Federal Court  Cour fédérale

Date: 20130618

Docket: T-841-12

Citation: 2013 FC 678

Toronto, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ROBERT MCILVENNA

Applicant

and

BANK OF NOVA SCOTIA (SCOTIABANK)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Robert McIlvenna seeks judicial review of a decision of the Canadian Human Rights Commission dated March 14, 2012, wherein the Commission, under the provisions of subsection 41(1)(c) of the *Canadian Human Rights Act*, RSC 1985, C. H-6, dismissed the Applicant's complaint against the Respondent Bank of Nova Scotia (Scotiabank).

[2] For the reasons that follow, I will dismiss the application, with costs.

THE FACTS

[3] The Applicant is a retired school teacher. He purchased a house in Sudbury, Ontario, referred to as the Noel Street house, and secured a mortgage from the Respondent Scotiabank for that purpose. At a later time, the Bank called in the mortgage loan under circumstances which led the Applicant to file a Complaint with the Canadian Human Rights Commission. The essential part of the Complaint is set out at paragraphs 9 to 12:

> *9. I believe that the only reason for demanding immediate repayment is because the Bank has learned that there is cannabis growing on the property, and that but for this reason the Bank would not have called my loan.*
>
> *10. I am aware that lenders have experienced problems with residential properties being used for illegal 'grow ops' of cannabis, invariably those problems have been the result of clandestine operations, that were constructed poorly and without regard to Building Code compliance, with the result that the buildings suffered from poor ventilation causing excessive humidity, mould and related problems. All of these things in turn have led to a diminished property value, a legitimate concern of lenders.*
>
> *11. Not only are these concerns not present at the Noel Street house, but neither the appraiser nor the Bank officials had the slightest interest in hearing about the effective efforts to address potential concerns with proper ventilation and humidity controls that are in place. Once the Bank heard that there was cannabis growing at the house, it appeared clear that their minds had been made up to call the loan.*
>
> *12. I believe the Bank's actions in this case, and apparently in their policies, are discriminatory against people with a disability, where such disability requires the use (and growing) of cannabis. The Bank staff did not seem to care that the occupants of the home were both prescribed cannabis by their respective physicians, and both were licensed by Health Canada to possess and grow cannabis.*

[4] Upon receipt of this Complaint, the Commission began initial investigations. An Officer wrote to the Bank on November 3, 2010 asking a number of questions, including: why was the Complainant asked to repay and; did the liability of the occupant of the house, the Complainant's son, have anything to do with it. The Bank provided an extensive reply by letter dated December 6, 2010, including stating that the reason for calling in the mortgage was the extensive alterations to the house and its state of disrepair, and that the son's disability played no part in the decision. On September 22, 2011, the Commission wrote stating that the matter would be placed before the Commission for a decision as to whether it had jurisdiction to deal with the issues. Each of the Applicant (through his lawyer Hennessy) and the Bank, made written submissions as to jurisdiction.

[5] I have summarized the above facts in brief because, according to the certificate of the Commission, none of the above correspondence, except for the initial Complaint, was before the Commission when it made its decision. What was before the Commission was a Report from a member of the Resolution Services Division, which summarized the previous submissions of the parties and made a recommendation. A copy of that Report was sent to each of the Applicants' lawyer and Scotiabank, and each provided submissions as to the Report. Those submissions were also before the Commission when it made its decision.

[6] The point to be made is that there were initial investigations made into those matters. Those investigations were considered and summarized in the Report, and each party made submissions as to the Report. The Commission did *not* make a decision based on the complaint alone; it had before it the Report and the parties' submissions as to the Report.

[7] The Report summarized the submissions of the parties as follows:

> *Information from the parties*
>
> *9. The parties were invited to provide their positions on the issues for decision. They were invited to address the factors that are relevant to the Commissioners' decision, including the factors listed above.*
>
> *Respondent's position*
>
> *10. The respondent takes the position that it was exercising its contractual right to call the mortgage as the Standard Charge Terms (the Terms) were violated by the complainant, which does not constitute a discriminatory practice. It notes that in June 2010 the complainant asked for an increase of his line of credit so as to complete renovations for which the funds had run out; a renovation plan was also submitted. As the renovations had not been done with advanced warning to the Bank as per the Terms, an appraisal was requested, which was conducted June 24, 2010. The respondent notes that the appraiser found the home gutted, with the exception of its shell, there were no windows and the roof was exposed plywood. It is alleged that the occupant of the home informed the appraiser the renovations were to "build a bigger and better grow-op" to house 500 marijuana plants used for medicinal purposes. Also, it was found that the work undertaken deviated from the plan submitted and the appraiser was informed that there was no intention to submit revised plans for approval by the municipality. The appraiser's report to the respondent informed of the marijuana plants and noted that the renovations were about 40% complete.*
>
> *11. The respondent indicates that certain obligations of the Terms were breached: to keep the property in good condition; and to inform the Bank of any planned improvements, provide a plan, and not to deviate from the plan. The respondent notes that these breaches entitled it to call the mortgage and/or take possession of the property. It also notes that two additional circumstances allowed it to demand that the full balance be repaid: the property value was reduced to what the Bank considered an unacceptable level, and a term that states if "anything else happens that we*

