Federal Court  Cour fédérale

Date: 20160720

Docket: T-1612-15

Citation: 2016 FC 837

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SOUTHERN CHIEFS ORGANIZATION INC.

Applicant

and

JESSICA DUMAS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision [the Decision] by the Canadian Human Rights Commission [the Commission], pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act], to request that the Chairperson of the Canadian Human Rights Tribunal commence an inquiry into a complaint [the Complaint] filed by the Respondent. The Decision is

dated August 25, 2015. For the reasons provided below, the matter will be returned to the Investigator for reconsideration.

II. Background

[2] The Applicant, Southern Chiefs Organization Inc., is a not-for-profit corporation that acts as a political organization on behalf of its First Nation members.

[3] The Respondent, Jessica Dumas, was hired in December 2008 by the Applicant to work as a Community Justice Development Coordinator. In that role she reported directly to Michael Bear, Chief of Staff at the time, and ultimately to Morris Swan Shannacappo, the Applicant's then Grand Chief. She resigned from her position on July 16, 2012.

[4] On July 18, 2013, the Respondent filed the Complaint against the Applicant with the Commission. She alleges that she was harassed and discriminated against in the workplace by Mr. Bear on the basis of her age, sex, and marital status. As a result, she suffered anxiety, had to take a medical leave of absence, and was eventually forced to resign. Though the Complaint lists both the Applicant and Mr. Bear as respondents, the Commission processed the Complaint as if only the Applicant had been named.

[5] On June 25, 2015, the Commission designated an Investigator to conduct an investigation [the Investigation] into the Complaint. From June 2014 to May 2015, the Investigator assessed the question of whether the Complaint ought to proceed to be heard by the Tribunal.

[6] On May 28, 2015, the Commission released the Investigation Report [the Report], which recommended that the Tribunal commence an inquiry into the Complaint. The Applicant submitted a response to the Report on July 3, 2015 outlining a number of concerns that it had with the Report's contents.

[7] The Commission issued the Decision on August 25, 2015. Since it stated only that, "having regard to all the circumstances of the complaint, further inquiry is warranted", the reasons given by the Investigator in the Report serve as the reasons for the Decision itself (*Cerescorp Company v Marshall*, 2011 FC 468 at para 49 [*Cerescorp*]).

III. The Complaint

[8] The Respondent makes four separate allegations of misconduct in the Complaint:

A. *The South Beach Casino incident*: On May 2, 2012, at a breakfast buffet at the South Beach Casino in Scanterbury, Manitoba, Mr. Bear demanded that the Respondent get him food. When she refused, he allegedly responded: "don't you think she should go and get my breakfast? That's how you take care of a man. It's practice so then maybe you can keep a man".

B. *The Inappropriate questions about her relationship status*: On several separate occasions Mr. Bear would ask blunt questions as to whether the Respondent was dating various male work associates.

C. *The inappropriate staring incident*: On June 13, 2012, the Respondent attended a meeting with Mr. Bear to discuss the performance and attendance of an employee in her department. At a certain point in the meeting, Mr. Bear moved from his seat across the table to sit next to her. He then, in her words, "looked at my head and clearly moved his eyes down my body to my shoes, and then clearly moved his eyes back up to my head, he would raise his eye brows [sic] as he was doing this".

D. *Reprimand without cause*: The Respondent states that she was humiliated, demeaned, and insulted as a result of Mr. Bear's "inappropriate gazing and gawking" at the June 13, 2012 meeting. As a result, she began a medical leave of absence for stress and anxiety. Shortly after she returned to work on July 16, 2012, she received a letter of reprimand from Mr. Bear for, in her words, "taking a

> medical leave at a time when the justice program was in disarray". She resigned the same day.

IV. The Decision

[9] In the Report which forms the basis of the Decision, the Investigator first stated that there were two issues to be assessed:

> A. Whether the Applicant failed to provide a harassment-free workplace to the Respondent; and
>
> B. Whether the Applicant terminated the Respondent's employment on the basis of her age, sex, or marital status.

[10] The Investigator then outlined the investigation process, asking whether there is support for the Respondent's allegation of harassment and then whether the Applicant was or should have been aware of the harassment and, if so, what steps were taken.

