Federal Court Cour fédérale

Date: 20140702

Docket: T-1521-13

Citation: 2014 FC 643

Ottawa, Ontario, July 2, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

STEVEN LOVE

Applicant

and

OFFICE OF THE PRIVACY COMMISSIONER OF CANADA

Respondent

<u>JUDGMENT AND REASONS</u>

INTRODUCTION

[1] This is an application under s. 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 for judicial review of a decision of the Canadian Human Rights Commission [Commission], dated August 21, 2013 [Decision]. The Commission decided, under s. 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [Act or *CHRA*], not to deal with the Applicant's complaint

against the Respondent Office of the Privacy Commissioner of Canada [OPC] on the grounds that the complaint was trivial, frivolous, vexatious or made in bad faith.

BACKGROUND

[2] This matter is somewhat unusual in that it deals with a complaint to one administrative body, the Commission, about the handling of the Applicant's complaint to another administrative body, the OPC, regarding his treatment at the hands of a government department, Citizenship and Immigration Canada [CIC].

[3] The Applicant complained to the OPC on February 23, 2011 that CIC had violated his rights under the *Privacy Act*, RSC, 1985, c P-21. He says in his affidavit that he filed three complaints against CIC with the OPC on that date, and made further complaints later on, as he alleges that CIC continued to violate his privacy rights. There is very little information before the Court about these complaints against CIC, as they are not the subject matter of the current application.

[4] In the Applicant's view, the OPC did not deal appropriately with his complaints against CIC. In fact, he alleges that the OPC discriminated against him on the basis of his sexual orientation and his mental and physical disabilities. He says that of the 5 complaints he filed, the OPC only issued a ruling on one of them, and even then did not deal with the substance of his complaint. He alleges that he was treated dismissively by the OPC, and that staff members made comments that revealed discriminatory attitudes.

[5] As a result of this alleged treatment by the OPC, the Applicant filed a complaint with the Commission. In that complaint, he alleged that the OPC had failed to rule on most of his complaints, ignored or distorted the relevant facts, actively misled him, prevented him from making representations, inappropriately defended CIC's actions, and improperly refused to take jurisdiction.

[6] The Applicant alleged in his complaint to the Commission that the OPC's failure to properly investigate and rule on his complaints amounted to adverse differential treatment based on his sexual orientation and his disability, contrary to s. 5 of the Act. He described his treatment at the hands of both CIC and the OPC in the following terms:

> I am a homosexual and I suffer from a ultimately fatal liver condition. This condition affects my cognitive function causing confusion and does lead to bouts of extreme anxiety. I believe I was discriminated against on the basis of my sexual orientation and my mental and physical disability. Throughout this entire process I have been humiliated and provoked. I have been subjected to prolonged and needless mental and emotional anguish. My physical health has been adversely affected by stress. My constitutional rights have been systematically stripped from me. The OPC's [sic] refuses to speak against CIC and defends there [sic] actions, leaving me feeling worthless and debased.

[7] In addition to outlining the alleged deficiencies in the handling of his complaints by the OPC, the Applicant pointed to two statements by the OPC staff as evidence of discriminatory attitudes. He alleged that in discussing one of his complaints of February 23, 2011, the OPC investigator assigned to the matter referred to his partner as "your whatever." The Applicant says he was so offended by this that he asked to speak to the investigator's supervisor. That supervisor, Angela Cornac, agreed to reassign the file. With respect to his disability, the Applicant says the OPC took a patronizing approach:

> They continued to patronize, advising, 'Please let me know if I need any accommodations for…' a '… phone call.' When asked to elaborate they flatly refused to respond. From beginning to last a dismissive attitude has been taken toward me in regard to my sexual orientation and my disabilities.

[8] The Commission's Early Resolution Team Leader [Resolution Officer] notified the parties that it had received the complaint. That notice, dated March 14, 2013, expressed the view of the Commission's staff that s. 41(1)(d) of the *CHRA* might apply to the complaint. That provision allows the Commission to refuse to deal with a complaint if it is trivial, frivolous, vexatious or make in bad faith. The letter raised the issue that the complaint might be frivolous because it "does not establish a clear link to a prohibited ground of discrimination under the Act". The Resolution Officer invited the parties to provide their positions on this issue, which would be used to prepare a report for the Commission's consideration, and attached an information sheet setting out specific questions they should answer in their submissions.

[9] Both parties made two rounds of written submissions to the Commission. Based on these submissions, a member of the Commission's staff, Jennifer Bouchard, prepared a report and recommendations regarding whether the Commission should deal with the complaint [Report]. This type of report is called a "Section 40/41 Report," in reference to the relevant provisions of the Act. Ms. Bouchard's Report, dated June 11, 2013, recommended that the Commission not deal with the complaint pursuant to s. 41(1)(d) on the basis that it was "frivolous."

[10] The Commission accepted the recommendation in the Report and decided not to deal with the complaint on August 21, 2013.

DECISION UNDER REVIEW

[11] The Record of Decision dated August 21, 2013 is brief, comprising only one page. Under the heading "Decision under section 41(1)", it states:

> The Commission decided, for the reasons identified below, not to deal with the complaint under paragraph 41(1)(d) of the *Canadian Human Rights Act*.

