrew the objection; however, it maintained that documents not in the CTR should only be considered as part of the Court's review for procedural fairness, and not the review of the merits of the Commission's decision. I agree with BNS on this point.

[14] Turning to the clerical errors, Mr. Curtis asked that the Applicant's Record be amended to remove the name of the first individual who is listed in paragraph 30 of his affidavit (page 57 of the Applicant's Record), and to remove the corresponding reference to this individual's name on page 5 of the table of contents, in the description of Exhibit Z. These changes are accepted.

[15] As noted above, the Commission transmitted the CTR to the Court registry. Both parties mistakenly believed that this meant that the six-volume CTR formed part of the record before the Court, even though it was not included in either party's record. I informed the parties about the Federal Court of Appeal's decision in *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, which discusses how materials before an administrative decision maker become part of the Court's record on judicial review. The parties requested that the CTR be filed and treated as part of the record on this application. At the hearing, I granted the parties' request.

[16] The final preliminary matter relates to supplemental authorities that BNS sought to rely on. BNS presented the supplemental authorities at the start of its responding submissions. Mr. Curtis asked that BNS not be permitted to rely on the supplemental authorities, arguing that the documents should have been provided to him earlier and with pinpoints to the relevant paragraphs so that he would be prepared to address them. After the hearing, Mr. Curtis wrote to

the Court reiterating his position, and noting particular opposition to the Court relying on one of my decisions, *Jagadeesh v Canadian Imperial Bank of Commerce*, 2023 FC 1311 [*Jagadeesh*].

[17] I recognize that BNS submitted the supplemental authorities late, and I do not see a reason why they could not have been included in the responding memorandum of argument. However, the paragraphs in these authorities that BNS relies on, including *Jagadeesh* in particular, relate to well established legal principles that the Court must apply when reviewing Commission decisions. In the appeal from *Jagadeesh*, the Federal Court of Appeal summarized the key legal principles governing the Commission's role and responsibilities: *Jagadeesh v Canadian Imperial Bank of Commerce*, 2024 FCA 172 [*Jagadeesh FCA*]. Consequently, I see no prejudice to Mr. Curtis, and I have considered the supplemental authorities.

IV. **Background**

A. *Mr. Curtis's complaint*

[18] Mr. Curtis worked at BNS for 18 years, the last 12 as a mortgage development manager (MDM) in the Mortgage Sales Division (Division). In his complaint, Mr. Curtis explained that he had an excellent employment record at BNS. He won awards for outstanding sales performance, received commendations for outstanding customer service and professionalism, and never had issues prior to the events in question.

[19] The complaint alleged that the culture of the Division shifted with certain personnel changes. It alleged that Mr. Curtis, a Black man, suffered racial discrimination and harassment after a change in the management team, and his superiors treated him differently from his co-workers. Mr. Curtis described experiencing discrimination beginning in late 2007, as

evidenced by the following events: (i) despite his senior position and top sales achievements, BNS refused his requests for an assistant (a mortgage development officer, or “MDO”) in 2007 and 2008; senior MDMs are usually assigned an MDO, and Mr. Curtis’s white colleagues had an MDO; (ii) BNS set an unrealistic sales target for 2009, which he protested on the basis that the target was unachievable without an MDO or management support—white MDMs with a similar target had an MDO and management support; (iii) the unrealistically high target led Mr. Curtis’s supervisor to give him a “below expectation” performance review for 2009, even though he had protested the target, and even though his performance exceeded that of other MDMs; the performance review was changed to “met expectation” after he protested, but he was nevertheless excluded from attending a conference for high achievers that he qualified to attend; (iv) BNS refused Mr. Curtis’s requests for copies of his performance appraisals, which became concerning to him after the negative appraisal; and (v) in April 2010, a colleague with whom Mr. Curtis did not get along was hired into the role of district manager, making her Mr. Curtis’s immediate supervisor; Mr. Curtis’s supervisors wanted him to train new recruits—who were white—which he did not want to do because such training was not part of his job description and it would interfere with his work and his ability to meet his targets, especially without an MDO to assist him; Mr. Curtis alleged that his supervisors reacted negatively to his refusal and withdrew their “management support”.

[20] These allegations are the ones the Commission considered distinct from later allegations, and out of time.

[21] Mr. Curtis’s complaint also alleged that BNS treated him differently than his white co-workers and engaged in discrimination by the manner in which it conducted investigations

into mortgage files he had closed (including by acting in a way that damaged his reputation), the circumstances of his suspension from work on April 25, 2012, and BNS's treatment after his departure.

[22] The Commission considered the allegations that spanned the period from September 2011 to April 25, 2012 to be a separate set of allegations. It decided to deal only with the September 2011 to April 25, 2012 allegations. Mr. Curtis's complaint presented a chronology of allegations without categorizing them into sets and, as noted above, the complaint form and narrative both indicated that the discrimination was still happening. On the complaint form, Mr. Curtis did not provide an end date and he checked the box indicating that the discrimination was ongoing. I will return to this point in the analysis, but I mention it now because I refer to the allegations regarding events that post-date August 2011 as the "later allegations". These are summarized in the next paragraphs.

[23] According to Mr. Curtis's complaint, in September 2011 an underwriting manager initiated an investigation into a mortgage approval file, accusing Mr. Curtis of taking a deal from a white MDM. Mr. Curtis alleged that, in truth, the white MDM had misrepresented client income information, the client in turn asked Mr. Curtis to fix the problem, and he did. Mr. Curtis alleged he endured a subsequent onslaught of accusations from white employees who accused him of unethical behaviour, even though "it was proven that, it was the white MDM who was guilty of the 'unethical' behaviour". His complaint stated that this "increased tension and emotional issues for me and proved to me, that there was collusion among the white group, to harass me due to my colour."

[24] The complaint also alleged that on April 24, 2012, Mr. Curtis was told he had to “go downtown” the next day to speak with Ms. Shirley Roberts, a manager with BNS’s Employee Relations department. This was the same day as a mandatory regional annual meeting where Mr. Curtis’s absence would be noticed. When Mr. Curtis asked about this timing, he was told not to attend the annual meeting. On April 25, 2012, Mr. Curtis arrived for his meeting with Ms. Roberts and entered the room to see that she was accompanied by two other people—a corporate security officer and an investigator. The complaint alleged that Mr. Curtis was subjected to a four-hour interrogation that was recorded up to the point when Ms. Roberts spoke to tell him that he was being suspended, and handed him a suspension letter. When Mr. Curtis protested, he was told he had to accept the suspension or he would be fired for insubordination. He was instructed not to discuss the matter with anyone, as it was confidential. However, by the next morning “the entire bank had heard”. Mr. Curtis alleged that at the annual meeting, the regional manager had announced to the attendees that Mr. Curtis had to go downtown for a meeting, and followed this announcement with a discussion about ethics, thus alluding that he was involved in something unethical, and damaging his reputation and character.

[25] Finally, the complaint alleged that BNS’s differential treatment resulted in Mr. Curtis being denied employment with other banks, “due to the harsh negative references by Scotiabank and where they continue to violate my human rights by defaming my character in the financial industry”. Mr. Curtis alleged that BNS caused other banks to rescind offers of employment, rendered him ineligible to gain employment with other banks, and limited his ability to function

as an independent broker (his current career)—a practice he alleged was still in effect. The complaint alleged that, since his departure from BNS:

[...] management has embarked on character assassination, defamation, and slander and barred me from gaining employment with other banks. I have had several job offers rescinded, due to bad reference from Scotiabank. This makes me ineligible to gain employment with other banks. These discriminatory actions have severely limited my ability to function as an independent broker. I have emails from Shirley Roberts of Scotiabank's Employee Relations, which confirms that this practice is in effect.