believe endangers your ability to pay or that we believe endangers the property." As a result of incomplete renovations, the property value was reduced by $47,000 and thus worth amount $8990 less than the balance owing. So, in August 2010 the respondent made a demand to the complainant to repay the mortgage in full within two weeks.

12. *The respondent takes the position that as a result of the condition of the property upon appraisal, it "[…] had a valid concern that its security was at risk" and, since it was not insured by the Canadian Mortgage and Housing Corporation, "[…] any loss suffered as a result of a default in the value of the property would be borne by the Bank."*

13. *In response to a question as to whether the respondent made any enquiries about the ventilation and humidity controls at the property, it replied as follows: "The appraiser noted that when inspecting the basement there were a new forced air gas furnace and an air exchange system which appeared to be larger than normal. However, no specific testing was done at this time given the state of the Property, which was in a shell condition." When asked whether it had taken into account the occupants' disabilities prior to calling the mortgage, the respondent replied as follows: "The occupants' alleged disabilities were not a factor in any way in the Bank's decision to call the mortgage. In fact the Bank does not have any knowledge of the occupants alleged disabilities. For the Bank's purpose the mortgagors of the property were Robert and Jocelyn McIlvenna. It was their security that had significantly reduced in value and on which the Bank was demanding payment."*

14. *The respondent further notes that since calling the mortgage, the complainant has further breached the Terms by registering a second mortgage on the property without first acquiring its written consent. As a result of this second mortgage, the Bank's priority over subsequent encumbrances has been compromised.*

Complainant's position

15. *The complainant notes that "When the appraiser was made aware that the marijuana was growing in the house, the inspection came to an abrupt end. Within a short time (a couple of days at most) the Bank called the McIlvennas to the Bank for a meeting. At that time they were told their*

mortgage, which was up to date in payments, was being called […]. They were told that the bank does not allow marijuana to be grown in houses they hold as security."

16. The complainant acknowledges that his son and daughter-in-law have no privity of contract with the respondent. However, he notes that it was their disabilities that gave rise to the prescription and related cultivation which so troubled the respondent's officials to the point where they called the mortgage.

[8] The Analysis and Conclusions portion of that Report stated:

<u>Analysis</u>

Link to a Ground

36. As discussed above, it appears that the practice at issue may be discriminatory if linked to a prohibited ground. It also appears that the practice had an adverse impact such as financial implications, and humiliation. The parties do not appear to dispute that Terms of the Agreement were breached. The issue for consideration at this point however, is whether the decision to call the mortgage, was exclusively based on this breach of the Terms or if it was based on a ground of discrimination, whether in part or entirely.

37. The Federal Court decision in Hartjes v. Canada (Attorney General) 2008 FC 830, at paragraph 12, provides clarification regarding the applicability of section 41(1)(c) of the Act:

> *As I read s. 41(1)(c), "jurisdiction" could refer to two different categories of matters. For example, a complaint by an inmate of a provincial institution could likely be dismissed under s. 41(1)(c) this would be a question of "true jurisdiction"…In a broader context, a complainant may complain of certain acts that are, on their own, not allegations that fall within the mandate of the Commission but allege that these acts took place because of race, ethnic origin, disability or another prohibited ground.* ***In such a case, unless the complainant can disclose sufficient***

> ***information or facts to show a link to a prohibited ground of discrimination, the acts complained of are not within the statutory mandate of the Commission***. *In this second example, the pre-screening exercise involves an assessment of the sufficiency of the evidence. [Emphasis added]*

38. *In Hartjes, at paragraph 23, the Court further noted "Although the threshold may be low, there is a burden on a complainant to put sufficient information or evidence forward to persuade the Commission that there is a link between complained-of acts and a prohibited ground".*