[12] Under the heading "Reasons for decision" the Commission states:

> The Commission adopts the following conclusion set out in the Section 40/41 Report:
>
> *Reasonable grounds is a low threshold in providing evidence of a discriminatory practice and link to a prohibited ground; however allegations must have both these elements and be based on reasonable grounds. In this complaint the allegations that the OPC treated the complainant in an adverse differenti8al manner based on his sexual orientation and disability are not based on reasonable grounds.*

[13] The Section 40/41 Report sets out the analysis that resulted in this conclusion in greater detail. Under "Factors relevant to a decision under section 41(1)(d)" the Report states:

> 6. The *Canadian Human Rights Act* (the Act) is intended to protect individual rights of vital importance. It does not apply to every situation in which someone feels unfairly treated. The Commission can only deal with complaints that alleged conduct that is discriminatory according to the Act.
>
> 7. First, only the conduct (actions, omissions or behaviours) described in sections 5 to 14.1 of the Act can be considered ***discriminatory practices***. Conduct may be considered discriminatory under the Act even if the respondent did not intend to discriminate. Some of the discriminatory practices under the Act include:

> - Denying someone goods, services, facilities or accommodation (section 5)
>
> […]
>
> 8. Second, the conduct in the complaint must also be linked to one or more of the 11 ***prohibited grounds of discrimination*** listed in section 3 of the Act […]
>
> 9. If a complaint does not meet both of these requirements, it is considered "frivolous" under section 41(1)(d) of the Act. The Act gives the Commission the discretion not to deal with complaints alleging conduct that is not discriminatory according to the Act.
>
> 10. The Commission may refuse to deal with a complaint if it is plain and obvious that the complaint is frivolous. In deciding whether or not a complaint is frivolous within the meaning of section 41(1)(d) of the Act, the Commission can consider the following factors:
>
> > a) Are there facts that suggest that the alleged conduct is covered by one or more of the discriminatory practices described in sections 5 to 14.1 of the Act…? If so, what are those facts?
> >
> > b) Are there facts that link the alleged conduct to one or more of the grounds of discrimination listed in section 3 of the Act…? If so, what are those facts?
> >
> > c) Does the complainant have reasonable grounds to believe that the respondent's conduct is discriminatory under the Act? If so, what are these reasonable grounds? Note that "reasonable grounds" require more than just a statement (a bald assertion) that the conduct is discriminatory.

[14] Under "Analysis" the Report observed that decisions not to deal with a complaint at the section 41 stage of the Commission's process are subject to a higher level of judicial scrutiny (citing *Hérold v Canada Revenue Agency*, 2011 FC 544 [*Hérold*]), that the Commission should only decide not to deal with complaints in plain and obvious cases, and that the allegations of fact contained in a complaint must be taken as true (citing *Keith v Correctional Service of*

Canada, 2012 FCA 117 at paras 50-51 [*Keith*]). It observed that the requirement of "reasonable grounds" presents a low threshold, but nonetheless "obliges a complainant to provide some basis for the allegations" (citing *Hartjes v Canada (Attorney General)*, 2008 FC 830 [*Hartjes*]). The Report goes on to provide the following analysis leading up to its conclusion:

> 18. More than speculation is needed to file a complaint. "Reasonable grounds" require more than just a statement or bald assertion that the conduct is discriminatory. There is an obligation on the part of the complainant to demonstrate that a reasonable person in his circumstances would believe that the policies or practices complained of are discriminatory.
>
> 19. The first step in this analysis is to determine whether the respondent's conduct as alleged in the complaint could be considered a discriminatory practice under section 5 of the Act. In his complaint the complainant alleges that the respondent mishandled the complaints he filed under the *Privacy Act*, refusing to investigate some of them and refusing to rule on others. He states that this treatment is based on his disability and sexual orientation. If proven, these allegations could constitute a discriminatory practice under section 5 of the Act.
>
> 20. It appears that the complainant disagrees with the respondent's report of findings for his complaints. The Commission is not an appeal body and it cannot review the OPC decisions. If the complainant disagrees with the OPC's decision the appropriate recourse is at the Federal Court, and he has not done so. The OPC addressed each of the concerns some were investigated according to their policies and procedures. The *Privacy Act* contains recourse provision that would adequately address the complainant's concerns. If the complainant was not satisfied with the decision of the respondent his proper recourse is in accordance with the provision put forth under this Act.
>
> 21. The second step in this analysis is to determine whether the respondent's conduct alleged in the complaint is linked to one or more of the 11 prohibited grounds of discrimination listed in section 3 of the Act. In this complaint the complainant alleges that he was treated in an adverse differential manner due to his sexual orientation and disability, and that those were factors in the unsatisfactory investigation of his Privacy complaints. He bases this on an alleged comment by an employee of the OPC who allegedly referred to the complainant's conjugal partner as 'your whatever'. While this may indeed have been offensive to the

> complainant, it appears not to have impacted his OPC complaint as he then spoke with a supervisor and the file was reassigned. Beyond this single alleged comment, the complainant has not provided any information in his complaint that suggests that the OPC treated him in an adverse differential manner based on a prohibited ground. The allegation that the OPC's treatment of the complainant is linked to his sexual orientation and disability is a bald assertion unsupported by facts.
>
> 22. […]
>
> 23. The complainant, in his complaint form, has not demonstrated that he has reasonable grounds to believe that the respondent treated him in an adverse differential manner based on his sexual orientation and/or disability. His Privacy complaints did not result in his desired outcome, but that is not evidence of adverse differential treatment linked to his sexual orientation and/or disability.
>
> 24. Although the requirement of reasonable grounds is a low threshold, the complainant must provide sufficient information to demonstrate that there is a link between his allegations and a prohibited ground. He has not provided sufficient information to demonstrate that a reasonable person in his circumstances would believed that the respondent treated him in an adverse differential manner based on his disability or sexual orientation. This complaint is therefore frivolous within the meaning of section 41(1)(d) of the Act.