[26] The Commission decided to dismiss the complaint pursuant to subparagraph 44(3)(b)(i) because, having regard to all the circumstances of the complaint, further inquiry by the Tribunal was not warranted.

B. *History of legal proceedings and complaint process*

[27] Mr. Curtis is frustrated that, years after he commenced his human rights complaint, the Commission decided to dismiss it at the screening stage. The Commission did not deal with the complaint earlier because Mr. Curtis was pursuing other legal proceedings against BNS.

[28] For context, I summarize aspects of some of the legal proceedings between Mr. Curtis and BNS, as well as certain decisions of the Commission regarding the human rights complaint.

The summary is lengthy, but in my view, the background assists in understanding Mr. Curtis's allegations challenging the Commission's decision.

- (1) Complaint initiated, Commission decides not to deal with complaint because another procedure is available
 - June 2012: Mr. Curtis filed a complaint against BNS under section 242 of the *Canada Labour Code*, RSC 1985, c L-2 (*CLC*), alleging that BNS constructively and unjustly dismissed him from employment by suspending him on April 25, 2012. Among other arguments, Mr. Curtis alleged that the suspension letter from BNS stated he was being suspended with pay, but in fact, he was suspended without pay because his salary was 100% commission-based. Mr. Curtis alleged that for this reason, he was forced to submit a letter of resignation on April 30, 2012 and look for other employment.
 - September 2012: Mr. Curtis contacted the Commission about submitting a complaint.
 - April 2013: Mr. Curtis filed a human rights complaint in a form acceptable to the Commission, and the complaint was assigned file no. 20130462.
 - June 2013: BNS asked the Commission not to deal with the complaint on the basis that the *CLC* proceeding was the preferable forum to review Mr. Curtis's allegations.

- July 2013: The *CLC* hearing was adjourned pending the Commission's determination on whether Mr. Curtis's human rights complaint could be addressed in the context of the *CLC* proceeding.
- October 2013: The Commission decided not to deal with Mr. Curtis's human rights complaint at that time on the basis that, as the parties had agreed, the complaint could be addressed in the context of the *CLC* proceeding. However, when it came time to reconvene the *CLC* proceeding, BNS raised a preliminary objection challenging the *CLC* adjudicator's jurisdiction.

(2) *CLC* adjudicator's decision, judicial review

- November 2013: The parties agreed to bifurcate the *CLC* proceeding to address BNS's preliminary objection first, and the *CLC* adjudicator heard from the parties regarding the preliminary objection. Mr. Curtis was represented by counsel at the time.
- November 2013 to February 2014: While the adjudicator's decision was under reserve, Mr. Curtis asked the adjudicator to re-open the hearing. By this point, Mr. Curtis had terminated the retainer with counsel and he was representing himself. Mr. Curtis alleged, among other things, that his counsel did not follow his instructions to oppose bifurcation. The parties filed additional submissions.

- July 2014: The *CLC* adjudicator issued his decision that dismissed Mr. Curtis's request to re-open the hearing and decided the preliminary issue in BNS's favour. The adjudicator: did not accept Mr. Curtis's argument that he was constructively dismissed because his suspension was, in reality, a suspension without pay; found that BNS's decision to suspend Mr. Curtis with pay did not fundamentally change his terms of employment; and found that Mr. Curtis was not constructively dismissed, as BNS did not engage in conduct that had the effect of terminating the contract of employment. The adjudicator concluded that Mr. Curtis had voluntarily resigned and dismissed the complaint based on a lack of jurisdiction because no dismissal occurred.
 - August 2014: Mr. Curtis commenced an application in this Court for judicial review of the adjudicator's decision.
- (3) Request to reactivate complaint, Commission decides not to deal with complaint because judicial review in progress, and civil action
- April-June 2015: Mr. Curtis asked the Commission to reactivate his human rights complaint, noting he had recently learned that BNS's discrimination went further than he realized. BNS had filed information about him with the Bank Crime Prevention and Investigation Office (BCPIO) that would prevent Mr. Curtis from gaining employment with any bank for 7 years. BNS argued that the Commission should not reactivate the human rights complaint, because the *CLC* proceeding was

not at an end while the application for judicial review was in progress, and because Mr. Curtis had commenced an action against it in the Ontario Superior Court of Justice (Civil Action) alleging defamation and wrongful dismissal.

- August 2015: An investigator completed a section 40/41 report recommending that the Commission should not deal with the complaint at that time. The investigator found that Mr. Curtis should finish the other redress procedures that he started: (i) in the Civil Action, the Ontario Superior Court of Justice would be looking at the same facts and had the authority to grant remedies consistent with those available under the *CHRA*; and (ii) the process started under the *CLC* was not at an end because Mr. Curtis was challenging the adjudicator's decision.
- November 2015: In line with the investigator's recommendation, the Commission decided it would not investigate Mr. Curtis's complaint at that time.
- April 2017: The application for judicial review of the *CLC* adjudicator's decision was dismissed (*Curtis v Bank of Nova Scotia*, 2017 FC 380).

(4) Request to reactivate and update complaint, Commission considers whether it should deal with complaint in view of civil action and raises timeliness issue

- May-July 2017: Mr. Curtis wrote to the Commission in May 2017 to ask that his human rights complaint be reactivated. He argued that the unjust

dismissal complaint under the *CLC* had ended without addressing the human rights issues. With respect to the Civil Action, Mr. Curtis argued that he never claimed damages for discrimination and furthermore, in January 2016 the parties had agreed that Mr. Curtis would discontinue the allegations of wrongful dismissal, leaving only claims for defamation. The Commission wrote to BNS in June 2017, copying Mr. Curtis. The letter stated that, based on the information Mr. Curtis provided, neither the Civil Action nor the *CLC* complaint addressed his human rights issues and the Commission had thus reactivated his complaint. The letter informed BNS that the Commission would obtain evidence relating to Mr. Curtis's allegations and an investigator would be assigned as soon as possible, and asked BNS to respond to the allegations by July 21, 2017. Mr. Curtis, believing that his complaint would proceed, submitted what he described as an "update" to his complaint on July 19, 2017 together with supporting evidence. However, on July 14, 2017, BNS had raised an objection under *CHRA* section 41(1)(a). BNS argued that the Commission should not deal with Mr. Curtis's complaint because the Civil Action raised similar issues as those advanced in the human rights complaint. It is unclear when Mr. Curtis was informed of BNS's objection, but it appears that he discussed the objection with a manager in the Commission's Investigations Division on July 20, 2017. He sent an email to the manager on July 21, 2017, stating there was no need for another section 40/41 report and asking that the investigation stage be completed immediately.