39. *Moreover, the Federal Court has held that decisions under paragraph 41(1)(c) of the CHRA attract a higher level of judicial scrutiny. The Court has said that at this early screening stage, the Commission should only decide not to deal with a complaint if it is "plain and obvious" that there is not a prima facie case of discrimination. See for example Canada Post Corp. v. Canada (Human Rights Commission) (1997), 130 F.T.R. 241, aff'd (1999), 245 N.R. 397, Michon-Hamelin v. Canada (Attorney-General), 2007 FC 1258; [2007] F.C.J. No. 1607 (Q.L.) and Leslie Hicks v. Attorney General of Canada, 2008 FC 1059. These cases describe the test that guides the analysis and decision-making at this stage of the Commission process. Also, due to the quasi-constitutional nature of the Act, a fair, large, liberal and purposive interpretation must be applied (see Robichaud v. Canada (Treasury Board) [1987], 2 S.C.R. 84).*

40. *As noted above, the threshold on the complainant to demonstrate a link to a ground is a low one. However, the threshold does not appear to be met in the present case. Several terms of the mortgage agreement were breached and as such, the respondent exercised its right to call the mortgage. As such, it appears plain and obvious that the decision to call the mortgage was not based on a prohibited ground of discrimination.*

41. *In light of information from the parties and the explanation provided by the respondent, it appears plain and obvious that there is no prima facie case of discrimination linked to a ground.*

Standing

42. Even if the Commission assumes without deciding that the complainant does have standing to bring forward the present complaint, it is not linked to a ground of discrimination since the respondent was enforcing its contractual rights pursuant to the breaches of the Terms of the mortgage agreement.

Conclusion

43. It appears plain and obvious that the complaint is not linked to a ground of discrimination. The respondent was exercising its contractual right following a breach of the Terms of the mortgage agreement.

Overall Conclusion and Recommendation

Conclusion

44. While the respondent was providing a service as contemplated by section 5 of the Act, its decision to call the mortgage following several breaches of the Terms of the mortgage agreement does not appear to be based on a ground of discrimination but rather a breach of contract.

Recommendation

45. It is recommended, pursuant to paragraph 41(1)(c) of the Canadian Human Rights Act, that the Commission not deal with the complaint

- *Because it is not based on a prohibited ground of discrimination identified in section 3 of the Act.*

[9] On March 14, 2011, the Commission made the decision, now under review, adopting the Recommendation of the Report and dismissing the complaint.

ISSUES

[10] The parties have raised the following issues:

1. What is the standard of review?

2. Given that standard, should the decision be set aside?

STANDARD OF REVIEW

[11] Both parties submit that the standard of review is reasonableness. In *Hartjes v Canada (Attorney General)*, 2008 FC 830, Justice Snider of this Court, at paragraph 20, affirmed that the Commission's determination as to whether the allegations of a complainant are linked to or based on a prohibited ground of discrimination, is reviewable under the reasonableness standard. This decision was followed in *Boiko v Canada (National Research Council)*, 2010 FC 110 at paragraphs 30 to 31.

WAS THE DECISION REASONABLE?

[12] Given that the standard of review is reasonableness, the remaining issue is whether the decision under review was reasonable.

[13] The jurisprudence with respect to the role of the Commission in dealing with a complaint under section 41 must be examined with some care. I repeat subsection 41(1)(c), which is the section relied upon by the Commission here:

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 :*
. . .	. . .
(c) the complaint is beyond the jurisdiction of the Commission;	*c) la plainte n'est pas de sa compétence;*

[14] It must be noted that there is no point during the process stipulated as being the point at which the Commission may make such a decision. Unlike, for instance, Rule 221 (1) (a) of this Court, there is no provision as to what, if any, evidence or information beyond the Complaint, that the Commission may take into consideration. The words *"it appears to the Commission"* imply a broad discretion in the commission to deal with issues such as whether a complaint is beyond its jurisdiction, at a point in the process and in a manner of its choosing, subject to complying with the principles of natural justice.

[15] Thus, we find cases where the Courts have judicially reviewed decisions of the Commission under subsection 41 (1) where a decision was made based only upon the Complaint itself.

[16] An example is *Valookaran v Royal Bank of Canada*, 2011 FC 276, where Justice Snider dealt with a situation where the Commission made a decision based on the Complaint alone. She wrote at paragraphs 13, 15 and 19:

> *13 Moreover, I observe that s. 41(1)(c) of the Act provides the Commission with considerable discretion. Specifically, s. 41(1)(c)*

> *provides that "the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that ... the complaint is beyond the jurisdiction of the Commission" [emphasis added]. The use of the words "it appears to the Commission" infers the exercise of discretion.*
>
> . . .
>
> *15 Procedural fairness does not require the Commission to undergo a lengthy analysis of the complaint at the initial stages. When the Commission dismisses a complaint prior to an investigation, the substance of the allegations must be accepted as true (see Michon-Hamelin v Canada (Attorney General), 2007 FC 1258, at paragraph 23). Where it is plain and obvious, assuming the truth of the allegations, that the complaint falls under s. 41, an investigation is not required and the Commission may refuse to deal with the complaint (see Canada Post Corp v Canada (Human Rights Commission) (1997), 130 FTR 241, [1997] FCJ No 578 (QL) (TD) at paragraph 3).*
>
> . . .
>
> *19 I cannot find that the Applicant was not given an opportunity to present her case or respond to the concerns of the Commission or the Respondent.*