ISSUES

[15] The Applicant raises the following five issues for the Court's consideration:

a. Did the Report rely on errors of fact?

b. Did the Report rely on errors of law?

c. Did the Commission fail to observe the principles of procedural fairness by denying the Applicant the opportunity to make full answer and defence?

d. Was the Report capricious?

e. Was the Report biased in favour of the OPC?

[16] The first two issues relate to the merits of the decision, while the third relates to the fairness of the process by which it was made. The allegation that the Decision was "capricious" appears to encompass elements of both.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[18] The Respondent says that the procedural fairness questions raised by the Applicant are reviewable on a standard of correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Exeter v Canada (Attorney General)*, 2012 FCA 119 at para 6 [*Exeter*]. I agree: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53 [*Sketchley*].

[19] With respect to the merits of the Decision, the Respondent says that the appropriate standard of review is reasonableness (*Exeter*, above, at para 6; *Hérold*, above, at para 36; *Dunsmuir*, above, at para 47). The Respondent further suggests that in performing its screening function under s. 41(1), the Commission is entitled to a "high degree of deference." The language in s. 41(1) confers wide discretion for the Commission to decline to deal with a complaint where it "appears to the Commission" that certain criteria are met, and that this broad language, along with the nature of the Commission's role as a screening rather than adjudicative body, indicates that "Parliament did not intend the Court to intervene lightly in the decisions of the Commission": *Sketchley*, above, at para 38; *Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 39; *Hérold*, above, at para 33.

[20] I agree that the standard of review regarding the merits of the decision is reasonableness. There is, however, an apparent tension between the Respondent's suggestion of "heightened deference" and the suggestion by the Commission itself in the Report that screening decisions made without an investigation are subject to "heightened scrutiny" by the Courts.

[21] The Commission cited *Hérold* and *Keith*, both above, for the proposition that "heightened scrutiny" applies. In my view the cited portions of those cases relate to the test to be applied to the screening decision, and not the standard of review to be applied by the Court. Nonetheless, the Court of Appeal's direction at paragraphs 50-51 of the *Keith* decision bears repeating:

> [50] The Commission may decline to deal with a complaint under paragraph 41(1)(c) of the Act when the complaint is beyond its jurisdiction. Such a decision may be made prior to or after an investigation carried out pursuant to section 43 of the Act. In this case, the Commission reached its decision without the benefit of such an investigation. The jurisprudence of the Federal Court

> provides that in such circumstances the Commission should only decline to deal with a complaint in plain and obvious cases. This is so since the decision of the Commission pursuant to section 41 is a final decision made at a preliminary stage without the benefit of an investigation under section 43 of the Act: *Canada Post Corp. v. Canadian Human Rights Commission et al.* (1997), 130 F.T.R. 241 at para. 3 (Rothstein J.), conf. 169 F.T.R. 138, affirmed 245 N.R. 397 (F.C.A.); *Michon-Hamelin v. Canada (Attorney General)*, 2007 FC 1258 at para. 16 (Mactavish J., citing Rothstein J. in *Canada Post Corp.*, above); *Hicks v. Canada (Attorney General)*, 2008 FC 1059 at para. 22 (Snider J.); *Canada (Attorney General) v. Maracle*, 2012 FC 105 at paras. 39-40 (Bédard J.).
>
> [51] Moreover, since the Commission decided the jurisdictional question without the benefit of a section 43 investigation, the allegations of fact contained in the complaint must be taken as true: *Michon-Hamelin v. Canada (Attorney General)*, above, at paras. 23-24; *Hicks v. Canada (Attorney General)*, above, at para. 6.
>
> [emphasis added]

[22] In the end, the question is not one of "heightened deference" or "heightened scrutiny." Rather, the question is whether the decision not to allow the complaint to proceed any further was reasonable, taking into account the test to be applied and the information available (and not available) to the Commission in light of the fact that no investigation had yet taken place.

[23] 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 para 47, and *Khosa*, above, at para 59. 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."

[24] While it is sometimes said that issues of bias relate to procedural fairness and are reviewable on a standard of correctness (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 45; *Konya v Canada (Citizenship and Immigration)*, 2013 FC 975 at para 5; *Punia v Canada (Citizenship and Immigration)*, 2013 FC 1078 at para 19), this seems to offer little practical guidance in a case like this one, where the issue of bias has not been considered and ruled upon by the administrative decision-maker. Rather, it seems to me that the Court must simply apply the well established test for bias based on all of the evidence. That test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the matter was not decided in an impartial manner: *Exeter*, above, at para 16; *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394-95 [*Committee for Justice and Liberty*].

STATUTORY PROVISIONS

[25] The following provisions of the Act are applicable in these proceedings:

Prohibited grounds of discrimination	**Motifs de distinction illicite**
3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been	3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

ordered.

[…]

Denial of good, service, facility or accommodation

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

[…]

Complaints

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

Commission to deal with complaint

41. (1) Subject to section 40, the Commission shall deal

[…]

Refus de biens, de services, d'installations ou d'hébergement

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public

a) d'en priver un individu;

b) de le défavoriser à l'occasion de leur fourniture.

[…]

Plaintes

40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

Irrecevabilité

41. (1) Sous réserve de l'article 40, la Commission statue sur

with any complaint filed with it unless in respect of that complaint it appears to the Commission that	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.
[…]	[…]

ARGUMENT

Applicant

Errors of Fact

[26] The Applicant argues that the Commission erred in fact by speculating on what actions the OPC did and did not take with respect to his complaints.