- August 2017: The investigations manager emailed Mr. Curtis on August 4, 2017 (this email is in the Applicant's Record but not in the CTR). The email explains, "As stated earlier I am unable to grant your request. The respondent has formally raised a preliminary objection, and a s.41 report is required to be prepared so that the Commission can decide the matter." The email informed Mr. Curtis that he had been given similar information by another Commission employee two years earlier, and reproduced notes of the 2015 conversation stating the employee's opinion that the defamation aspect of the Civil Action does not overlap with the human rights issues, and the defamation claim could move forward at the same time as the human rights complaint, cautioning that this was her personal opinion and there would have to be a section 40/41 report on the issue and a decision by the Commission. Mr. Curtis next wrote to the Deputy Chief Commissioner on August 16, 2017 to request that he intervene because BNS's objection was an abuse of process. This was a five-page letter with 8 attachments that explained the procedural history and asked for an order denying BNS's objection, an order allowing his complaint to be updated to reflect the revisions to his complaint submitted on July 19, 2017, and an order that the complaint proceed to investigation with a 30-day deadline for BNS to defend the updated complaint.
- September 2017: The Commission sent Mr. Curtis a letter about the section 41 objection and asked for his responding submissions. In October 2017, Mr. Curtis provided submissions responding to BNS's

section 41(1)(a) objection. In the Fall of 2017, Mr. Curtis exchanged multiple emails with Commission staff, expressing his frustration and disagreement with how his complaint and BNS's objection were being handled.

- May 2018: On May 2, 2018, the assigned investigator (Investigator) sent an email to Mr. Curtis, stating it appeared that his complaint dealt with two separate and distinct periods. The email explained that the Commission has discretion to sever allegations that are separate and independent of the remaining allegations, and to decide not to deal with allegations that occurred more than one year before the complaint was filed, in accordance with section 41(1)(e) of the *CHRA*. The letter asked Mr. Curtis to respond to five questions regarding the section 41(1)(e) issue. On May 3, 2018, a different investigations manager (it appears that a new manager took over) spoke with BNS's lawyer, and gave her view that section 41(1)(a) no longer applied to Mr. Curtis's case after his amendments to the Civil Action. The note from that call indicates that BNS agreed to forego the section 41 stage and focus on the merits of the complaint. BNS delivered a defence on May 9, 2018.

(5) Mr. Curtis objects to Commission's handling of his complaint

- May-June 2018: Mr. Curtis did not immediately respond to the Investigator's five questions regarding section 41(1)(e). Instead, he exchanged emails with Commission staff, expressing his frustration with

how his complaint was being handled. He demanded that the Commission provide an official letter explaining the process and the current stage and status of his complaint before he provided a position statement or telephone interview “as it appears that there are two different processes ongoing simultaneously with my file”. He asked for copies of BNS’s materials and asked the Commission to confirm whether it had accepted his July 19, 2017 submission that amended the complaint “to reflect the codes that were violated, which are the same Human rights employment discrimination of my complaint”. The Commission sent a formal letter by email on June 4, 2018 and by mail on June 6, 2018, explaining: (i) on the section 41(1)(a) point, that the amended Civil Action no longer dealt with the essence of the complaint and therefore BNS would be asked to respond to the allegations; (ii) while the Commission was investigating all of the allegations in the complaint, a review of the complaint form and information provided by BNS indicated that some of the allegations relate to incidents that occurred more than one year before the complaint was filed, involve different individuals, and present large gaps in time; these allegations could be untimely and could be severed, but the determination would require evidence (which cannot be considered at the section 41 stage) and therefore the matter would proceed to investigation; (iii) the Commission had received all of the information Mr. Curtis provided to date and it would be considered in the investigation; (iv) the complaint could not be amended to expand its scope beyond the complaint that was

accepted on April 22, 2013, however, the Investigator would assess the additional information Mr. Curtis provided in his July 19, 2017 letter in support of the existing allegations, as well as Mr. Curtis's supporting evidence; and (v) Mr. Curtis was given a copy of BNS's defence and told that while the Commission could not provide copies of BNS's documents, he would have an opportunity to respond to the Investigator's report which would summarize the evidence.

- (6) Mr. Curtis commences application for *mandamus* and declaratory relief
- July 2018: Mr. Curtis filed a notice of application in the Federal Court on July 9, 2018, seeking a writ of *mandamus* and declaratory relief (Mandamus Application). The application sought relief that would require the Commission to investigate the complaint "in a procedurally fair manner", stop considering section 41 objections (including the section 41(1)(e) issue), and accept Mr. Curtis's amendments to his complaint. Mr. Curtis sent letters to the Commission about the Mandamus Application, and stated that he had filed a motion seeking an order that the Commission cease its current procedure. He asked the Commission to cease all activity on his complaint pending a decision from the Court. Around this time, Mr. Curtis also filed a response in his complaint (including a response regarding section 41(1)(e)), stating he was doing so to abide by the Commission's directive to provide a submission under the "threat" that the investigation would be completed without his input, and

indicating that his response was without prejudice to his protest regarding the Commission's handling of his complaint.

(7) Investigator completes report

- August 2018: The Investigator completed her report on August 2, 2018, which was sent to the parties with a cover letter dated August 7, 2018. Mr. Curtis wrote to the Commission on August 28, 2018, alleging that the Investigator breached procedural fairness by not interviewing him. He also complained that the Investigation Report did not address his allegations regarding termination of employment—a primary complaint of discriminatory practices that had not been dealt with in other proceedings. Mr. Curtis stated he had been disadvantaged by not being interviewed and he had insufficient time to make submissions, claiming he received the Investigation Report on August 15. He asked for an extension of time to respond and permission to file a 30-page submission. The Commission's August 28, 2018 email in response stated that: the Investigator made several requests to obtain Mr. Curtis's position and supporting evidence, and despite the numerous extensions, he failed to do so; several requests were made to schedule an interview and he had declined these requests (the writer pointed to emails and letters dated May 2, May 29, June 6 and June 28, 2018, but I only see a request to schedule an interview in the June 28, 2018 email); given Mr. Curtis's concerns, the Commission was prepared to interview him on August 30, 2018; the request for an

extension of time was denied on the basis that the Investigation Report was delivered on August 8, 2018 and the submissions would be due on August 30; and the request for a 30-page submission was denied on the basis that submissions cannot exceed 10 pages according to Commission procedures. Mr. Curtis responded on August 29, 2018, disputing the Commission's position, asking to see the procedures the Commission relied on, and re-requesting an extension of time and additional pages. Both requests were denied. Mr. Curtis provided his submissions responding to the Investigator's report by the August 30, 2018 deadline. There were further email exchanges where Mr. Curtis stated that he never declined interview requests or refused to cooperate in the process. He raised issues with the process and complained that the Commission rushed the investigation and prepared an incomplete report after he filed the Mandamus Application.

(8) Mr. Curtis's interview

- September 2018: Mr. Curtis was interviewed on September 21, 2018, by a different investigator than the author of the Investigation Report. On September 30, 2018, BNS filed its written response to the Investigation Report.
- October 2018: The investigator who interviewed Mr. Curtis on September 21 prepared a Supplementary Investigation Report dated October 20, 2018. The Supplementary Investigation Report concluded that

there was no reason to change the findings and recommendations of the August 3, 2018 Investigation Report. It stated: (i) Mr. Curtis did not provide any additional supporting evidence that his allegations were linked and formed a continuous pattern of discrimination; he also did not provide any additional information to show that the Commission should exercise discretion to deal with all of the allegations in the complaint; (ii) on the remaining allegations related to the end of his employment, Mr. Curtis did not provide any evidence, other than his own bald assertions, to show that BNS's treatment was linked to race or colour. The CTR includes an October 23, 2018 letter to Mr. Curtis providing a copy the Supplementary Investigation Report and setting a November 20, 2018 deadline for responding submissions, however, at the hearing of this proceeding Mr. Curtis denied receiving it. He did not file submissions in response to Supplementary Investigation Report.