[11] After providing some background and discussing preliminary objections raised by the Respondent, the Investigator then described her methodology. The Investigator noted that she spoke with the Respondent and four witnesses who all had at one time been employed by SCO, but none of whom were employed at the time of the investigation. These individuals were Shirli Ewanchuk (former Director of Health); Ellen Contois, (former Administrative Support); Crystel McLean-Grisdale (former Assistant Justice Coordinator); and former Grand Chief Morris Swan Shannacappo.

[12] The Investigator stated that she made repeated unsuccessful attempts to locate Mr. Bear for an interview. She also attempted to interview Denice Perswain, employed by the Applicant as Finance Administrator, as Ms. Perswain was the sole witness present for the South Beach Casino incident. Ms. Perswain declined to participate, however, as she was still an employee of the Applicant.

A. Is there support for the Respondent's allegation of harassment?

[13] The Investigator addressed the Respondent's allegations as follows:

A. *The South Beach Casino incident*: the Investigator concluded that "[t]he evidence suggests that Mr. Bear asked the [Respondent] to bring him food and made comments about the [Respondent] 'taking care of' and 'keeping' a man". The Investigator based this conclusion on the evidence of Ms. Ewanchuk, who joined the Respondent and Ms. Perswain shortly after the incident and was immediately told about it.

B. *Inappropriate questions about her relationship status*: the Investigator found that the "evidence suggests that Mr. Bear inquired about the complainant's personal life". Again, the Investigator reached this conclusion on the basis of Ms. Ewanchuk's evidence – that Mr. Bear had asked Ms. Ewanchuk on several occasions about the Respondent's marital or relationship status and that, when Ms. Ewanchuk informed Mr. Bear that these were inappropriate questions, he would laugh.

C. *The inappropriate staring incident:* the Investigator concluded that "[t]he evidence indicates that Mr. Bear stood close to the complainant as she worked and made comments about her physical appearance". This conclusion was based on the evidence of Ms. Ewanchuk, who stated that she often saw Mr. Bear stand close to the Respondent as she worked, that Mr. Bear often did the same to Ms. Ewanchuk, that he seemed to lack "physical boundaries", and that Mr. Bear often commented to Ms. Ewanchuk on the Respondent's physical appearance and "appeared to be romantically interested" in her. The conclusion about Mr. Bear's inappropriate comments was also based on the evidence of Ms. Contois, who recalled the Respondent stating that she felt "creeped out" by how Mr. Bear looked at her and who also recalled one instance, sometime shortly before the Respondent went on leave, where the Respondent approached Ms. Contois after a meeting with Mr. Bear, began to cry, and told her that Mr. Bear's gaze "creeped her out" and that she "[couldn't] take it anymore".

D. *Reprimand without cause*: based on documentary evidence submitted by the Applicant, the Investigator determined that the Respondent was not reprimanded for taking medical leave but rather for failing to return work-related materials to the Applicant, a request to which she had not adhered.

[14] Finally, the Investigator noted that Ms. McLean-Grisdale provided evidence of "other associated behaviour" on the part of Mr. Bear – that he was aggressive, that the Respondent was uncomfortable in his presence, and that on one occasion Mr. Bear pretended to run Ms. McLean-Grisdale and the Respondent down with his car in the parking lot adjacent to the Applicant's offices. This evidence, according to the Investigator, "provides further context to Mr. Bear's demeanour and interactions with the [Respondent]".

[15] In light of all the above, the Investigator concluded that, other than the reprimand without cause, the alleged misconduct of harassment had occurred. The Investigator found that the evidence indicated that Mr. Bear's inappropriate behaviour was: persistent and repetitious; unwelcomed; linked to her sex and marital status; may have been linked to her age; and detrimentally affected the work environment and led to adverse job-related consequences for the Respondent. However, the Investigator also concluded that the Respondent's letter of resignation did not make explicit mention of the alleged misconduct, nor did she state to the Applicant when she took her medical leave that she felt the alleged misconduct was the source of her anxiety and distress.

B. Was the Applicant aware or should the Applicant have been aware of the harassment and, if so, what steps were taken?

[16] The Investigator first observed that the Respondent's original position was that she had not told the Applicant about the harassment or why she had resigned because there was no way to do so, given the Applicant's reporting structure, which advises employees to report harassment either to their immediate supervisor or, where the immediate supervisor is the source of the alleged harassment, to the Applicant's Chief of Staff. The Investigator noted that Mr. Bear was both one of the Respondent's immediate supervisors and the Applicant's Chief of Staff at the time of the alleged misconduct. The Investigator further noted that the Respondent had provided conflicting information about whether she had advised Grand Chief Shannacappo of Mr. Bear's alleged misconduct.