[27] First, the Applicant says the statement in the Report that "It appears that the complainant disagrees with the respondent's report of findings for his complaint" is factually incorrect, because there are no findings for the Applicant to disagree with. He says his complaints were ignored or set aside by the OPC, and that the single report of findings makes no reference to his complaints. The Applicant points to a letter from the OPC of July 4, 2012 reporting the conclusion that his complaint was not well-founded – which was not before the Commission when it made the Decision under review but was filed by the Applicant with his affidavit in the current matter – as evidence of this. He notes that this letter references only one file number, and refers to a complaint received by the OPC on April 5, 2011, and not to the complaints he originally filed on February 23, 2011.

[28] The Applicant says that after he complained about his treatment by the OPC, a subsequent letter from the OPC dated February 6, 2013 suddenly listed two file numbers in the heading. That letter, which was also not before the Commission when it made its Decision, reports that the OPC was satisfied that the Applicant's complaints were properly handled and

investigated, and that "no further action will be taken" by the OPC in relation to his correspondence. The Applicant submits that this is evidence of the OPC's refusal to properly address his complaints, and that the statement in the Report that "The OPC addressed each of the concerns some were investigated according to their policies and procedures [sic]" is inaccurate. The Applicant contends that the OPC did not investigate his complaints according to their policies and procedures.

[29] Moreover, the Applicant says the OPC outright refused to allow him the opportunity to make representations prior to issuing its single report of findings, and outright misled him as to its intent. He points to an e-mail he wrote to his then-counsel stating that the OPC "has investigated and is preparing a finding that my complaints are 'well founded'" as evidence that he was misled about the OPC's intended findings. His argument seems to be that, had he known that the OPC was preparing to find that his complaints were not well-founded, he would have made further submissions.

[30] The Applicant notes that this Court has affirmed that the OPC is subject to the principles of procedural fairness in handling complaints (*Kniss v Canada (Privacy Commissioner)*, 2013 FC 31 at para 18), and that the Act requires that complainants be given an opportunity to make representations to the Commissioner: Act, s. 33(2). Yet, the OPC blatantly refused him the opportunity to address the substance of his complaints, stating in an email of January 2013 that should he wish to go ahead with a scheduled call with OPC staff, "the only issue that will be discussed is your comments that this Office may have failed to investigate two complaints under the Privacy Act."

[31] The Applicant also takes issue with the statement in the Report that the reference by an OPC staff member to his conjugal partner as "your whatever" "appears not to have impacted his OPC complaint…." This is factually incorrect, the Applicant argues, because there was no finding made by the OPC with respect to the complaint at issue in that conversation. Thus, he says, the Commission was speculating on matters of fact contrary to instructions from the Federal Court of Appeal not to do so at the section 41 stage. He quotes *Keith*, above, at para 51 on this point:

> [51] Moreover, since the Commission decided the jurisdictional question without the benefit of a section 43 investigation, the allegations of fact contained in the complaint must be taken as true: *Michon-Hamelin v. Canada (Attorney General)*, above, at paras. 23-24; *Hicks v. Canada (Attorney General)*, above, at para. 6.

The Applicant says that the Commission openly contradicted his allegations in spite of this direction from the Federal Court of Appeal.

Errors of Law

[32] The Applicant argues that the Commission erred in law in stating, in the Report, that the *Privacy Act* contains recourse provisions that would adequately address his concerns about the OPC's handling of his complaints. The Applicant takes this to be a reference to s. 41 of the *Privacy Act*, and argues that this provision would not provide adequate recourse. He says the OPC has withheld findings on the Applicant's complaints, and without such findings he has no right to appeal. As such, he argues, the Commission based its Decision on an error in law.

[33] Moreover, the Applicant argues, two of his complaints to the OPC related to intrusions into private and personal matters, and s. 41 of the *Privacy Act* provides no appeal for findings on these types of complaints.

[34] The Applicant also argues that the OPC erred in law in the way it interpreted its own jurisdiction. He notes that before complaining to the Commission, he gave the OPC an opportunity to respond to his concerns regarding the manner in which his complaints were handled. He points to the OPC's letter of February 6, 2013 stating its understanding that he was in substance making a human rights complaint, and this was outside of the OPC's jurisdiction. The OPC suggested he contact the Commission. Now, he argues, the Commission is declining to consider his complaint based on the view that adequate recourse was available to him under the *Privacy Act*. In the Applicant's view, this shows that the Commission and the OPC are at odds over a question of jurisdiction, and it is incumbent on the Court to resolve this dispute.

Breaches of Procedural Fairness

[35] The Applicant further argues that the Commission breached his procedural fairness rights in three ways. First, he says that his full submissions were not placed before the Commission when it made its Decision. Second, he says the Commission failed to state the provision or provisions of the *Privacy Act*, RSC, 1985, c P-21 [*Privacy Act*] that would have provided adequate recourse for his concerns, thereby leaving him to guess at the Commission's meaning. And third, he argues that the Commission asked the parties for submissions in relation to s. 41(1)(d) of the Act, but then based its Decision at least in part on s. 41(1)(b) without providing him with any opportunity to make submissions on this point.

[36] The first of these arguments relates to the Applicant's submissions regarding whether there was a clear link between the alleged conduct and a prohibited ground of discrimination under the Act. He says that the Report "concedes that the applicant established a clear link to a prohibited ground" when it stated at paragraph 19 that "If proven, these allegations could constitute a discriminatory practice under section 5 of the Act." Despite this, he argues, the Report did not include his full response on the question of a link to a prohibited ground, and he was therefore denied "the opportunity to make a full answer and defense for the Commission to consider."