(9) Commission issues decision, Mandamus Application is dismissed

- January 2019: The Commission issued its decision on January 2, 2019.
- May 2019: The Commission brought a motion to dismiss the Mandamus Application. The Commission (and BNS) argued that the Mandamus Application should be struck for mootness because the Commission had issued its decision. The motion was granted.

V. Analysis

A. *Decision*

[29] The Commission's decision reads:

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in your complaint (20130462) against Bank of Nova Scotia.

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, to deal only with the September 2011 to April 25, 2012, allegations in the complaint because the other allegations in the complaint spanning from November 2007 to the summer of 2011 are separate and apart from the more recent allegations and do not form a continuous pattern of discrimination with the later allegations.

The Commission also 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.

Accordingly, the file on this matter has now been closed.

[30] Where the Commission endorses the recommendations of an investigator and provides limited reasons for its decision, the investigation report will be viewed as constituting the Commission's reasoning for the purpose of a decision under subsection 44(3) of the *CHRA*: *Jagadeesh FCA* at para 32, citing *Syndicat des employés de production du Québec et de l'Acadie v Canada (Human Rights Commission)*, [1989] 2 SCR 879 at para 35 and *Bell Canada v Communications, Energy and Paperworkers Union of Canada (1998)*, 1998 CanLII 8700 (FCA), [1999] 1 FC 113 at para 30 [*Bell Canada*].

[31] In this case, the Commission did not provide its own reasoning or address the parties' submissions in response to the Investigation Report (a point to which I will return).

Consequently, the Commission's reasons are taken to be those in the investigator's report: *Bell Canada* at para 30. However, it is unclear whether the Commission endorsed the findings in the Supplementary Investigation Report. Mr. Curtis contends that the Commission did not consider the Supplementary Investigation Report—the decision refers to “report” in the singular. I find it troubling that the Commission did not say that it considered the Supplementary Investigation Report, the purpose of which was to provide information to the Commission following Mr. Curtis's interview, and to provide his views, comments, input and additional evidence. However, if I assume the Commission considered the Supplementary Investigation Report and endorsed its conclusions, I would still set aside the decision. For the reasons explained in the section addressing procedural fairness, in my view the Investigation Report was not thorough, and the flaws were not remedied by the parties' submissions or by the Supplementary Investigation Report.

[32] A summary of key findings and reasons in the Investigation Report are set out below.

[33] The Investigation Report states that the Investigator interviewed Ms. Roberts, Senior Manager with the Employee Relations department at BNS. It states that the Investigator made numerous attempts to schedule an interview with Mr. Curtis, but was unable to interview him. According to the Investigator, instead of providing availability for an interview, Mr. Curtis questioned the investigative process, challenged the Investigator's authority, and did not appear to want to arrange an interview. However, the Investigator states she considered Mr. Curtis's

July 2018 submissions addressing BNS's defence, and the additional information and documentary evidence that he had provided in July 2017.

[34] The Investigator first addressed "preliminary matters":

- The Investigator noted that Mr. Curtis was pursuing the Civil Action, that the August 2015 section 40/41 report recommended that the Commission should not deal with the complaint at that time because of overlap between the complaint and the Civil Action, and that the Civil Action was no longer able to deal with human rights issues after Mr. Curtis amended the statement of claim. The Investigator concluded that *CHRA* paragraph 41(1)(a) ceased to apply and the Commission should deal with the complaint.
- While Mr. Curtis's complaint form listed adverse differential treatment and termination of employment as alleged practices, the investigation would only address the alleged adverse differential treatment.
 - The investigation would not address allegations about termination of employment because Mr. Curtis had submitted a letter of resignation on April 30, 2012, the *CLC* arbitrator determined that he was not constructively dismissed, and the Federal Court found the arbitrator's decision to be reasonable.
 - The investigation would not address allegations about events occurring after Mr. Curtis's resignation because they post-dated his employment and he was pursuing the Civil Action for defamation.

[35] In addressing the alleged adverse differential treatment, the Investigation Report separated Mr. Curtis's allegations into two sets: (i) allegations between November 2007 and the summer of 2011 (first set), and (ii) allegations between September 2011 and April 25, 2012 (second set). The Investigator found the two sets of allegations were distinct, as they occurred over two separate time periods, appeared to deal with different issues, and involved different people from different departments at BNS. Specifically, the first set of allegations pertained to performance issues, being denied an assistant, and being asked to train new staff. The second set pertained to the events surrounding the end of the employment relationship. The Investigator noted the time between events in the first set, which suggested they were "isolated incidents that do not form a continuous pattern of discrimination with the more recent allegations". The Investigator found that the first set of allegations should be severed and recommended that the Commission only deal with allegations between September 2011 and April 25, 2012.

[36] The Investigator stated that the remainder of the investigation would only address the September 2011 to April 25, 2012 allegations, which she summarized as:

- September 2011: A manager initiated an investigation into a mortgage approval file. The complainant, Mr. Curtis, received an "onslaught of accusations" of unethical behavior.
- April 25, 2012: The complainant met with three people for an interview. The complainant alleges that he was interrogated for "almost four hours", and was placed under suspension.

[37] In assessing whether Mr. Curtis was adversely affected in employment, the Investigator summarized each party's position and the evidence for each allegation. The Investigator concluded that the evidence did not support a link between the negative treatment and Mr. Curtis's race or colour. Other than a bald assertion, the Investigator found Mr. Curtis had not provided evidence to support his allegations that the alleged treatment occurred because of his race or colour.

[38] Specifically, regarding the investigation into the mortgage approval file, the Investigator found the evidence indicated that: the investigation was initiated after BNS's security group identified allegedly fraudulent supporting documentation for mortgages handled by Mr. Curtis; the decision to initiate the investigation was made by employees in the security group which operates independently from the Division where Mr. Curtis was employed; Mr. Curtis's supervisors were not involved in the decision to initiate an investigation; and the evidence did not suggest that the alleged treatment occurred because of race or colour. Regarding the investigation and suspension on April 25, 2012, the evidence indicated that the April 25 interview was scheduled to present the findings of the internal investigation and did not support that the interview was deliberately scheduled to prevent Mr. Curtis from attending the regional meeting. The Investigator also found that Ms. Roberts was authorized to issue the suspension with pay pending the investigation and this appeared to accord with BNS standard practices, the evidence did not support that the suspension was illegal, and the evidence did not support that the alleged treatment occurred because of race or colour.

[39] Consequently, the Investigator recommended that the complaint be dismissed because further inquiry was not warranted.

[40] Mr. Curtis and BNS filed submissions in response to the Investigation Report. As noted above, a Supplementary Investigation Report was prepared after Mr. Curtis's interview.

Mr. Curtis states he did not file submissions responding to the Supplementary Investigation Report because he did not receive it.