[17] The Investigator concluded that it was not necessary to resolve this issue and the contradiction in the Respondent's testimony because of the fact that the Respondent had informed Ms. Ewanchuk, who the Investigator believed to be the Director of Health at the material time (i.e. when the incidents took place, between May and July of 2012). As such, the Investigator concluded that the Applicant should have known about the harassment since "one of its directors was aware of it and spoke to Mr. Bear about it, noting to him that it was inappropriate".

[18] Finally, the Investigator determined that the Applicant had not taken appropriate action to deal with the harassment and found that the Applicant's personnel policy does not outline management's responsibilities when harassment is witnessed or reported. Furthermore, Ms. Ewanchuk was aware of the alleged misconduct but did not raise it "with management", and while the Applicant insisted that it had exercised due diligence throughout, "it did not provide

evidence during the investigation to support this statement". The Investigator also noted that the Ms. Ewanchuk had spoken to the Respondent about Mr. Bear's conduct and suggested that she not be alone in her office with him.

[19] As a result, the Investigator found that the Respondent's complaint warranted further inquiry and recommended that, per paragraph 44(3)(a) of the Act, the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint.

V. Issues

[20] The Applicant raises the following issues:

A. Did the Investigator and the Commission breach the Applicant's right to procedural fairness by:

1. failing to conduct a sufficiently thorough investigation?

2. failing to be neutral?

3. failing to assess the Respondent's credibility?

4. failing to provide the Applicant with an adequate response to its concerns about the Investigation and the Report?

B. Was the Commission's decision to request further inquiry unreasonable?

VI. Standard of Review

[21] The standard of review applicable to questions of the Commission and the Investigator's thoroughness and neutrality is correctness (*Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92; *Big River First Nation v Dodwell*, 2012 FC 766 at para 33).

[22] The Applicant cites *Canada (Attorney General) v Tran*, 2011 FC 1519 at para 19 [*Tran*], for the principle that a failure to assess credibility is reviewable on a correctness standard. *Tran*, however, suggests that the obligation to assess a complainant's credibility is a reviewable on a correctness standard because it is a matter of jurisdiction (para 18). That conclusion arose from the specific facts of that case – there, the investigator stated that it could not interview a particular witness even though that witness was available. Justice Simpson interpreted that as an incorrect statement that the investigator felt he had no jurisdiction to do so. In this case, however, the Investigator made no such statement. As such, and as will be more fully explained below, I think that it is more appropriate to consider a failure to assess credibility as part of the question of whether the investigation was sufficiently thorough – which, as noted above, involves procedural fairness and thus attracts a correctness review.

[23] Similarly, the question of whether the Investigator provided the Applicant with an adequate response to its concerns about the Investigation and the Report is a matter of thoroughness and thus reviewed on a correctness standard. As noted in *Brosnan v Bank of Montreal*, 2015 FC 925 at para 22, "[t]horoughness also entails that the Commission must, as a matter of fairness, respond to any submissions which go to the heart of the investigator's findings" (see also *Carroll v Canada (Attorney General)*, 2015 FC 287 at paras 68-69).

[24] Finally, the Commission's decision to request further inquiry is reviewable on a reasonableness standard (*Cerescorp* at para 14). As such, so long as the decision demonstrates justification, transparency and intelligibility and falls within a range of acceptable, defensible outcomes, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VII. Analysis

[25] Before turning to the specific issues raised by the Applicant, a brief discussion of the Commission's role in the complaints process under the Act may be of assistance. As recently explained by Justice Gleeson in *Phipps v Canada Post Corporation*, 2015 FC 1080:

> [35] The Commission is established under section 26 of [the Act] and consists of a Chief Commissioner, a Deputy Chief Commissioner and three to six members. Section 32 provides for the appointment of such officers and employees as necessary for the proper conduct of the work of the Commission in accordance with the *Public Service Employment Act*, SC 2003, c. 22, ss 12, 13.
>
> [36] Complaints alleging discriminatory practice are received by the Commission and, with exceptions, where the Commission has reasonable grounds to believe a person has engaged or is engaging in a discriminatory practice, as defined in [the Act], the Commission may initiate a complaint (section 40). Where a complaint is initiated, the Commission may designate a person to investigate the complaint (section 43(1)). The Investigator shall investigate and submit a report to the Commission (section 44(1)).
>
> [37] Upon receipt of the report the Commission will dispose of the complaint in one of three manners: (1) refer the complaint to an appropriate external authority where the Commission is of the opinion that the complainant ought to exhaust grievance or review procedures otherwise reasonably available or the complaint could be more appropriately dealt with by means of a procedure provided for under an Act of Parliament other than [the Act]; (2) where the Commission believes an inquiry is warranted, refer the complaint to the Canadian Human Rights Tribunal requesting the Chairperson to institute an inquiry under section 49 of [the Act]; or (3) where the Commission is satisfied that an inquiry into the complaint is not warranted, having had regard to all of the circumstances, dismiss the complaint.

[26] The Commission is "not an adjudicative body… [r]ather, the role of the Commission is to carry out an administrative and screening function" (*Canadian Union of Public Employees*

(Airline Division) v Air Canada, 2013 FC 184 at paras 60-61 [*Air Canada*]). In the words of the Supreme Court in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 53 [*Cooper*]:

> …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.

[27] This is a low threshold, requiring only that the Commission determine whether there is a reasonable basis in the evidence for proceeding to the next stage (*Cerescorp* at para 51). Importantly, in suggesting that further inquiry into the complaint is warranted, the Commission is "not making any final determination about the complaint's ultimate success or failure" (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 24).

[28] The Commission is also entitled to a significant degree of latitude in the performance of its functions: "it may be safely said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission" (*Bell Canada v Communications, Energy and Paperworks Union of Canada*, [1999] 1 FCR 113 at 137 (FCA)).

[29] Nonetheless, the Commission must abide by certain principles of procedural fairness. One is that the investigation be sufficiently thorough (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at 600 (FC) [*Slattery*]). An investigation is thorough so long as it is not "clearly deficient" or fails to assess any "obviously crucial evidence" (*Slattery* at 600, 605). This is a deferential standard: there is no obligation on the Investigator to interview every

individual suggested by the parties (*Bateman v Canada (Attorney General)*, 2008 FC 393 at para 29 [*Bateman*]), nor is it "the Court's role either to dissect the Investigator's report on a microscopic level or second-guess the Investigator's approach to his task" (*Abi-Mansour v Canada (Revenue Agency)*, 2015 FC 883 at para 21 [*Abi-Mansour*]), nor must be the investigation be perfect (*Air Canada* at para 68). The obviously crucial test "requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54 [*Gosal*]).

[30] Thoroughness includes an obligation to thoroughly review the parties' submissions, and "where a party's submissions to the Commission pertaining to an investigator's report allege substantial and material omissions in the investigation and provide support for that assertion the Commission must refer to those discrepancies and indicate, even briefly, why it is of the view that they are either immaterial or insufficient to challenge the investigator's recommendation" (*Gosal* at para 49; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26). That duty, however, applies more strictly "in cases in which the investigator has recommended that the complaint be dismissed" since while "a dismissal brings an end to the matter… [a] referral to the Tribunal is in no way determinative of the truth of the allegation of discrimination" (*Canada (Attorney General) v Davis*, 2009 FC 1104 at para 56).

[31] A second applicable principle of procedural fairness is that of neutrality (*Slattery* at 600). According to Justice Gauthier (then of this Court), the test for neutrality is whether the investigator approached the case with a 'closed mind' (*Gosal* at para 51). The burden of proof

for demonstrating a lack of neutrality is high and requires more than a mere suspicion (*Abi-Mansour* at para 51).

A. Did the Investigator fail to conduct a sufficiently thorough investigation?

[32] I find that there are several respects in which the Investigator, while otherwise undeniably diligent, failed to conduct a sufficiently thorough investigation, rendering it clearly deficient.

[33] The first flaw in the investigation was the conclusion that, through Ms, Ewanchuk, the Applicant's one-time Director of Health, the Applicant knew of Mr. Bear's alleged misconduct. This is because the evidence now before me shows that Ms. Ewanchuk was not actually an employee of the Applicant during any of the period relevant to the Respondent's complaint; while Ms. Ewanchuk was terminated "in or about March of 2012" (Applicant's Record at 16 [AR]), the incidents in question took place between May 2 and June 13, 2012, ending with the Respondent's resignation on July 16, 2012.