[37] Second, the Applicant notes that the Commission stated at paragraph 20 of the Report that adequate recourse was available to him under the *Privacy Act*, but failed to state the provisions of the *Privacy Act* that would provide him with such recourse, and therefore denied him "the opportunity to make full answer and defense."

[38] Finally, the Applicant argues that paragraph 20 of the Report also reveals that the Commission was basing its Decision on s. 41(1)(b) of the Act, which states that the Commission may decline to deal with a complaint where:

> (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;

[39] The Applicant says the Commission posed no questions for him to respond to in relation to s. 41(1)(b) of the Act, and thereby denied him the right to make full answer and defence.

Capriciousness of the Decision

[40] The Applicant argues that the author of the Report acted capriciously by adopting the Respondent's position in that report. The Respondent stated in its submissions that the Applicant was relying on bald assertions that he was discriminated against based on prohibited grounds. The Report then stated at paragraph 21 that "[t]he allegation that the OPC's treatment of the complaint is linked to his sexual orientation and disability is a bald assertion unsupported by facts."

[41] The Applicant also notes that the Report stated at paragraph 3 that:

> The complainant has also filed a complaint against Citizenship and Immigration Canada, and these files will be presented to the Commission at the same time as requested by the complainant.

Despite this, the Applicant says, the two were presented to the Commission as separate complaints, and as a result, the Commission would not necessarily have been aware that the author of the Report had adopted contradictory positions in dealing with the two complaints.

Bias

[42] The Applicant argues that since the OPC and the Commission have argued the same point, "albeit from the opposite direction," it would be reasonable for the Applicant to conclude that the Commission would have some sympathy for the OPC's position. This seems to be related to the jurisdictional argument: that is, both the OPC and the Commission tried to decline jurisdiction, so the Commission would have some natural sympathy for the OPC's position in that regard. The Applicant says it would be reasonable to conclude that the alleged errors of

mixed fact and law, failures to adhere to the principles of procedural fairness and capricious actions outlined above result from that sympathy, and that the Decision and the decision-making process were therefore biased in favour of the OPC.

[43] The Applicant says that the simple fact of the matter is that the violations of his privacy rights are in part related to his disability. He argues that the OPC's refusal to investigate and issue findings on his complaints will set a precedent that seriously limits the level of privacy protection available to Canadians with disabilities under the *Privacy Act*, both in terms of the use and disclosure of their personal health information by the federal government and their right of access to their own health records held by the federal government. He says that he has been robbed of his right to privacy and has no appeal rights in the circumstances, and the only means of redress available to him is through the Commission and ultimately the Human Rights Tribunal. He therefore asks the Court to quash the Commission's Decision refusing to deal with his complaint, or in the alternative, to issue an order of mandamus requiring the Commission to investigate his complaint in accordance with s. 43(1) of the Act.

Respondent

Preliminary Issue: Additional Evidence Filed by the Applicant

[44] The Respondent notes that the Applicant's record in this proceeding contains a number of documents that were not before the Commission when it made its Decision, and argues that these documents are therefore not relevant in this proceeding: *O'Grady v Bell Canada*, 2012 FC 1448 at para 22.

Process Fair and Impartial

[45] The Respondent says that, contrary to the Applicant's submissions, he had ample opportunity to put forward his arguments and have them considered by the Commission. The Applicant provided written submissions in response to the Report and written comments on the OPC's response to the Report, and both were considered by the Commission. As such, no procedural unfairness arises: *Hérold*, above, at para 42.

[46] With respect to the two concerns raised by the Applicant in relation to paragraph 20 of the Report – that it fails to specify the provisions of the *Privacy Act* that would provide recourse to the Applicant, and shows that the Decision was based on s. 41(1)(b) of the Act rather than s. 41(1)(d) upon which the parties were asked to make submissions – the Respondent argues that it is clear from reading the Report as a whole that this paragraph played little if any role in the final recommendation that was adopted by the Commission in its Decision. The paragraphs that follow state that the problem with the Applicant's complaint was that he had not put forward any facts to support his allegation that the alleged conduct was based on his sexual orientation or disability (paragraphs 21-24). The Applicant thus failed to demonstrate "a link between his allegations and a prohibited ground" (paragraph 24), and this was the reason the complaint was considered to be "frivolous" (paragraphs 24-25).

[47] Furthermore, the Respondent argues, the Applicant had the opportunity to respond to paragraph 20 in his response to the Report, and in fact did so by arguing that the *Privacy Act* did

not provide him with adequate recourse in the circumstances, so no issue of procedural fairness arises.

[48] With respect to the Applicant's allegations of bias, the Respondent says that the Applicant has not advanced substantial grounds that would meet the well-known test for a reasonable apprehension of bias. That is, he has not advanced grounds that would cause "an informed person, viewing the matter realistically and practically – and having thought the matter through" to conclude that it is more likely than not that the matter was not decided in a fair and impartial manner: *Exeter*, above, at para 16; *Committee for Justice and Liberty*, above, at pp. 394-95. Simply because errors allegedly were made in processing the Applicant's complaint, it does not follow that the Commission was biased against him, the Respondent argues.

[49] On the contrary, the Respondent argues, the process was fair and impartial. The Commission notified the parties it was considering dismissing the complaint under s. 41(1)(d), and posed specific questions for the parties to address. A Commission staff member obtained the parties' positions and prepared the Report. The parties had an opportunity to respond to the Report, and to reply to each others' submissions, and these materials were considered by the Commission before making its Decision. Thus, the Applicant knew the case he had to meet and was given ample opportunity to he heard before his complaint was dismissed.

