Federal Court  Cour fédérale

Date: 20101207

Docket: T-167-10

Citation: 2010 FC 1232

Ottawa, Ontario, December 7, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PUIYEE CHAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATION

[1] This is an application for judicial review of the decision dated December 23, 2009 (Decision) of the Canadian Human Rights Commission (Commission) that refused to consider the Applicant's complaint (Complaint) against Elections Canada on the basis that the Complaint fell within subsection 41(1)(*d*) of the *Canadian Human Rights Act* (R.S., 1985, c. H-6) (Act) because an independent investigator had already conducted a thorough investigation of the Applicant's allegations.

BACKGROUND

[2] The Applicant, Ms. Puiyee Chan, was an employee of Elections Canada at the material time.

[3] The Applicant believes that she experienced discrimination and harassment in the workplace in 2004 and 2005.

[4] On November 16, 2005, the Applicant attended a meeting with her immediate supervisor (Ms. Whitridge) and her supervisor (Mr. Bastarache) in order to discuss some matters in dispute in the workplace, including the Applicant's work performance and her absenteeism.

[5] On November 17, 2005, the Applicant did not come to work. She went on paid sick leave, and later unpaid sick leave, until she retired on October 6, 2008.

[6] The Applicant filed a harassment complaint with Elections Canada about a year after she stopped coming to work, on November 6, 2006. Elections Canada commissioned an independent investigation of the Applicant's allegations. The resulting report (Textus Report) concluded that all of Ms. Chan's allegations were unfounded.

[7] The Applicant filed a Complaint alleging harassment and discrimination to the Commission on November 24, 2008.

[8] On December 23, 2009, the Commission held that the Applicant's Complaint had already been considered through alternatives redress – the independent external investigation commissioned by Elections Canada in 2007 – and dismissed the Complaint.

[9] On February 4, 2010, the Applicant brought the within application for judicial review of the Commission's decision.

DECISION

[10] The Commission reviewed the Investigator's Report dated October 27, 2009 (Investigator's Report) and decided "pursuant to paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, not to deal with the complaint."

[11] The reason why the Commission felt the Complaint fell within paragraph 41(1)(*d*) of the Act was because "an independent investigator has conducted a thorough investigation of the complainant's allegations."

[12] The Commission also adopted the following conclusions from the Investigator's Report:

> However, while the complainant is not satisfied with the results of the internal harassment investigation, this is not sufficient reason for the Commission to deal with a complaint that has already been considered through alternate redress. The respondent's internal harassment complaint process allowed for an investigation by an independent, external investigator, who appears to have conducted

> his investigation in a similar way that a Commission investigator would. The independent investigator reviewed documentary evidence, spoke to relevant witnesses (many of whom the complainant suggested), and provided the parties with the opportunity to comment on a draft report outlining his findings. There is nothing to suggest that the internal harassment investigation omitted evidence or information that the Commission should now consider.
>
> Based on the above, the circumstances indicate that it would not be in the public interest, or in the interest of administrative efficiency, for the Commission to now deal with this complaint following the other process.

ISSUES RAISED

[13] The Applicant raises the following issues for consideration:

a. What is the appropriate standard of review?

b. Did the Commission have the jurisdiction to decide not to deal with the Applicant's complaint?

STANDARD OF REVIEW

[14] The Applicant raises a jurisdictional issue which, if the Applicant's characterization is correct, should be reviewed on a standard of correctness. See *Dunsmuir*, above, at paragraph 59.