[17] In *Hartjes*, supra, Justice Snider at paragraph 14 observed that the Commission possesses "considerable discretion" in dealing with issues under section 41:

> *14 Finally, I observe that s. 41(1)(c) of the CHRA provides the Commission with considerable discretion. Specifically, s. 41(1)(c) provides that "the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that ... the complaint is beyond the jurisdiction of the Commission" [emphasis added]. The use of the words "it appears to the Commission" infers the exercise of discretion.*

[18] The Courts have stated that normally the Commission would deal with such issues at the outset of the matter and strike out the "plain and obvious" matters, and where no investigation has

been carried out, the allegations in the Complaint must be accepted as true. Justice Mactavish in *Michon-Hamelin v Canada (Attorney General)*, 2007 FC 1258, wrote at paragraphs 16 and 23 to 25:

> *16 In Canada Post Corp. v. Canada (Human Rights Commission) (1997), 130 F.T.R. 241, aff'd (1999), 245 N.R. 397, Justice Rothstein observed that:*
>
> > *para. 3 A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases... If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.*
>
> . . .
>
> *23 Given that no investigation was carried out in relation to the substance of Ms. Michon-Hamelin's human rights complaint, the allegations contained in her complaint form must be taken as true. Indeed, the Investigator had no evidence or information before her from the respondent to counter Ms. Michon-Hamelin's version of events.*
>
> *24 In this regard, Ms. Michon-Hamelin's complaint clearly asserted that the problems that she says that she encountered in relation to her application for injury-on-duty and disability benefits occurred because her employer did not accept that she was suffering from a disability.*
>
> *25 Thus Ms. Michon-Hamelin's complaint clearly links the employment-related adverse differential treatment identified in the complaint to a proscribed ground of discrimination, thereby bringing the matter squarely within the jurisdiction of the Canadian Human Rights Commission.*

[19] The circumstances in the present case are different. The parties were given an opportunity at the outset to present their case in detail, which they did. A Report was written. The parties were given an extensive opportunity to make submissions as to the Report, which they did. Only then was a decision made.

[20] Not only were ample opportunities given to the parties to make submissions, but the Commission had the benefit of an initial investigation as set out in the Report, upon which its decision could be made. As Justice Sopinka wrote in *Syndicat des employees de production du Quebec et l'Acadie v Canada (Human Rights Commission)*, [1989], 2 SCR 879 at page 899, the Commission was at a stage where it could make a reasonable determination as to whether to proceed to the next stage. This decision was cited with approval in *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854, where LaForest J, for the majority, wrote at paragraph 53:

> *53 The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at p. 899:*
>
> > *The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a*

> *determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.*

[21] The cases cited to me by the Applicant where the Court criticized the Commission for rejecting cases on preliminary review were cases where no investigation was conducted or the complainant was given no opportunity to make submissions. Here, an initial investigation was conducted, with submissions received from both parties. A Report was prepared. The parties were given an opportunity to comment on the Report, which they did. A decision was made based on the Report and those comments. The question is, under those circumstances, was the decision reasonable?

[22] I am satisfied that this decision was reasonable. While no doubt Scotiabank was made aware that the changes made and proposed to be made were to accommodate the growing of allegedly approved medical marijuana, those changes were substantial and were made without the consent of Scotiabank and had the effect of considerably reducing the value of the property. Scotiabank said that the alleged disabilities of the Applicant's son played no part in its decision to call the mortgage. It was reasonable for the Commission to conclude that there was no discrimination against the Applicant, the mortgagor, in that respect.

[23] As to costs, the parties have agreed that the successful party is entitled to costs fixed in the sum of $4,000.00. I will award that sum to the Respondent Scotiabank.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is entitled to costs fixed in the sum of $4,000.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-841-12
STYLE OF CAUSE:	ROBERT MCILVENNA v BANK OF NOVA SCOTIA (SCOTIABANK)
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 17, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	June 18, 2013

APPEARANCES:

Mr. Andrew Astritis	FOR THE APPLICANT
Mr. George G. Vuicic Ms. Cheryl A. Waram	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, Ontario	FOR THE APPLICANT
Hicks Morley Ottawa, Ontario	FOR THE RESPONDENT