Decision Was Reasonable

[50] The Respondent says the Commission reasonably declined to deal with the Applicant's complaint under s. 41(1)(d) on the basis that it was frivolous.

[51] In order for a complaint to be considered frivolous, the Respondent notes, it must be "plain and obvious" that the complainant cannot succeed: *Hérold*, above, at para 35. Furthermore, when the Commission declines to deal with a complaint under s. 41 without first conducting an investigation, as it did in this case, the allegations of fact contained in the complaint must be taken as true. Thus, the question to be answered is, assuming the Applicant's allegations are true, did the Commission act reasonably in declining to deal with the complaint: *Keith*, above, at para 51. For the purposes of assessing this, the Respondent notes, the Report is to be treated as part and parcel of the Commission's reasons for its Decision: *Sketchley*, above, at para 37; *Derksen v Canada (Correctional Service)*, 2013 FC 1120 at para 14.

[52] Viewed as a whole, the Respondent argues, the Commission's reasons meet the standard of "justification, transparency and intelligibility" set out in *Dunsmuir*, above, at para 47. The Report set out the relevant factors for consideration under s. 41(1)(d), the main positions of the parties with respect to those factors, and a cogent analysis of how those factors applied to the Applicant's complaint against the OPC.

[53] While the Applicant takes issue with the Report's comments regarding how his complaints were handled by the OPC, the Respondent argues that the passages the Applicant objects to are not central to the analysis and conclusion of the Report. It is clear from the analysis portion of the Report that the crucial problem with the complaint was that the Applicant put forward no evidence linking the alleged conduct with a prohibited ground of discrimination (paragraphs 21-24). In other words, even if one takes all of the allegations regarding the OPC's

conduct as true, there was no evidence to suggest that this conduct was based on a prohibited ground of discrimination.

[54] The Respondent says that the requirement in s. 40 of the Act that a complainant have "reasonable grounds" for believing that a person has engaged in a discriminatory practice means that a complainant must put forward some probative evidence that a respondent's actions were taken on the basis of a prohibited ground: Act, ss. 5, 40; *Hérold*, above, at para 41; *Hartjes*, above, at para 23. In this case, however, the only specific conduct alleged by the Applicant which could possibly be linked to a prohibited ground was the alleged comment by an OPC investigator referring to the Applicant's partner as "your whatever." As noted in the Report, even if the investigator did make this comment, it does not appear to have affected the OPC's treatment of the Applicant since his file was reassigned to another investigator.

[55] The Respondent argues that the Applicant's responses to the Report provided no additional evidence linking the OPC's conduct to a prohibited ground of discrimination. The Applicant refers to "several… derogatory comments" in his June 2013 response, but does not say what they were or who made them. He also says he was told by the Commission that his complaints could not be investigated because he was disabled and that he should contact the Commission, but it appears from the evidence submitted by the Applicant that the OPC was merely responding to the fact that the Applicant had claimed his human rights were being violated. The Commission was merely advising him that it only had jurisdiction over violations of the *Privacy Act*.

[56] Even if the Applicant's allegation that the OPC failed to properly investigate his complaints is taken as true, the Respondent says, this does not detract from the main conclusion of the Report that he failed to put forward reasonable grounds linking the OPC's conduct to a prohibited ground of discrimination.

[57] Similarly, whether the Applicant's concerns about the OPC's handling of his complaints could be adequately addressed under s. 41 of the *Privacy Act* is beside the point. This was not the basis of the Commission's Decision. Rather, the Commission concluded that the Applicant had not established a link between his treatment at the hands of the OPC and a prohibited ground of discrimination.

[58] In effect, the Respondent argues, the Applicant asked the Commission to infer that the OPC's alleged actions were based on a prohibited ground of discrimination. However, based on the evidence before it, it was reasonable for the Commission not to draw such an inference. Absent any probative evidence that the OPC's conduct was based on a prohibited ground of discrimination, it was plain an obvious that the Applicant's complaint would not succeed.

[59] While the Report may not be perfect in all respects, the Respondent says, perfection is not the standard. The Record of Decision and Report allow the Court to understand why the Commission made its Decision, and that Decision falls within the range of reasonable outcomes: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, at para 18.

ANALYSIS

[60] The Applicant spends a considerable amount of time in this application attacking the decision of the OPC on the basis of evidence that was not before the Commission and that is not material to the issues before me. If the Applicant was dissatisfied with the decision of the OPC then he should have asked the Court to review that decision. In any event, the merits of the OPC decision were not before the Commission and therefore are not before this Court.

[61] There are no material errors of fact in the Commission's Decision in the context of what was before the Commission. The essence of the Commission's Decision is found in the Report at paragraphs 21 and 23. The Applicant alleged that he had been treated in an adverse differential manner due to his sexual orientation and disability, but the grounds and information put forward for this assertion did not establish "reasonable grounds" for such a claim.

[62] As the Report points out, the Applicant based his case before the Commission on an alleged comment made by an OPC employee who the Applicant says referred to the Applicant's conjugal partner as "your whatever." The Applicant complained about this reference and the file was reassigned. As far as this comment is concerned, there was, and is, no evidence to suggest that the OPC treated him in an adverse differential manner based on a prohibited ground when it decided his complaint. In fact, the reassignment of the file following the Applicant's complaint is evidence that the OPC was alert and alive to the Applicant's concerns about the "your whatever" remark and took steps to ensure it would not impact the eventual decision.