[34] While this information appears only to have surfaced in the principal Affidavit in support of this judicial review (that of the Applicant's current Chief of Staff, Donald Courchene), the Respondent took no issue with its accuracy, nor with the Applicant's observation that any attribution of knowledge from Ms. Ewanchuk to the Applicant is problematic given Ms. Ewanchuk's departure in 2012. It is clear that the Investigator, at a minimum, could and should have asked Ms. Ewanchuk about the exact period of her employment, and presumably would have received the information had she done so. She did not.

[35] Even if one puts aside the dates of employment, given that they were not before the Investigator, it remains unclear whether Ms. Ewanchuk was sufficiently senior in the Applicant's organizational structure to have imputed knowledge to the Applicant through her own awareness of Mr. Bear's conduct. She advised the Investigator that she was at the same level as the Respondent, and not the Respondent's superior.

[36] The question of whether the Applicant was aware or should have been aware of Mr. Bear's alleged misconduct is central to the complaint, and Ms. Ewanchuk's status and knowledge are foundational aspects of that question, particularly in light of the Investigator's decision to forego any inquiry into the inconsistencies in the Respondent's evidence, or into whether there may have been witnesses to the incident at the June 13 meeting.

[37] While it is not the job of the Commission to determine if the complaint is made out, but rather to determine if an inquiry is warranted having regard to all the facts (*Cooper* at para 53), the foundational evidence by which knowledge was attributed to the Applicant was flawed. Ms. Ewanchuk may have been aware of the alleged conduct at some point, but if she was, she was not employed at the time and therefore could not be said to be in a position to impute knowledge to the Applicant. The Investigator's conclusion therefore cannot be upheld.

[38] Furthermore, four other clear weaknesses must be revisited by the Commission in deciding anew whether to send this matter to inquiry.

[39] First, the Investigator exclusively interviewed former employees of the Applicant: none of them were still employed by the Applicant when she conducted her interviews. The only current employee that the Investigator attempted to contact was Ms. Perswain, who did not accede to the interview request (although the Court acknowledges that such an interview request from an Investigator is voluntary, and there was nothing compelling Ms. Perswain to attend).

[40] Second, the Investigator did not interview any witnesses to the June 13, 2012 meeting. As the Applicant explained before this Court, Mr. Bear had written a memo to the Respondent, dated June 11, 2012, making it clear that the June 13 meeting was to include, among others, the Community Justice Committee and the RCMP. The Applicant highlighted this memo and fact that there may have been witnesses to the alleged June 13, 2012 incident in the July 3, 2015 letter in response to the Report, and strongly urged the Investigator to speak to someone who actually attended the meeting. The Investigator is, of course, not obliged to contact every individual suggested by the parties (*Bateman* at 29), and simply because the Applicant noted that others may have been present at the June 13, 2012 meeting does not oblige the Investigator to interview those individuals. In this case, however, given that there was no corroborating evidence regarding the claims of harassment at the June 13 meeting, it appears particularly important for the Commission to have at least attempted to elicit both sides of the story regarding that meeting.

[41] The third area which requires further consideration was whether the Applicant knew of the conduct, particularly in light of the observations about Ms. Ewanchuk above. As the Investigator noted, the evidence is on this point from the Respondent was contradictory. First, the Respondent stated in her complaint that she never advised the Grand Chief, but later changed

her testimony in her interview. The Grand Chief, on the other hand, was categorical in his interview that the Respondent did not advise him of any alleged inappropriate conduct of Mr. Bear, and that he knew nothing of it when the complaint was filed – in spite of what he reported as "monthly contact" during the Respondent's employment.

[42] The Applicant's personnel policy is clear that "the Complainant/Employee shall report the harassment to the Immediate Supervisor at once… If the Immediate Supervisor is the source of the alleged harassment, the employee shall report the problem to the Chief of Staff" (AR at 107). The Respondent's reporting relationships were set out in her Job Description, stating that she "reports directly to and is fully accountable to the Chief of Staff and to the Grand Chief" (AR at 98). The Investigator will therefore need to turn her mind to whether or not the organization knew of the alleged harassment.