[15] In my view, however, the Applicant has not raised issues that go to jurisdiction. Her complaint is that the Commission did not appropriately apply subsection 41(1)(*d*) of the Act to the

facts before it. In my view, this issue should attract a standard of reasonableness. Notwithstanding Justice Rothstein's words in *Canada Post Corp. v. Canada (Canadian Human Rights Commission) (re Canadian Postmasters and Assistants Assn.)* (1997), 130 F.T.R. 241, [1997] F.C.J. No. 578 [*Canadian Postmasters*] at paragraph 3, that "the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases," the more recent jurisprudence of the court, and in particular the post *Dunsmuir* decisions, have used reasonableness as the appropriate standard of review when the Commission decides not to deal with a complaint under subsection 41(1)(*d*). See *English-Baker v. Canada (Attorney General)*, 2009 FC 1253, [2009] F.C.J. No. 1604, at paragraph 13; *Verhelle v. Canada Post Corp.*, 2010 FC 416, [2010] F.C.J. No. 481 at paragraphs 6 and 7; *Morin v. Canada (Attorney General)*, 2007 FC 1355 (aff'd 2008 FCA 269), [2007] F.C.J. No. 1741 at paragraph 25.

[16] The Supreme Court of Canada in *Dunsmuir*, above, held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph

47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[18] The following provisions from the Act are applicable in this case:

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.

ARGUMENTS

The Applicant

[19] The Applicant says that the Commission did not have the jurisdiction to decide not to deal with the Complaint and can refuse only if it is "plain and obvious" that a complaint falls under one of the grounds set out in section 41 of the Act. See *Canadian Postmasters*, above, at paragraph 3.

[20] The Applicant also says that the Commission decided not to deal with the Complaint because any further investigation would not be in the public interest or in the interest of administrative efficiency. Hence, the Commission applied the wrong standard and committed an error of law.

[21] The Applicant points out that this Court has expressly held that the Commission cannot refuse to exercise its jurisdiction simply because the matter has already been decided in another forum, which is what the Commission did in this case. See *Boudreault v. Canada (Attorney General)* (1995), 99 F.T.R. 293, [1995] F.C.J. No. 1055, at paragraph 17.

[22] The Commission may refuse to deal with a complaint where the allegations have been adjudicated by another administrative body exercising concurrent jurisdiction over the matter at issue. However, in such cases, the Commission must examine the substance of the decision of the other administrative body before determining whether or not to deal with the complaint. See *Canada Post Corporation v. Barrette*, [2000] 4 F.C. 145, [2000] F.C.J. No. 539 at paragraph 28.

[23] In the present case, the Applicant says there is no indication that the Commission assessed the scope of the investigations carried out by Textus or the appropriateness of those findings. The Applicant's Complaint raised issues that Textus did not examine and for which Textus did not apply a proper human rights analysis or refer to any of the provisions of the Act. Textus investigated allegations of harassment, not discrimination.

The Respondent

[24] The Respondent says that the Commission dismissed the Complaint on the basis that it had already been dealt with through alternative redress. A previous investigation had been conducted by an independent, external investigator, who had held that the Applicant's complaints were unfounded. The Commission found that Textus had employed a methodology similar to that used by a Commission investigator and that there was no additional evidence to be considered. The Decision was reasonable and the application should be dismissed.

[25] The Textus Report addressed all of the allegations set out by the Applicant in her Complaint to the Commission. The allegations raised by the Applicant before the Commission were substantially the same as those dealt with in the Textus Report.

[26] As for the Applicant's submission that Textus did not examine or make findings about discrimination based on ethnic origin, it is not clear that there are any such allegations in the Complaint before the Commission.

[27] *Boudreault*, above, is distinguishable because, in the present case, the Commission based its Decision on the fact that the Complaint had already been investigated as well as on the substance of the Textus report, the thoroughness of the investigation, and consideration as to whether the Textus investigation had been conducted on a fair and appropriate manner.

ANALYSIS

[28] The Decision makes clear that the Commission declined to deal with the Complaint, relying upon subsection 41(1)(*d*) of the Act, which reads as follows:

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 :
…	…
(*d*) the complaint is trivial,	*d*) la plainte est frivole,

frivolous, vexatious or made in bad faith; or	vexatoire ou entachée de mauvaise foi;

[29] Section 41 of the Act clearly extends to the Commission the power and jurisdiction to refuse to deal with any complaint, provided it appears to the Commission that one of the grounds of exclusion enumerated under section 41 is applicable.