B. *Procedural Fairness*

[41] Mr. Curtis submits the Commission breached the duty of procedural fairness during the investigative process. He argues that the Commission: (i) failed to conduct a proper investigation, including because it failed or refused to investigate all of the allegations in the complaint and instead only conducted what was effectively another 41(1) objection report; (ii) was not open and transparent about the investigative process; (iii) failed to appoint a properly qualified investigator; (iv) improperly rejected his request to amend the complaint; (v) did not interview him prior to completing the Investigation Report; (vi) ignored his submissions; (vii) improperly allowed BNS to make multiple objections pursuant to subsection 41(1) of the *CHRA*; and (viii) was biased.

[42] BNS submits Mr. Curtis was afforded a high degree of procedural fairness, and his allegations that the process was unfair are baseless.

[43] BNS submits Mr. Curtis was provided with an opportunity to address gaps or bring important evidence to the attention of the Investigator: *Lafond v Canada (Attorney General)*, 2015 FC 735 at para 21 [*Lafond*]. In the Investigation Report, the Investigator explained that she attempted to schedule an interview with Mr. Curtis but he did not appear interested. Mr. Curtis

provided written submissions, as well as additional information and documentation, and the Investigator confirmed that these were considered.

[44] BNS submits Mr. Curtis's allegation that the Commission was not transparent about its process is not particularized or supported by the evidence. Furthermore, BNS states it was entitled to make objections under section 41 of the *CHRA*, and preventing it from doing so would have been procedurally unfair.

[45] BNS argues that the Commission investigated Mr. Curtis's human rights complaint, and it is not true that the Commission failed to appoint a proper investigator. There is no evidence in the record to suggest that the Investigator was unqualified and the Investigation Report should be reviewed on its merits.

[46] Finally, BNS submits the Commission was not required to accept amendments to Mr. Curtis's complaint and in any event, the amendments were considered as submissions. According to BNS, Mr. Curtis was offered an interview and many opportunities to make submissions, including submissions to the Commission about the Investigation Report. Mr. Curtis has not established that any submissions were unreasonably refused.

[47] In my view, Mr. Curtis has established that the Commission breached the duty of procedural fairness.

[48] I begin with Mr. Curtis's allegations that the Commission did not allow him to amend his complaint. BNS is correct that the Commission was not required to accept amendments to

Mr. Curtis's complaint. However, in my view, the Commission did not address the proposed amendments in a procedurally fair manner.

[49] Shortly after his second request to reactivate the complaint, Mr. Curtis sent a letter to the Commission dated July 19, 2017, attaching what he called an "update" to the complaint. The letter stated this was not new information but "more accurately structured information" to support a request for a full hearing before the Tribunal. The letter pointed out that the complaint period went beyond April 2012, as BNS coded his termination status as "not eligible for re-hire" and posted a BCPIO flag. The discriminatory actions had not ceased and the effects on his career were devastating.

[50] It appears that the Commission did not respond to the July 2017 letter until Mr. Curtis asked, in June 2018, how the Commission was going to proceed with his file. He asked whether it was going to accept the 2017 submission that amended the complaint to "reflect the codes that were violated, which are the same Human rights employment discrimination of my complaint".

The Commission's June 6, 2018 letter provided the following response:

We already have all of the information that you have provided to date and this information will be considered in the course of investigation. However, please note that we cannot amend your complaint to include all of the additional allegations detailed in your letter of July 19, 2017. While the additional information contained in your letter in support of the existing allegations and your supporting evidence will be assessed in the course of investigation, we cannot amend your complaint to expand the scope of the complaint accepted on April 22, 2013. This complaint has already gone to the Commission twice for decision and it would be procedurally unfair to expand its scope more than 5 years after it was accepted.

[51] The Commission's letter did not identify the allegations and/or information that expanded the scope of the original complaint, and confusingly, the letter stated that the investigation would consider all of the information Mr. Curtis had provided. It is not apparent to me that the information in the July 2017 letter fell outside the scope of the original complaint.

[52] After some follow-up correspondence where Mr. Curtis expressed disagreement with the Commission's position on the amendment and the way it was handling his complaint, Mr. Curtis filed the Mandamus Application on July 9, 2018. The Mandamus Application requested, among other things, an order that would require the Commission to accept the amendment as a matter of procedural fairness. On July 11, 2018, Mr. Curtis sent the Mandamus Application to the Commission together with a letter explaining that he had filed a motion asking the Court to order the Commission to cease its current procedure. Mr. Curtis asked that the investigation team not proceed any further, pending a decision on the motion that was scheduled for August 14, 2018. The Commission did not suspend the investigation. The Investigator issued the Investigation Report on August 2, 2018.

[53] In my view, the Commission breached procedural fairness when it refused to accept the "amendment" without explaining which allegations were outside the scope of the original complaint. This put Mr. Curtis in a difficult position, and it was one of the reasons for commencing the Mandamus Application. The Investigation Report did not correct the problem. The Investigator stated that she consulted the July 2017 letter. She did not identify any information as falling outside the scope of the original complaint. However, as I explain below, the Investigation Report did not address or even accurately summarize central submissions made in the letter.

[54] Mr. Curtis alleges that he should have been interviewed before the Investigation Report was completed, and the Commission's decision should be set aside on this basis alone. BNS's position is that the Investigator tried to interview Mr. Curtis but he was uncooperative—a point that Mr. Curtis disputes. Apart from the statement in the Investigation Report, I did not see evidence of multiple attempts to schedule an interview—I did not find notes of the Investigator's attempts schedule an interview, and the Investigator's June 28, 2018 email that asks Mr. Curtis to provide his availability for an interview does not mention any difficulties or prior attempts. However, it appears that Mr. Curtis did not respond to the request for his availability. Mr. Curtis bears the onus of establishing his allegations. Based on the information in the record, I am not satisfied that the failure to interview Mr. Curtis constituted a separate breach of procedural fairness in the circumstances.

[55] That said, the fact that Mr. Curtis was not interviewed meant that his written submissions were important to his right to be heard. Mr. Curtis submits that the Investigator did not consider his submissions, and therefore the investigation was not thorough.

[56] As I explained, the Commission is entitled to rely on an investigator's report to reach its decision. Where the Commission endorses the recommendations of an investigator and provides limited reasons for its decision, the investigation report will be viewed as constituting the Commission's reasoning: *Jagadeesh FCA* at para 32. However, procedural fairness requires that the investigation be neutral and thorough. An investigation is thorough if it is not clearly deficient and does not fail to assess any obviously crucial evidence. The investigation and report must provide an adequate and fair basis for the Commission to evaluate whether there is sufficient evidence to warrant the appointment of a tribunal: *Jagadeesh* at para 55, citing *Slattery*

v Canada (Human Rights Commission), 1994 CanLII 3463 (FC), [1994] 2 FC 574 at 598, 604-606. If an investigation report is defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion: *Jagadeesh FCA* at para 33, citing *Grover v Canada (National Research Council)*, 206 FTR 207, 2001 FCT 687 at para 70 and *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 112 [*Sketchley*].

[57] Investigations do not have to be perfect. Not every defect is fatal and some defects may be overcome by providing the parties with the opportunity to make submissions with respect to the investigation report: *Jagadeesh FCA* at para 31. The only errors that will justify the intervention of a court on judicial review are investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions: *Jagadeesh FCA* at para 31 citing *Sketchley* at para 38 and *Hughes v Canada (Attorney General)*, 2010 FC 837 at para 34 [*Hughes*].