[63] The Applicant was asking the Commission to find – and is now asking the Court to find – that whatever lay behind the remark was carried forward and materially impacted the OPC's decision on his complaints. But there is no evidence or information to support this assertion.

[64] The Applicant has also suggested that a question posed to him by an OPC staff member regarding whether he required "any accommodations for… a… phone call" is evidence of a discriminatory mind-set, but I fail to see how the question allegedly posed could be taken as discriminatory.

[65] The Applicant provided no evidence or information as to how his disability could have affected the OPC's decision. This remains a bald allegation and the Commission made no mistake of fact in this regard.

[66] Some comment is warranted here regarding what the Commission is and is not required to accept as true when exercising its discretion under section 41 of the *CHRA* in advance of conducting an investigation. Justice Kane has recently canvassed the jurisprudence on this issue and provided a helpful summary in *Public Service Alliance of Canada v Canada (Attorney General)*, 2014 FC 393 at paras 49-61 [*Public Service Alliance*]. She affirms that:

> [56] At the screening stage, the applicant is required to set out the allegations but is not required to provide any evidence to prove those allegations. There is no need to provide supporting documentation or evidence; such evidence only becomes necessary if the complaint proceeds to an investigation (*Valookaran*, supra at para 22; *Michon-Hamelin v. Canada (Attorney General)*, 2007 FC 1258, [2007] F.C.J. No. 1607 [*Michon-Hamelin*]).

[67] Justice Bédard stated in *Canada (Attorney General) v Maracle*, 2012 FC 105, 404 FTR 173 at para 41 [*Maracle*]:

> [41] A complainant is not required to present evidence at the pre-investigation stage but the complaint must nevertheless disclose a sufficient link to a prohibited ground of discrimination.

[68] I agree with Justice Kane that s. 41 decisions must ultimately strike a balance between two important objectives (*Public Service Alliance*, above, at para 61):

> [61] Although screening out a complaint is regarded as exceptional because it finally disposes of the complaint without any investigation, this consideration must be balanced against the purpose of section 41, which is to provide for the screening out of complaints in plain and obvious cases, including where the complaint fails to disclose a sufficient link to a ground of discrimination or where the complainant fails to provide sufficient information to establish the link.

[69] While a complainant is not expected to put forward evidence at the pre-investigation stage, the requirement to establish reasonable grounds for the complaint means that they cannot rely on bald allegations either (*Hartjes*, above, at para 23). Analogies have frequently been made to the test for striking a court pleading or a preliminary inquiry (see *Maracle*, above, at para 42; *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at para 53, 140 DLR (4th) 193). The complainant does not need to prove that what they say is true, but they must allege facts that, if believed, would establish a link to a prohibited ground of discrimination. He or she cannot merely assert that such a link exists. Otherwise, no complaint could ever be screened out at the s. 41 stage.

[70] As was recently pointed out in a similar case, the Commission has adopted procedures that provide repeated opportunities for the complainant to put forward the details of their complaint so as to establish reasonable grounds before a s. 41 decision is made, and this should be taken into account in assessing the reasonableness of the Commission's Decision. Justice Hughes described the matter as follows in *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2013 FC 678 at paras 5-6 and 18-19:

> [5] …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.
>
> […]
>
> [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…
>
> [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.

[71] Similar procedures were followed in the present case. In my view, it remains true that the complainant is not required to present evidence in support of their allegations at the pre-

investigation stage, but it is entirely appropriate to reject bald allegations as insufficient to establish reasonable grounds for the complaint since the complainant has had notice of the deficiency and opportunities to provide additional information.

[72] The distinction between facts alleged and bald allegations can be simply illustrated in this case. The Applicant need not prove his assertion that a member of the OPC staff referred to his conjugal partner as "your whatever." This is assumed to be true. But he cannot simply assert that an alleged failure by the OPC to properly investigate his complaints is linked to a prohibited ground of discrimination. He must recount some facts that, if believed, would serve to establish this link. Otherwise, the claim has no chance of success.

[73] In my view, the Commission was not "speculating" in any of its findings as alleged by the Applicant. It was merely pointing out that the Applicant had not established a reasonable basis upon which to carry the complaint forward.

[74] The basis for the Commission's Decision was not, as the Applicant alleges, that adequate recourse was available to him under the *Privacy Act*. The basis of the Commission's Decision was s. 41(1)(d) of the *CHRA*, not s. 41(1)(b). Even if the Commission was inaccurate about recourse under the *Privacy Act*, this did not affect the Decision on the key points as set out above. The Commission was simply pointing out that the issue before it was not the overall reasonableness or fairness of the OPC decision or its approach to handling his complaints, which could have been challenged by other means. The issue before the Commission was differential treatment on prohibited grounds. The Applicant is now attempting to attack the Commission's

Decision on this issue by referring the Court back to what he now argues were problems with the OPC decision.

[75] As regards procedural fairness, the Applicant is again attempting to invoke matters that are not material to the fundamental issue that was before the Commission and that played no role in the Decision on this issue. The essence of the Decision is that the Applicant had failed to put forward any facts that the OPC's conduct and decision were based upon his sexual orientation or disability. The Commission accepted a possible link to a prohibited ground and afforded the Applicant the presumption of truth regarding his allegations of fact. What the Applicant didn't do was establish reasonable grounds to believe that the OPC's conduct was linked to a prohibited ground of discrimination. The Applicant was provided with the Report, so he was fully aware of this issue, and was also able to address comments by the OPC. Yet he provided no additional evidence and alleged no additional facts to link the OPC's conduct to a prohibited ground of discrimination.