[30] It seems to me, then, that the Commission clearly had the jurisdiction not to deal with the Complaint in this case. The only issue is whether it appeared to the Commission that one of the exclusionary grounds applied. The Commission identified and relied upon subsection 41(1)(*d*). Hence, the issue is whether, in relying upon subsection 41(1)(*d*), the Commission did so appropriately. In the body of her arguments, the Applicant says that, in deciding this issue, the Commission applied the wrong test and so committed an error of law.

[31] She says that the Commission decided not to deal with her Complaint on the grounds that an investigation would not be in the "public interest" or in the "interest of administrative efficiency" and that this is the wrong standard. However, the Applicant is quoting these words out of context.

[32] When the Decision is read as a whole, the Commission's reason for not dealing with the Complaint and for applying subsection 41(1)(*d*) of the Act is that "an independent investigator has conducted a thorough investigation of the complainants allegations." This rationale is further expanded upon where the Commission cites and adopts wording from the Commission Investigator's Report. That Report does say that "it would not be in the public interest, or in the

interest of administrative efficiency, for the Commission to now deal with this complaint following the other process," but this comment is not the test applied, and it is not the reason for the Decision. The reason for the Decision is that subsection 41(1)(*d*) applies because:

a. The Complaint has already been considered through alternate redress;

b. The Elections Canada internal harassment complaint process allowed for an investigation by an independent, external investigator, who appears to have conducted his investigation in a similar way that a Commission investigator would;

c. The independent investigator (i.e. Textus) reviewed documentary evidence, spoke to relevant witnesses (many of whom the complainant suggested) and provided the parties with the opportunity to comment on a draft report outlining its findings;

d. There is nothing to suggest that the internal harassment investigation omitted evidence or information that the Commission should now consider.

[33] Hence, in my view, the only issue before me in this case is whether the Commission reasonably applied subsection 41(1)(*d*) of the Act to the facts of this case.

[34] The Applicant says that the earlier Textus investigation and Report did not deal with all aspects of her complaint and was not an appropriate substitute for a Commission investigation. These points, however, go to the reasonableness of the Decision, which the Applicant does not raise as an issue in her written submissions and which are, in any event, unsubstantiated by the record. In my view, the record shows that the allegations dealt with by Textus were substantially the same as those raised in the Complaint placed before the Commission. There is not a sufficient difference

between the allegations before Textus and the allegations in the Complaint to render the Commission's Decision unreasonable. In effect, the allegations in the Complaint had already been subjected to an independent investigation that was conducted in a manner similar to a Commission investigation. There was no point in simply repeating the exercise.

[35] In oral argument the Applicant raised a variety of reasons why it was not reasonable for the Commission to accept and rely upon the earlier Textus investigation and report when deciding the subsection 41(1)(*d*) issue:

a. It effectively allows an employer to by-pass the whole human rights system by using a private investigator;

b. It means that an applicant loses remedies because the report of a hired investigator cannot be judicially reviewed;

c. A neutral entity is required to investigate discrimination and human rights issues;

d. It is not possible for an applicant to contract out of the Act and, on the facts of this case, the Applicant did not waive her rights to a Commission investigation;

e. If a previous decision is relied upon, the Commission must turn its mind to and examine the process and the findings, which did not occur in this case;

f. A previous decision can be relied upon only if the body making the decision has concurrent jurisdiction with the Commission on human rights matters;

g. The Textus investigation and Report relied upon by the Commission in this case contains glaring errors when it comes to human rights principles. In particular, the

Textus Report does not deal with discrimination, which needs to be examined by a human rights expert;

h. This was a textbook case of the employer retaliating against a sick employee, and Textus did not recognize this or refer to the relevant provisions in the Act;

i. Even if it was reasonable for the Commission to rely upon the Textus investigation and Report, the Applicant raised new issues of discrimination in her Complaint to the Commission and the matter should be sent back so that the Commission can deal with these new issues;

j. Not to allow this application would create a very bad precedent because it would allow employers to escape human rights scrutiny by hiring private investigators;

k. The Applicant has never had her allegations adjudicated by an independent body and she is not simply attempting to re-litigate the allegations she has raised.