[58] Mr. Curtis raises issues with the adequacy of the investigation, and states that the investigation and the resulting Investigation Report were flawed. The Court must decide whether Mr. Curtis has established investigative flaws sufficiently fundamental that they could not be remedied by the parties' responding submissions.

[59] I find that the Investigator did not conduct a thorough investigation, and the investigative flaws were sufficiently fundamental to meet the threshold established by the jurisprudence. In my view, the key flaws relate to: (i) the investigation of BNS's alleged failure to follow bank policy regarding the mortgage file investigation that led to Mr. Curtis's suspension on April 25,

2012 and the alleged differential treatment regarding the mortgage file investigation and suspension, as compared to other bank employees; and (ii) the Investigator's decision not to investigate events post-dating April 25, 2012, regarding how the employment relationship ended. In my view, the investigation into these allegations was either not thorough or not done, and the Investigation Report did not provide an adequate basis for the Commission to evaluate whether an inquiry by the Tribunal was warranted.

[60] Section 7 of the *CHRA* provides:

Employment	Emploi
7 It is a discriminatory practice, directly or indirectly,	7 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	

[61] The Investigator took a narrow view of Mr. Curtis's allegations of adverse differential treatment in the course of his employment and did not thoroughly investigate core allegations in Mr. Curtis's complaint—including allegations that BNS did not follow bank policy for the mortgage file investigation that led to his suspension on April 25, 2012, and treated him differently from co-workers who were not Black. For example, Mr. Curtis submitted that: (i)

BNS did not follow its policies (performance improvement and discipline policies) in his investigation, suspension, and the acceptance of his resignation; (ii) the BNS employees who were responsible for verifying the supporting documentation for Mr. Curtis' mortgage deals (who were not Black) were not investigated or disciplined; (iii) other MDMs (who were not Black) were treated differently when allegedly fraudulent supporting documents were found in mortgage files they had closed; (iv) BNS's suspension constituted a refusal to employ or continue to employ him and was contrary to BNS policy because it was not a suspension with pay since his remuneration was 100% commission, and non-Black co-workers were treated differently; and (v) the basis for his suspension was an alleged business conduct breach—accepting a deal from an improper referral source (someone who is both a mortgage broker and a realtor)—when BNS business conduct guidelines contain no such prohibition, and BNS never established that he was involved in any fraud.

[62] The Investigator also decided not to investigate events post-dating April 25, 2012. Mr. Curtis's submissions about these events related to his allegations that: (i) BNS coded him “not eligible for re-hire” based on false allegations of fraud, and this is a lifetime ban against working at BNS; and (ii) BNS posted a BCPIO alert which made him ineligible for employment at other banks—offers of employment from other banks were rescinded because of the alert. In my view, these were core aspects of Mr. Curtis' complaint and the Investigator did not provide adequate justification for not addressing them.

[63] As noted above, the Investigator decided not to address allegations about termination of employment because Mr. Curtis submitted a letter of resignation on April 30, 2012, the *CLC* arbitrator had determined that he was not constructively dismissed, and the Federal Court found

that decision to be reasonable. The Investigator decided not to address allegations about events occurring after Mr. Curtis's resignation from BNS because they post-dated his employment and Mr. Curtis was pursuing the Civil Action for defamation in the Ontario Superior court. However, this reasoning seems inconsistent with the previous Commission decisions that the *CLC* proceeding and the Civil Action did not address the human rights aspects of Mr. Curtis's complaint—a point that the Investigator acknowledged. Furthermore, I agree with Mr. Curtis that the Commission was required to conduct its own analysis, not simply rely on the adjudicator's findings regarding *CLC* provisions. *CHRA* section 7 states that it is a discriminatory practice, either directly or indirectly, to "refuse to employ or to continue to employ any individual" on a prohibited ground of discrimination. The Investigator does not explain why a suspension without pay or a lifetime refusal to re-hire would fall outside this language.

[64] In my view, the parties' responding submissions and the Supplementary Investigation Report could not and did not remedy these deficiencies in the investigation and Investigation Report. The Investigator did not adequately investigate core aspects of the complaint, and may have required further information from the parties in order to make a recommendation to the Commission. Accordingly, the investigation was not "thorough" as required by the jurisprudence: *Jagadeesh FCA* at paras 28-31.

[65] While these findings are sufficient to warrant returning the matter to the Commission, I will briefly address the remaining procedural fairness allegations, for completeness.

[66] Mr. Curtis alleges that the Investigator failed to interview the proper individuals from his line of report who were involved in the mortgage investigation process and authorized some of the allegedly discriminatory acts. In my view, it is unnecessary to decide this issue. The new investigator will determine who should be interviewed as part of the fresh investigation.

[67] Mr. Curtis denied receiving the Supplementary Investigation Report and states he was deprived of an opportunity to make submissions in response to that report; however, he did not provide sworn evidence in this regard. Mr. Curtis's explanation is that he did not even know that the Supplementary Investigation Report existed. Based on my review of the CTR, this is a reasonable explanation. In an email sent to the investigations manager after Mr. Curtis's interview, the interviewing investigator stated she had told Mr. Curtis that "either you or I would be in touch about 'next steps' because I am not sure if a supplementary report will be prepared, if submissions will be accepted, etc." Furthermore, the Commission's decision referred to a "report" in the singular, so Mr. Curtis would have no reason to look for the Supplementary Investigation Report from reading the Commission's decision. Mr. Curtis bears the burden to prove he did not receive the Supplementary Investigation Report, and the covering letter attaching it is properly addressed to him. That said, I did not see evidence that the letter was actually mailed, such as a mailing receipt (there were mailing receipts for other documents). While it is a close call, I am satisfied that Mr. Curtis did not receive the Supplementary Investigation Report, and therefore, he did not have an opportunity to respond to it.

[68] I am not satisfied that the investigation of Mr. Curtis's complaint was procedurally unfair for any of the other alleged reasons, as addressed below.

[69] Mr. Curtis alleges that the Investigator was not qualified to conduct the investigation. I agree with BNS that nothing in the record suggests that the Investigator was unqualified, and the Investigation Report should be reviewed on its merits. An investigator's training is a matter for the Commission and the Court's role is to address the process that was followed and the report that was produced: *Hutchinson v Canada (Minister of the Environment) (CA)*, 2003 FCA 133 at para 61 [*Hutchinson*]. I also agree with BNS that it was entitled to raise section 41 objections. Mr. Curtis has not established that the Commission erred or acted in a procedurally unfair manner by allowing BNS to raise the objections it did.

[70] Mr. Curtis argued that the Commission should have provided copies of BNS's evidence, and the evidence was not summarized in the Investigation Report. I disagree. The Commission informed Mr. Curtis that it could not disclose BNS's evidence. BNS's submissions were provided to Mr. Curtis for response, and the Investigation Report summarized BNS's evidence. The Commission may provide the substance of the evidence and an opportunity to respond: *Hutchinson* at paras 47-50, 53. The right to know the case to be met and to respond to it arises in connection with material that will be put before the decision maker, not material that passes through an investigator's hands: *Hutchinson* at para 49.

[71] Mr. Curtis also argued that a number of documents he provided to the Commission are not in the CTR. Mr. Curtis states that the documents included at Tab X of the Applicant's Record were submitted to the Commission, but ignored by the Investigator. However, the record does not establish that Mr. Curtis actually provided these documents to the Commission. Mr. Curtis's affidavit does not describe the documents in Tab X as those missing from the CTR and the email Mr. Curtis sent to the Commission does not establish the documents that were attached.