[43] Fourth, the Investigator will also have to take into account, in reconsidering the matter, the question of whether the Respondent's anxiety and emotional distress resulted from the alleged harassment, or whether they were the adverse consequences of unrelated issues, such as the difficult work conditions that she herself alluded to in the complaint letter when she stated that "the position is very demanding and there is no 'appropriate' time to take time away"; or that she "could no longer stand to be a part of an organization that was falling apart and had no support for its staff"; or that "[t]he structure of [the Applicant] has fallen apart significantly since Mike Bear has been hired as Chief of Staff" (AR at 156).

[44] In conclusion, while appreciating that under normal circumstances deference is owed to decisions of the Commission, both in terms of the investigation process selected and the conclusions drawn from the interviews, where there are fundamental issues with the thoroughness of the investigation, it cannot stand. This is not to say that the Commission need determine if the complaint is made out; clearly, that is not the role of an investigation (*Cooper*). Rather, it will need to reconsider whether, in light of the observations above, an inquiry is still warranted. This will include whether the evidence suggests that the Applicant actually had, or should have had, knowledge of the allegations.

B. Did the Investigator fail to remain neutral?

[45] The Applicant submits that the Investigator failed to remain neutral in conducting the investigation. The Applicant points to two facts to support its case on this point. First, the Applicant notes that the Investigator made no attempt to contact any of the parties mentioned in the June 11, 2012 memo from Mr. Bear about the June 13, 2012 meeting. Second, the Applicant notes that the Investigator made no attempt to interview Ms. Sanderson, Mr. Bear's executive assistant, who the Respondent allegedly informed of Mr. Bear's behaviour. Since the Respondent stated that she did not believe Ms. Sanderson "would back [her] up", the Applicant contends that the decision not to interview Ms. Sanderson, focusing instead on interviewing a series of individuals that were sympathetic to the Respondent's Complaint, demonstrates a lack of neutrality.

[46] The burden of demonstrating the existence of a lack of neutrality – in other words, a reasonable apprehension of bias – is high and it rests on the Applicant. I do not find that the Applicant has met this high bar.

[47] First, the Investigator was not obliged to interview every individual suggested by the parties or to explicitly address every piece of evidence they made available; failing to have done so alone does not support a finding of bias.

[48] Second, the Investigator ultimately found that one of the four grounds of misconduct raised by the Respondent had no merit, a strange finding if the Investigator were truly biased in her favour.

[49] Third, the Investigator provided the Applicant with an extension of time to raise its concerns, which would also reflect and approach inconsistent with a biased investigation.

[50] In my view, these indicia demonstrate that the Investigator displayed neutrality, including interacting with Applicant's counsel and being responsive to communications (see, for instance, a memo from the Investigator detailing her interactions with counsel, which displayed impartiality and a willingness to listen to work with the Applicant and consider its position (Respondent's Record at 2-3)).

C. Was the Decision unreasonable?

[51] The Applicant alleges that there were numerous errors in the Commission's decision. Given my findings on the issue of thoroughness, however, there is no need to examine the reasonableness of the decision. That assessment can only be made with the proper evidentiary foundation that a thorough investigation can provide.

VIII. Remedy

[52] The Applicant has requested that this Court dismiss the complaint through the issuance of a writ of *mandamus*. The Federal Court of Appeal summarized the necessary criteria to issue a *mandamus* order in *Canada (Attorney General) v Arsenault*, 2009 FCA 300 at para 32:

> 1. There must be a public legal duty to act;
> 2. The duty must be owed to the applicant;
> 3. There is a clear right to the performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
> (b) here was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied;
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty;

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The court in the exercise of its discretion finds no equitable bar to the relief sought;

8. On a "balance of convenience" an order in the nature of mandamus favours the applicant.

[53] I do not find that the Applicant has met the requirements of the third part of this analysis since it is certainly possible that, once additional evidence is obtained when the matter is returned for further investigation, the Respondent's complaint may nonetheless require further inquiry.

IX. Conclusion

[54] This Court will not dismiss the complaint through the issuance of a *mandamus* order. Rather, it will, in light of the above, grant the Applicant its application for judicial review and return the matter to the same Investigator, given the significant work already done on the file, assuming her availability.

X. Costs

[55] The parties requested reviewing this judgment before providing their submissions on costs. If the parties are unable to agree to costs between themselves, they may make brief written submissions on costs (a maximum of three pages each), within 20 days from the date of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The complaint will be returned to the Investigator, subject to her availability, for redetermination in light of these reasons.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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