[36] On the facts of this case, I do not see how there has been any attempt by any party involved to by-pass the human rights system. Like anyone else who files a complaint with the Commission, the Applicant's Complaint is subject to subsection 41(1) of the Act. She has in fact accessed the human rights system and has been dealt with in a way that the system allows.

[37] The Commission's Decision was based upon, and made only after, an Investigator's Report that addresses and instructs the Commission concerning the law on using previous reports. The Investigator's Report also examines the Textus Report from the point of view of independent external investigation, with specific reference to: the conduct of the Textus investigation and

whether it was conducted in a similar way to a Commission investigation; the review of documentary evidence; interviewing witnesses (including those suggested by the Applicant); and providing the parties with an opportunity to comment on a draft report outlining the Textus findings.

[38] I do not think that allowing reliance upon a previous report such as the Textus Report would create a dangerous precedent because each case would require a stringent review of the previous report to ensure that it had been conducted in a way, and provided a result, that is equivalent to a Commission investigation. If it did not, then, as occurs in any case where subsection 41(1) is used to decline to investigate further, the applicant will have a right to apply for judicial review. All that is occurring in such a situation is that the Commission investigator is advising the Commission that the investigative work required by the complaint in question has already been done in such a way that further investigation by an investigator under the Act is not necessary. This will, of course, be a stringent assessment in each case because the investigator and the Commission will have to turn their minds to the requirements and safeguards of the Act and decide whether the appropriate standards have been met. I can see no reason in principle why this cannot be done, however, and the Applicant has cited no case that says that reliance cannot be placed upon the report of an independent, external investigator when deciding whether subsection 41(1)(*d*) of the Act should be applied.

[39] In my view, then, the issue before the Court is whether it was reasonable for the Commission to rely upon the Textus Report in the way it did. The Applicant says that it was not reasonable because the Textus Report was not neutral, it did not appropriately address the human

rights dimension contained in the Applicant's Complaint, and it did not address new issues that were raised in the Applicant's Complaint to the Commission.

[40] There is no evidence before me that the Textus investigation and Report lacked neutrality or objectivity, and so I cannot say that the Commission placed unreasonable reliance upon it for this reason. The Commission investigator obviously examined this issue and reported that the Textus Report constituted an investigation by an independent external investigator.

[41] The investigator's Report does, however, characterize the Textus Report as an examination of Elections Canada's "internal harassment complaint process," and so the issue arises as to whether discrimination issues were appropriately addressed. The Applicant's initial letter of complaint to the Commission dated November 8, 2006, referred to harassment and discrimination issues. The Respondent says that this letter makes no reference to race or ethnic background as a basis for discrimination. The Applicant elaborates on her discrimination allegations when she says that she had been

> quoted as having odd behaviours and was asked to take a psychological assessment. The way I dressed might look odd but I am not odd; I just look different from the majority and I have a different way to handle my personal life. Why did the office judge me?
>
> In the year 2005, I experienced menopause symptoms and felt exceptionally cold in the office. I put on a jacket, hat and scarf. I was perceived as having an odd behaviour. My right how to deal with a cold office has been violated. Have they discriminated against me because of my health disability? For your information, I did take a psychological test and I have NO psychological problem.

> I used to take a naturopath approach to deal with my migraines. On November 16, 2005, the office demanded a doctor's certificate for less than an hour's sick leave. Now I will be forced take tylenol. This means my right to choose a medical remedy (naturopath versus western medicine) has been taken away by the office. The office is discriminating against me due to my choice of medical remedy. In 2005, I took a bit more sick leave than before due to the onset of menopause.