[72] Finally, Mr. Curtis alleges that a Commission employee demonstrated bias towards him and the Commission favoured BNS throughout the process. An allegation of bias is serious and a mere suspicion is not sufficient: *Hughes* at para 21. The burden of demonstrating bias or a reasonable apprehension of bias rests on the person making the allegation: *Hughes* at para 21. Based on my review of the record, Mr. Curtis has not met his burden.

C. *Reasonableness of the Decision*

[73] Mr. Curtis submits the allegations in the complaint should not have been severed, since the allegations are interrelated, involve the same people, and demonstrate a continuous pattern of discrimination. He argues that the Commission had considered paragraph 41(1)(e) in 2013 and 2015, but found that it did not apply. Mr. Curtis also argues that the Investigator made several factual and legal errors in the Investigation Report. Among other things, he argues that: (i) the Commission failed to properly assess the termination of his employment, as the *CLC* adjudicator did not decide this issue; (ii) the Investigator did not actually conduct an investigation, but rather, only did another subsection 41(1) objection report; (iii) BNS violated sections 5, 7, 8, 10, 11, 12, and 14 of the *CHRA*; and (iii) he was illegally suspended from his employment without warning and without pay.

[74] Mr. Curtis submits the Commission was given all of the facts to establish that BNS engaged in discriminatory practices, but ignored the evidence. For example, he was coded as not re-hireable and BNS placed a BCPIO flag on his account for seven years when no one else involved in the process was accused of fraud apart from him. In oral submissions, Mr. Curtis took the Court through evidence to show that his suspension was not properly recorded and that

fraud was never established. Sometimes he relied on findings in the Civil Action or other information that was not before the Commission.

[75] When assessing the merits of the Commission's decision, the evidentiary record is generally restricted to the evidentiary record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19. My assessment of the merits is based on the information that was before the Commission.

[76] BNS submits the Commission's decision that the first set of allegations were untimely is internally coherent and based on a rational chain of analysis. The Commission performs a screening function, has significant legislative discretion, and is the master of its own process: *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at paras 60-62, 68 [*Canadian Union*]; *Rosianu v Western Logistics Inc*, 2021 FCA 241 at paras 34, 47 [*Rosianu*].

[77] BNS submits the Commission's decision regarding the later allegations is also reasonable, and the Court should not interfere.

[78] First, BNS submits this Court's intervention is unwarranted because the requirements of subparagraph 44(3)(b)(i) of the *CHRA* were met, requiring the Commission to dismiss Mr. Curtis's human rights complaint. Specifically, BNS argues that the Commission: (i) conducted an in-depth analysis of Mr. Curtis's allegations, information, submissions, and evidence; (ii) provided a comprehensive explanation as to why the first set of allegations were

untimely; and (iii) provided a detailed examination of the evidence, leading to the determination that the evidence does not support that the allegations were linked to Mr. Curtis's race or colour. The Commission is not an adjudicative body; rather, the role of the Commission is to carry out an administrative and screening function, with its central role being to assess the sufficiency of the evidence before it: *Canadian Union* at paras 60-61; *Rosianu* at para 47. The Commission has broad discretion in determining whether further inquiry is warranted, having regard to all of the circumstances: *Canadian Union* at para 62; *Rosianu* at para 34.

[79] BNS argues that Mr. Curtis's case is similar to *Lafond*, where the Court found that the investigator's report was very detailed, the parties were given the opportunity to respond, and the applicant was simply unhappy with the decision. BNS argues that the Investigation Report was comprehensive and provided an adequate explanation for the recommendation to dismiss Mr. Curtis's complaint. Mr. Curtis had the opportunity to respond, and he is simply unhappy with the Commission's decision.

[80] Second, BNS submits this Court addressed the reasonableness of the Commission's decision indirectly, through the Mandamus Application. While Mr. Curtis commenced the Mandamus Application to compel the Commission to carry out and complete its investigation, he continued to pursue the application after the Investigation Report and Commission decision had been issued, arguing that the January 2, 2019 letter was not the Commission's decision (which the Court did not accept): *Curtis v Canada (Human Rights Commission)*, 2019 FC 1498 at paras 4, 26. According to BNS, Mr. Curtis was attempting to have the human rights complaint reinvestigated, and while the Mandamus Application did not address the merits of the

Commission's decision, he is attempting to use this judicial review to obtain the same relief of a reinvestigation.

[81] Finally, BNS submits the majority of Mr. Curtis's allegations regarding the merits of the Commission's decision are not particularized or supported by evidence. For example, BNS argues that Mr. Curtis makes bald allegations of discrimination based on race and colour, but he has not provided evidence that BNS did not investigate other employees in analogous circumstances or that BNS's actions were racially motivated.

[82] When reviewing the merits of an administrative decision, it is not the Court's role to reassess or reweigh the evidence, or conduct its own analysis of the matter and ask what decision it would have made if it were deciding the matter itself: *Vavilov* at paras 83, 94-97, 125. The Court must review the decision that was actually made, and it must consider both the outcome and the rationale that led to that outcome: *Vavilov* at para 83.

[83] The central role of the Commission is to assess the sufficiency of the evidence before it: *Canadian Union* at paras 60-61; *Rosianu* at para 47. The Commission has broad discretion in determining whether further inquiry into a complaint is warranted, and its decision must be afforded deference: *Jagadeesh FCA* at para 26; *Canadian Union* at para 62; *Rosianu* at para 34.

[84] With respect to the Commission's decision to sever the earlier allegations, the Commission endorsed the findings in the Investigation Report without addressing the parties' submissions or the Supplementary Investigation Report. In my view, based on the circumstances of Mr. Curtis's case, the Commission's failure to address Mr. Curtis's submissions and the

Supplementary Investigation Report resulted in a failure to give responsive reasons justifying its decision. Since Mr. Curtis was not interviewed for the Investigation Report, the Investigator stated he would have an opportunity to provide responding submissions to the Commission. Indeed, the Investigation Report expressly invited Mr. Curtis to provide his position on the section 44(1)(e) timeliness issue in responding submissions. The Commission's decision acknowledged Mr. Curtis's responding submissions, but did not address his position or arguments. Also, the Commission's decision did not acknowledge or address the Supplementary Investigation Report, which had an important purpose: to provide additional information to the Commission following Mr. Curtis's post-Investigation Report interview, and to provide his view, comments, input and additional evidence. Thus, the Commission's decision did not address Mr. Curtis's written submissions or his position during the interview relating to the timeline of events and explanation that the same people (his supervisors) were involved in events spanning both sets of allegations.

[85] Furthermore, for reasons similar to those in the previous section on procedural fairness, the Investigation Report did not adequately address core allegations of Mr. Curtis's complaint and the Commission did not address his arguments about the deficiencies in the Investigation Report. Reading the decision in the context of the record, the Commission did not adequately justify its conclusion that Mr. Curtis's complaint did not warrant referral to the Tribunal.

[86] In my view, *Lafond* is distinguishable. I disagree with BNS that the investigation and Investigation Report in Mr. Curtis's case were comprehensive, or that Mr. Curtis is simply unhappy with the Commission's decision.