[76] The process followed by the Commission allowed the Applicant a full opportunity to make his case and to respond to anything contained in the Report. Indeed, the Applicant provided his full response on points that he now says he was not given an adequate opportunity to address.

[77] The Applicant has put forward no evidence that would support a finding of bias in accordance with the *Exeter*, above, test.

[78] Even if the Applicant's complaints about the OPC decision were true, there was no evidence to link the OPC's conduct in assessing the complaint or the negative decision to a prohibited ground of discrimination. The Applicant has attempted to complicate this intelligible, transparent and justifiable conclusion by reference to the OPC process and decision and to points in the Commission's Decision that are not material to the fundamental point at issue. The Applicant has established no grounds that would allow the Court to find a reviewable error that would justify quashing the Commission's Decision.

[79] The Applicant makes much of paragraph 20 of the Report and alleges mistakes of fact and law, but paragraph 20 is not material to the Commission's Decision concerning s. 41(1) of the Act. When the Commission says that the "Commission is not an appeal body and it cannot review the OPC decisions," it is simply saying that it cannot review the merits of an OPC decision so that, if the Applicant is dissatisfied with the refusals of the OPC he must seek other recourse than a complaint to the Commission. The Commission is not saying that it cannot review a s. 41(1) *CHRA* complaint against the OPC, because the Commission, in fact, goes on to deal with the Applicant's complaint.

[80] When the Report says the "OPC addressed each of the concerns some were investigated according to their policies and procedures," this doesn't mean that the OPC undertook the investigations and made the decisions that the Applicant requested. Paragraph 19 clarifies this by referring to the allegations that the OPC mishandled the complaints he filed under the *Privacy Act*, refusing to investigate some of them and refusing to rule on others. The Commission does not deny the alleged "mishandling" and accepts that it "could constitute a discriminatory practice

under section 5 of the Act." It is clear from the Decision as a whole that the Applicant's allegations against the OPC are accepted; the problem is that he was unable to establish that there were reasonable grounds to believe that whatever the OPC did, or failed to do, demonstrated a link to a prohibited ground.

[81] The issue of whether or not the "*Privacy Act* contains recourse provisions that would adequately address the complainant's concerns" is not relevant to the application before me. Obviously, the Commission was not saying that the *Privacy Act* provided recourse for his s.41(1) *CHRA* complaint against the OPC because the Commission deals with that complaint in the Decision. Whether or not the *Privacy Act* provides recourse for other aspects of the OPC's conduct is not relevant to a s. 41(1) *CHRA* complaint before the Commission.

[82] I would add, however, that there are remedies for alleged failures by the OPC to fulfill its statutory obligations, whether or not they amount to discrimination. The Applicant is right to say that s. 41 of the *Privacy Act* provides a somewhat narrow remedy that may not have addressed all of his concerns. It is simply a mechanism for a *de novo* review by the Court of a refusal to provide access to personal information. It is brought as an application naming the refusing party and not the OPC as respondent, and can only be pursued once the OPC has reported its recommendations: see *Oleinik v Canada (Privacy Commissioner)*, 2011 FC 1266 at paras 5-9 [*Oleinik*]. However, this Court's remedial powers on judicial review under s. 18.1 of the *Federal Courts Act* are sufficiently broad to provide remedies if the OPC were to unlawfully refuse to investigate or report its findings on a complaint, or were to conduct its investigation in an unfair manner: see *Oleinik*, above, at paras 10-11 and 18.

[83] It is possible to disagree with the Commission's conclusions on the Applicant's s. 41(1) complaint, but it is not possible to say that the Decision lacks justification, transparency or intelligibility, or that it falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[84] The Applicant obviously feels very frustrated and offended by his experiences with the OPC, but the conduct of the OPC is not before me and I have no record with which to evaluate it for reviewable error. The Decision of the Commission cannot be said to be unreasonable in accordance with *Dunsmuir*, above, or procedurally unfair or biased. I find that no reviewable error has been established.

[85] The Applicant has attempted to place before the Court by way of affidavit materials that were not before the Commission when it made its Decision. That material must be excluded for purposes of my review. See *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 16-20; *Tl'Azt'En First Nation v Joseph*, 2013 FC 767 at paras 16-17; *International Relief Fund for the Afflicted and Needy (Canada) v Canada (National Revenue)*, 2013 FCA 178. However, even if that material was admitted it would make no difference to my decision.

[86] As Justice Snider pointed out in *Hartjes*, above, at para 23,

> 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. This is the burden that the Applicant failed to discharge in the present case.

That is also the burden that the Applicant failed to discharge in the present case.

[87] I have said above that the reasonableness of the Commission's Decision must be evaluated in light of the test it was required to apply. Thus, the question before me is whether the Commission reasonably concluded that it was plain and obvious that the complaint could not succeed: *Hérold*, above, at para 35. Based on the information before the Commission, this was a reasonable conclusion, and it was supported by transparent and intelligible reasons.

[88] As Justice Snider also pointed out in *Hartjes*, above:

> [29] Even if I assume that it would have been reasonable for the Commission to accept the submissions and draw the inferences now argued, this would not mean that it was unreasonable for the Commission to decide otherwise. A characteristic of the reasonableness standard of review is that there may be a range of possible acceptable outcomes which are defensible in light of the facts and law. The fact that another possible outcome may be preferred by the Court or an applicant does not necessarily make a tribunal's decision unreasonable.

[89] The Respondent has not requested costs in this application.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. No costs are awarded.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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