[42] The Applicant's amended summary of her complaint to the Commission expands upon the episodes of harassment and discrimination because of her illness and behavior, but it does not refer to ethnic or cultural discrimination.

[43] In her November 17, 2009 response to the Investigator's section 41(1) analysis, the Applicant does refer to race and ethnicity issues as being new issues with which Textus did not deal. However, she provides little in the way of substance:

a. She says that in August 2005 "Ms. Whitridge made racial remark about my English in a 4-person meeting";

b. She says that on September 26, 2005 "Ms. Whitridge named four behaviors of mine as odd. They are: wearing outdoor clothes inside office, pushing chair, running in the street and standing behind a tree."

   She then says that "the clothing issue is discrimination based on ethnicity. The other three are discrimination based on race."

[44] There is little of substance in these new claims based upon ethnicity and race. If the Applicant claims, for example, that pushing a chair or standing behind a tree are race or ethnic

issues then I think that something further is required to explain to the Commission how they can possibly be so characterized. Ms. Whitridge's comment about the tree, for example, was that "She is concerned about pollution outside as she waits for her bus, and will hide behind trees to avoid bad air." This comment was investigated by Textus. I fail to see how it is a new issue or what it has to do with race or ethnicity. A simple assertion, at this late stage in the proceeding, that there are race and ethnic issues to deal with without any real explanation cannot, in my view, render the Decision unreasonable. And if the Applicant is of the view that if the comment about the tree gives rise to race and ethnic issues then it seems to me that her allegations about new discrimination issues based upon race and ethnicity cannot be taken seriously. The comment at the meeting was, apparently, that Ms. Whitridge could not understand the Applicant's English. This was raised only in 2008, and I can find little in the record to explain why the Applicant should have waited so long to introduce this new issue when she says in her letter of August 24, 2009 to the Commission that she "presented a complete complaint to CHRC in November 6, 2006." There is just not sufficient evidence before me to be able to say that the Commission was unreasonable to rely upon the Textus Report because it did not deal with what the Applicant later alleged were new race and ethnic issues but gave no real grounds for any such claim.

[45] This leaves the Applicant's allegation that the Commission was unreasonable to rely upon the Textus Report because it failed to address the human rights dimensions of the Applicant's complaints and made glaring errors with regard to human rights principles. My reading of the Textus Report leads me to the conclusion that, when read in its entirely, the Textus investigator is fully alive to discrimination issues and deals with them in a competent and knowledgeable way. The

allegations are found to be unfounded. The Textus Report shows an awareness of CHRC principles and even refers to the "CHRC's position that the employer still has the right to demand a medical certificate, which is not considered discriminatory in accordance with CHRA."

[46] I can see that the Applicant disagrees with the Decision and wishes to take issue with it, but I cannot say that it is unreasonable within the meaning of *Dunsmuir*, above, in the way that it examines and relies upon the Textus Report to find that alternative redress his already taken place and that subsection 41(1)(*d*) of the Act applies in this case because "an independent investigator has conducted a thorough investigation of the complainant's allegations."

[47] This is not a situation, in my view, where *Boudreault*, above, applies. In *Boudreault*, the applicant argued that the Commission simply adopted the decision of the appeal board established under section 31 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 rather than exercising its own discretion. Justice Tremblay-Lamer relied upon *Burke et al. v. CHRC* (1987), 125 N.R. 239 (F.C.A.) and *Pitawanakwat v. CHRC* (1987), 125 N.R. 237 (F.C.A.) for the proposition that if an applicant "has taken advantage of the available internal remedies, the Commission may not refuse to exercise its jurisdiction on the ground that the matter has already been decided" (paragraph 14). The rationale for *Boudreault* is provided at paragraph 17:

> The Commission thus did not exercise its discretion reasonably, since it based its decision not on its assessment of the case but on the fact that the appeal board had already dealt with the matter. The Commission therefore committed an error of law by refusing to exercise its jurisdiction in the case at bar.