[87] There is no merit to BNS's argument that this Court addressed the reasonableness of the Commission's decision indirectly in the Mandamus Application. The bases for dismissing the Mandamus Application as moot were that the Commission's decision had been rendered, Mr. Curtis had commenced this application for judicial review to challenge it, and there was nothing left for the Court to do in that proceeding.

[88] In summary, in my opinion, the Commission's decision does not exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 99), and is therefore unreasonable.

VI. **Conclusion and Remedy**

[89] For the foregoing reasons, this application is allowed.

[90] Mr. Curtis requests an order quashing the Commission's decision and remitting his complaint directly to the Tribunal. In the alternative, he requests that the matter be remitted to the Commission for redetermination by different people, including the investigations manager who was handling his complaint after 2017. Mr. Curtis also requests costs.

[91] When the Court sets aside an administrative decision on judicial review, the usual remedy is to send the matter back for reconsideration: *Vavilov* at para 141. On occasion, this usual remedy is not granted because no purpose would be served by sending the matter back. However, this discretion must be exercised carefully, because the administrator (here, the Commission) is responsible at law for deciding the merits—not the Court: *Entertainment*

Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2020 FCA 100 at paras 99-100.

[92] While the Commission erred, I am not persuaded that the Court should bypass the Commission’s statutory screening authority and remit the matter directly to the Tribunal. I am not satisfied that remitting the matter to the Commission would serve no useful purpose, and I am not satisfied that a particular outcome is inevitable: *Vavilov* at para 142.

[93] I recognize that Mr. Curtis has pursued this matter for years. After his employment relationship with BNS ended, other banks rescinded their job offers and he had to change career paths. Mr. Curtis points to *McIlvenna v Bank of Nova Scotia*, 2019 FC 1610 [*McIlvenna*] and states the Court ordered the Commission to refer the applicant’s complaint to the Tribunal in less compelling circumstances than his own. Mr. Curtis also states he does not trust the Commission, pointing to a number of judicial review decisions involving BNS that, he says, reveal a pattern of the Commission favouring the bank.

[94] Regarding the lengthy process, this was partly because Mr. Curtis pursued remedies in other forums—as he was entitled to do. The Commission’s decisions not to deal with the complaint in 2013 and 2015 because of those other proceedings were based on the *CHRA* framework, and the decisions are not under challenge.

[95] In my view, *McIlvenna* is distinguishable. The Commission in that case acted contrary to the investigator’s report, which was thorough and “appropriately recommended that the case go

to the Tribunal to resolve the identified evidentiary conflicts”: *McIlvenna* at para 26. In Mr. Curtis’s case, the investigation was deficient. Furthermore, the Commission summarily dismissed Mr. McIlvenna’s case three times on essentially the same basis, notwithstanding several material disagreements between the parties that the Commission had no ability or authority to resolve: *Ibid.* That is not the situation here.

[96] I am not persuaded that the judicial decisions involving BNS reveal a pattern, as Mr. Curtis suggests.

[97] Consequently, I find this is not a case where the Court should exercise remedial discretion to remit the matter directly to the Tribunal or order the Commission to do so.

[98] Turning to Mr. Curtis’s alternative request, in my view the complaint should be reinvestigated by someone other than the authors of the Investigation Report and Supplementary Investigation Report. Therefore, Mr. Curtis’s complaint will be remitted to the Commission for reinvestigation by a different investigator, and on completion, a fresh decision on whether the complaint should proceed to an inquiry before the Tribunal.

[99] However, I have not been persuaded of bias or persuaded that any other people should be excluded from the reinvestigation and new decision. In my view, the Commission should decide who to assign to Mr. Curtis’s case, based on a consideration of its procedures, operational constraints, and the nature and procedural history of the complaint. I will add, however, that

Mr. Curtis filed his complaint more than a decade ago, and the Commission should endeavour to commence the reinvestigation and proceed to reconsideration as soon as reasonably possible.

[100] Mr. Curtis asked for his costs of the application, and he requested that costs be assessed. However, an assessment officer's power to make a costs order is more limited than the Court's power—particularly in a case involving a self-represented litigant. I would encourage the parties to confer and attempt to reach an agreement on costs of this application. If the parties cannot agree, Mr. Curtis shall, within 30 days of this decision, serve on BNS and file with the Court his written submissions on costs. BNS shall serve and file written cost submissions within 15 days thereafter. Each party's cost submissions must be no more than three pages, not including any bill of costs.

VII. **Redactions**

[101] As a final matter, during the hearing I pointed out that the record may include personal information that should be redacted. I invited the parties to provide joint or separate post-hearing submissions on redactions. BNS requested a number of redactions. It contends that the information ought to be redacted to preserve privacy interests of third parties. Mr. Curtis argues that BNS did not comply with the Court's direction, it should have brought a motion if it believed redactions were required, and he sees no reason why any documents should be redacted.

[102] I do not agree that BNS failed to comply with the Court's direction, and I do not agree that BNS should have brought a motion. The issue of redactions was one that I raised.

[103] I have reviewed BNS's proposed redactions and in my view, they are overbroad. Many relate to names. Some of the names seem to be redacted simply to remove mention of the name. It is unclear to me why those redactions should be accepted, particularly when the same names appear in similar contexts in other parts of the record that have not been identified for redaction. I agree with the redactions BNS proposes on pages 444-461, 472, and 566-587 of the Applicant's Record (Volume 2). I agree that names on those pages should be redacted because the names are associated with other personal information. The registry is directed to modify Volume 2 of Mr. Curtis' record by extracting pages 444-461, 472, and 566-587 and replacing them with the corresponding redacted pages provided by BNS. While Mr. Curtis did not ask for any redactions, I raised the issue because I noticed bank account information at pages 467-471 of the Applicant's Record. At the hearing, Mr. Curtis stated that his bank account is closed but also stated that the information should be redacted. Out of an abundance of caution, I will also order that pages 467-471 of the Applicant's Record be extracted from the record and replaced with a page indicating they were removed. All pages that the registry extracts from Volume 2 shall remain part of the Court record in this matter. The unredacted pages shall be marked confidential, and filed under seal.

JUDGMENT IN T-208-19

THIS COURT'S JUDGMENT is that:

1. The Amended Memorandum of Fact and Law is accepted for filing.
2. The Applicant's Record is amended to remove the name of the first individual listed in paragraph 30 of Mr. Curtis's affidavit (page 57 of the Applicant's Record), and to remove the corresponding reference to his name in the description of Exhibit Z, on page 5 of the table of contents, which appears at the beginning of Volumes 1 and 2.
3. The Applicant's Record is also amended to replace pages 444-461, 472, and 566-587 with redacted pages and to remove pages 467-471 (all in Volume 2). The unredacted pages that are extracted from Volume 2 shall be marked confidential and filed under seal as part of the record.
4. This application for judicial review is allowed and the Commission's January 2, 2019 decision is set aside.
5. The matter is returned to the Commission for reinvestigation by a different investigator and a new decision.

6. If the parties cannot agree on costs, costs remain to be determined following receipt of written submissions in accordance with the Court's reasons.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-208-19

STYLE OF CAUSE: GARY CURTIS v THE BANK OF NOVA SCOTIA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 15, 2024 AND JULY 16, 2024

JUDGMENT AND REASONS: PALLOTTA J.

DATED: JANUARY 31, 2025

APPEARANCES:

Gary Curtis

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Bonnie Roberts Jones
Rayaz Khan

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hicks Morley Hamilton Stewart
Storie LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENT