

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20181015**

**Docket: A-407-17**

**Citation: 2018 FCA 189**

**CORAM: WEBB J.A.  
RENNIE J.A.  
LASKIN J.A.**

**BETWEEN:**

**MARY KWAN**

**Appellant**

**and**

**AMEX BANK OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on October 1, 2018.

Judgment delivered at Ottawa, Ontario, on October 15, 2018.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**RENNIE J.A.  
LASKIN J.A.**

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**AMEX BANK OF CANADA**

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**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] Mary Kwan has appealed the judgment of Justice Southcott (2017 FC 1053). He dismissed her application for judicial review of the decision of the Canadian Human Rights Commission (CHRC). The CHRC dismissed, under section 44 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*CHRA*), the complaint that she had filed under the *CHRA*. Although the decision letter from the CHRC is not dated, there is no dispute that the date of the letter is March 23, 2017.

[2] In Ms. Kwan's complaint form that she filed with the CHRC she indicated that the areas in which she believed discrimination took place were the following:

- Goods, services, facilities or accommodation
- Discriminatory policy or practice
- Harassment

[3] She also indicated that the grounds of discrimination that she believed applied were:

- Race
- National or ethnic origin
- Colour
- Age
- Sex (includes pregnancy and childbirth)
- Marital status

[4] Ms. Kwan's complaint arose as a result of her application for an American Express Gold rewards card. In her complaint she outlined various dealings that she had with representatives of Amex Bank of Canada in August and September 2015 in her attempt to obtain this card. In particular she focused on the discussions she had with these representatives and the steps that Amex Bank of Canada took to confirm her identity. She eventually received the card in late September 2015 and subsequently cancelled the card approximately a year later in October 2016.

[5] The Federal Court Judge thoroughly addressed all of the arguments that she made before him and dismissed her application for judicial review.

[6] For the reasons that follow I would dismiss this appeal.

I. Issues and Standards of Review

[7] Although Ms. Kwan raised a number of arguments in her memorandum and during the hearing, her submissions can be categorized into two subject areas. One is the alleged lack of thoroughness of the review by the assessor and the other is related to the legal question of whether Amex Bank of Canada was, prior to issuing the card to her, required to confirm her identity in accordance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, S.O.R./2002-184 (*Regulations*).

[8] The role of this Court is to determine whether the Federal Court Judge selected the appropriate standard of review and then applied it correctly (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paras. 45-47, [2013] 2 S.C.R. 559). As a result, this Court is to step into the shoes of the Federal Court Judge and focus on the decision of the CHRC (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 247, [2012] 1 S.C.R. 23; *Kinsel v. Canada (Minister of Citizenship and Immigration)* 2014 FCA 126, at para. 23, [2016] 1 F.C.R. 146).

[9] In *Keith v. Canada (Correctional Service)*, 2012 FCA 117, 431 N.R. 121, this Court addressed the issue of the standard of review applicable in relation to a judicial review of a decision of the CHRC to dismiss a complaint under section 44 of the *CHRA*:

**47** The decision of the Commission to dismiss a complaint under paragraph 44(3)(b) of the Act is a final decision made at an early stage, but in such case - contrary to a decision refusing to deal with a complaint under section 41 - the decision is made with the benefit and in the light of an investigation pursuant to section 43. Such a decision should be reviewed on a reasonableness standard, but as was said in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59, and recently reiterated in *Halifax* at paragraph 44, reasonableness is a single concept that "takes its colour" from the particular context. In this case, the nature of the Commission's role and the place of the paragraph 44(3)(b) decision in the process contemplated by the Act are important aspects of that context, and must be taken into account in applying the reasonableness standard.

**48** In my view, a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(b) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.

[10] As a result, any findings of fact made by the CHRC and any legal interpretations that are within the mandate of the CHRC are entitled to deference.

[11] With respect to Ms. Kwan's allegation of a lack of procedural fairness, the role of the reviewing court for procedural fairness matters is simply to determine whether the procedure that was followed was fair, having regard to the particular circumstances of the case (*Canadian Pacific Railway Co. v. Canada (Attorney General)*, 2018 FCA 69, at para. 54, [2018] F.C.J. No. 382 (*Canadian Pacific*)).

## II. Analysis

[12] At the hearing of this appeal Ms. Kwan raised the argument that she was subjected to additional screening requirements in relation to the establishment of her identity because she had declined to accept future marketing materials from Amex Bank of Canada. However, as she noted, this issue had not been raised previously in this matter either with the assessor or at the Federal Court and this issue is the subject of a different proceeding before another court. Therefore, this argument will not be considered in this appeal.

[13] Ms. Kwan also argued that Amex Bank of Canada was not required to confirm her identity under the *Regulations*. Paragraph 54.1(a) of the *Regulations* provides that:

**54.1** Subject to subsections 62(1) and (2) and section 63, every financial entity shall

(a) if the financial entity opens a credit card account in the name of a person, ascertain their identity in accordance with subsection 64(1);

**54.1** Sous réserve des paragraphes 62(1) et (2) et de l'article 63, toute entité financière doit prendre les mesures suivantes :

a) lorsqu'elle ouvre un compte de carte de crédit au nom d'une personne, vérifier l'identité de celle-ci conformément au paragraphe 64(1);

[14] While Ms. Kwan conceded that Amex Bank of Canada is a financial entity, it is her position that she was applying for a charge card and not a credit card. As a result, it is her position that Amex Bank of Canada was not required to confirm her identity as set out in the *Regulations*.

[15] However, Ms. Kwan has failed to establish the link between the requirement of the *Regulations* to confirm her identity and her claim for discrimination. Even assuming, without deciding, that Amex Bank of Canada was not required by section 54.1 of the *Regulations* to confirm her identity, this would not lead to a conclusion that there was any discrimination based on the grounds as claimed by Ms. Kwan in her complaint form but only that Amex Bank of Canada was following a provision that it was not obligated to follow. There was no evidence that Amex Bank of Canada applied one interpretation of the *Regulations* to her and a different interpretation to any other individual.

[16] Since Ms. Kwan stated that she has another matter that is proceeding in relation to a complaint that her privacy was invaded as a result of the actions taken by Amex Bank of Canada in relation to the confirmation of her identity, the interpretation of the *Regulations* should be deferred to that process. I would only note that, although “credit card” is not defined in the *Regulations*, the *Canadian Oxford Dictionary*, 2d ed., provides the following definitions:

**Charge card:** a credit card, esp. one for which the account must be paid in full when a statement is issued.

...

**Credit card:** a card issued by a bank or business authorizing the obtaining of goods on credit.

[17] Her submissions related to her interpretation of the *Regulations* are not relevant in relation to her allegations that Amex Bank of Canada discriminated against her based on any of the grounds as alleged in her complaint form and I would dismiss her appeal in relation to this issue.

[18] Ms. Kwan's claims with respect to the thoroughness of the investigation relate to the transcripts of the conversations that she had with the various representatives of Amex Bank of Canada, the methods they used to confirm her identity, and whether a P.O. Box would be a sufficient address. There was nothing to suggest that any of the methods used by Amex Bank of Canada to confirm her identity, or its determination that she could not use a P.O. Box as an address, were based on any of her alleged grounds of discrimination.

[19] Her allegations related to the transcripts appear to have changed as this matter has progressed. Ms. Kwan had a copy of the transcripts of her conversations with the representatives of Amex Bank of Canada while she was dealing with the assessor but she did not obtain a copy of the audio recordings until the matter had proceeded to the Federal Court. Despite not having a copy of the audio recordings, she alleged to the assessor for the CHRC that it was not her voice on the recording that was used to make the transcripts. The assessor confirmed that, in his opinion, it was her voice on the tape.

[20] This argument was repeated before the Federal Court and the Federal Court dismissed it. Neither the transcripts of the recordings nor the recordings themselves were placed before the Federal Court Judge. The Federal Court Judge noted this in paragraph 56 of his reasons:

**56** ... As submitted by the Respondent, there was no evidence before the Court related to the audio recordings, other than the findings of the Assessor. If, having received copies of the recordings, Ms. Kwan had identified specific discrepancies between them and the transcripts which would support her position, or otherwise identified aspects of the recordings which impugned their authenticity, I would have expected an effort on her part to add that evidence to the record before the Court.



[21] At the hearing of this appeal, Ms. Kwan, for the first time, alleged that the recordings were altered by transferring words that she had used in one part of the conversation to answer questions posed in another part of the conversation. This allegation was not made to the assessor nor to the Federal Court. There is no evidence to establish this – only the bald assertion of Ms. Kwan. Mere bald assertions that the transcripts are not accurate or that the audio recordings have been altered are not sufficient.

[22] With respect to the requirements of procedural fairness, as noted by this Court in *Canadian Pacific*, at paragraph 56, “the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond”.

[23] In this case the nine-page assessment report completed by the assessor is dated December 7, 2016. Ms. Kwan submitted her comments on January 2, 2017. Counsel for Amex Bank of Canada submitted comments the following day, on January 3, 2017. Ms. Kwan then submitted further comments on January 26, 2017. Ms. Kwan was given an adequate opportunity to respond to the report and also to respond to submissions by counsel for Amex Bank of Canada before the decision of the CHRC to dismiss her complaint was made on March 23, 2017. There is no basis to find that the proceeding was not procedurally fair.

[24] As a result, I would dismiss this appeal with costs fixed in the amount of \$2,665.

"Wyman W. Webb"

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J.A.

"I agree

Donald J. Rennie J.A."

"I agree

J.B. Laskin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT  
DATED NOVEMBER 21, 2017, CITATION NO. 2017 FC 1053 (DOCKET T-528-17)**

**DOCKET:** A-407-17

**STYLE OF CAUSE:** MARY KWAN v. AMEX BANK  
OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 1, 2018

**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** RENNIE J.A.  
LASKIN J.A.

**DATED:** OCTOBER 15, 2018

**APPEARANCES:**

Mary Kwan ON HER OWN BEHALF

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