[48] First, I think it is worth pointing out that Justice Tremblay-Lamer applied a reasonableness standard to the issue of whether the Commission did not exercise its discretion. Second, the basis for the decision in *Boudreault* is that the Commission failed to exercise its discretion because it simply relied upon the prior decision of the appeal board.

[49] In the present case, the Commission does not simply rely upon the decision of the Textus investigator. In fact, the Commission Investigator's Report upon which the Commission relies for its Decision goes out of its way to advise the Commission of the significance of *Boudreault* and what the Commission must do to ensure it does not fall into the error committed in *Boudreault*. This occurs at paragraphs 53 to 83 of the Investigator's Report. In particular, the following are worth quoting:

> a. Prior to April 27th, 2009, the Commission did not accept a complaint from the complainant as the allegations of discrimination in the complaint could be dealt with through a grievance of review procedure available to the complainant. The complainant was advised that, at the end of the grievance or review procedure, he/she could ask the Commission to activate the complaint.
>
> b. At the completion of the other process, the complainant returned to the Commission to ask that the complaint be activated.
>
> c. The issue to be decided at this time is whether the Commission should refuse to deal with the complaint under section 41(1)(*d*) of the Act on the basis that the allegations of discrimination have been addressed through the other process. Two Federal Court of Canada decisions have clarified the Commission's role in this type of situation.
>
> d. In *Boudreault*, the Federal Court decided that the Commission cannot refuse to deal with a complaint on the basis that it has already been dealt with by another process. The Commission must review the evidence itself and make its own decision as to the proper disposition of the case. However, the evidence gathered through the

other process, including documents and witness testimony, can be used by the Commission in arriving at its decision.

e. On the other hand, in *Barrette*, the Federal Court of Appeal reviewed a decision relating to an individual who had launched both a grievance and a human rights complaint against his employer. Upon receiving an unfavorable arbitration decision, the individual filed a human rights complaint, which prompted an objection from the employer on the grounds that the matter had been resolved in another forum. The court decided that "the Commission must, at least, turn its mind to the decision of the arbitrator to examine whether, in light of that decision and of the findings of fact and credibility made by the arbitrator, the complaint may not be such as to attract the application of paragraph 41(1)(*d*) – complaints that are "trivial, frivolous, vexatious or made in bad faith'."

f. Thus, while the Commission cannot rely on the decision of another process to dismiss a complaint but must make up its own mind (*Boudreault*), it also has the responsibility to examine whether it is in the public interest to deal with the complaint before carrying out its own investigation into the matter (*Barrette*).

g. In deciding whether or not to deal with the complaint under section 41(1)(*d*) of the Act, the Commission may consider the following factors:

    i. When was the grievance or other review procedure completed?

    ii. Was a final decision made?

    iii. Were all of the human rights allegations addressed by the grievance or other review procedure? What human rights allegations, if any, were not addressed? In what way were these allegations not addressed? Why were they not addressed?

    iv. What remedies were requested in the grievance or other review procedure?

    v. What remedies were granted or ordered in the grievance or other review procedure, if any?

vi. If all of the human rights issues were dealt with, are there other reasons why the Commission should now deal with the complaint?

[50] This is not a case, then, where the Commission declined to exercise its discretion and simply relied upon a previous decision. The Commission, in the present case, reviewed the process and findings of the Textus investigation together with the Applicant's comments upon the Investigator's Report that referred to her objections to the Textus investigation and then made up its own mind as to whether the Complaint had been dealt with so as not to require further investigation by the Commission. In accordance with *Barrette*, above, the Commission turned its mind to examine whether, in light of the previous investigation and its findings, the complaint attracted subsection 41(1)(*d*). It concluded that it did. I cannot say that this finding was unreasonable within the range stipulated by *Dunsmuir*, above.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-167-10
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APPEARANCES:

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