Federal Court  Cour fédérale

Date: 20170719

Docket: T-1176-16

Citation: 2017 FC 699

Ottawa, Ontario, July 19, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ROBERT McILVENNA

Applicant

and

BANK OF NOVA SCOTIA (SCOTIABANK)

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Robert McIlvenna, filed a complaint with the Canadian Human Rights Commission on August 23, 2010, alleging that the Bank of Nova Scotia had discriminated against him and his family when the Bank decided to demand repayment of a mortgage loan because his son and daughter-in-law were growing medicinal marijuana at the mortgaged premises located in Val Therese, Ontario. The Commission dismissed the Applicant's complaint for the first time in a letter dated March 14, 2012, when it decided under section 41(1)(c) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*Act*], not to deal with the complaint because the

facts as alleged did not constitute a discriminatory practice. This decision by the Commission was quashed though by the Federal Court of Appeal which remitted the matter back to the Commission for further investigation (see: *McIlvenna v Bank of Nova Scotia*, 2014 FCA 203, 466 NR 195).

[2] After further investigating the Applicant's complaint, the Commission again dismissed it in a letter dated June 16, 2016, pursuant to paragraph 44(3)(b)(i) of the *Act*. The Applicant has now applied pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, for judicial review of the Commission's most recent decision dismissing his complaint.

I. Background

[3] In December 2009, the Applicant and his wife met with one of the Bank's Personal Banking Officers to discuss an increase to their line of credit to complete renovations to their house in Val Therese which was then occupied by the Applicant's son, daughter-in-law, and their three children. After some of the renovations had been completed, the Applicant and his wife returned to the Bank to discuss their line of credit. The Bank arranged for an appraiser to inspect the property on June 24, 2010, and in a letter dated July 16, 2010, the appraiser noted that the Applicant's son had informed him that he and his wife were permitted by Health Canada to grow marijuana for medicinal purposes and the second story addition to the house would be to accommodate the marijuana plants he and his wife require for medicinal purposes. The appraiser reported that the house was stripped to its studs; the exterior façade was removed; and the house was at a point which would be considered a shell only. The appraiser confirmed in this letter that,

after completing his visit to the Applicant's property, he immediately called the Bank branch to inform the Bank of this information.

[4] A few weeks later, on July 15, 2010, the Applicant and his son, Ryan McIlvenna, attended a meeting with Estelle Joliat, a Community Manager at the Bank's branch in Sudbury. At this meeting, the Bank denied an increase to the line of credit and informed the Applicant of its intention to demand repayment of the entire mortgage. Ms. Joliat sent an email on the day of this meeting to the Bank's National Collection Centre, in which she summarized the meeting as well as the events leading up to the meeting. In a letter to the Applicant dated August 5, 2010, the Bank demanded full repayment of the mortgage, stating that the Applicant had breached the terms and conditions of the mortgage agreement.

[5] On August 23, 2010, the Applicant filed a complaint with the Commission alleging that the Bank had discriminated against him and his family because of the disabilities of his son and his daughter-in-law. In his complaint, the Applicant explained that his son and daughter-in-law had each been prescribed marijuana and been licensed by Health Canada to possess and grow marijuana for treatment of their disabilities. The Applicant alleged that when he met with Ms. Joliat on July 15, 2010, he was informed that the Bank would be demanding repayment of the entire mortgage because marijuana was being grown in the house. The Applicant complained that the Bank's actions and policies were discriminatory against people with disabilities who require the use and growing of marijuana.

[6] In response to the Applicant's complaint, a human rights officer at the Commission commenced an investigation and, on September 22, 2011, the officer released a preliminary report with the results of the investigation. After the Applicant and the Bank provided their responses to the report, the officer finalized the report and, in turn, the Commission decided in a letter dated March 14, 2012, to not deal with the complaint pursuant to paragraph 41(1)(c) of the *Act* because the Bank's decision to call in the mortgage was not based on a prohibited ground of discrimination.

A. *The Investigator's Report*

[7] After the Federal Court of Appeal quashed the Commission's decision dated March 14, 2012, and remitted the matter back to the Commission for further investigation, the Commission recommenced its investigation of the Applicant's complaint. Over the course of several months, various individuals were interviewed and in a report dated February 26, 2016, the investigator [Investigator] released her investigation report [the Report] which recommended that the Commission dismiss the complaint pursuant to subparagraph 44(3)(b)(i) of the *Act* because an inquiry into the complaint was not warranted. The Investigator noted in the Report that six individuals had been interviewed, namely, the Applicant, his son, the appraiser, Ms. Joliat, and two other Bank employees. The Investigator followed a two-step investigation process by, firstly, examining whether there was support for the Applicant's allegation of discrimination in the provision of a service and, secondly, whether the Bank could provide a reasonable explanation for its actions that was not a pretext for discrimination on a prohibited ground.

[8] The Investigator reviewed the parties' submissions and their opposing positions as to whether the Applicant's son's disability had been a factor in the Bank's decision to demand repayment of the mortgage. The Investigator concluded that:

> It is unclear whether the respondent's decision to call in the mortgage was linked to the respondent's son's disability. Substantial changes were made to the property without the consent of the bank, and had the effect of reducing its value. However, although the respondent maintains that the alleged disabilities of the complainant's son played no part in its decision to call the mortgage, it was made aware that the changes made, and proposed to be made, were to accommodate the growing of medical marijuana. As such, the investigation will proceed to Step 2.

[9] The Investigator then proceeded to address whether the Bank had a reasonable explanation for enforcing the mortgage which was not based on the Applicant's son's disability. The Investigator noted the Bank's position that certain obligations of the mortgage terms were breached, notably, to keep the property in good condition and to inform the Bank of any planned improvements; and that the Applicant's breach of these terms entitled the Bank to call in the mortgage and/or take possession of the property. The Investigator also noted the Bank's view that, because the property value had been reduced to what the Bank considered an unacceptable level as a result of the incomplete renovations, and because of its belief that the property was endangered, this allowed the Bank to demand repayment of the mortgage.

[10] The Investigator outlined the conflicting accounts of the December 2009 meetings between the Applicant and an employee at the Bank, noting that while the Applicant's position was that the Bank either implicitly or explicitly encouraged him to proceed with the renovations and return for financing once the renovations were 40% complete, the Bank's view was that it did not agree to any additional financing. The Investigator also examined the circumstances

surrounding the appraisal of the property, noting that the appraiser had advised the Applicant's son he would be informing the Bank about the growing of marijuana at the mortgaged property.

[11] The Investigator then reviewed the events surrounding the meeting on July 15, 2010 between the Applicant, his son, and Ms. Joliat. The Investigator reported that the Applicant and his son had said Ms. Joliat's explanation for calling in their mortgage was based on the fact that marijuana was being grown at the house. The Investigator noted that, according to the Applicant, Ms. Joliat had stated that "growing marijuana at a mortgaged home was prohibited by bank policy," that she was "very concerned about the environmental issues within residences where cannabis was grown" and that "the Bank does not allow marijuana in their communities."

[12] The Investigator further noted that Ms. Joliat denied making any of these comments and had stated that she focused on the fact that the use of the property was no longer the same as when the mortgage had been approved and that the house was a shell with no windows and a plywood roof. The Investigator referred to an email Ms. Joliat had sent after the meeting with the Applicant and his son to the Bank's National Collection Centre which emphasized the fact that the property had been altered. The Investigator noted the Bank's position that, as a result of the appraiser's information, it had determined that additional funding could not be advanced and that the terms of the mortgage had been breached. After reviewing the information provided by a Senior Manager at the Bank's National Collection Centre as to the various circumstances under which the Bank may call in a mortgage, the Investigator concluded that:

> The evidence gathered indicates that the bank called in the mortgage because the complainant breached several terms of the mortgage, and the respondent was concerned that the complainant did not have the ability to bring the property back to an acceptable

> state of repair, particularly given that the STEP Mortgage did not allow the mortgagors to incur any additional funding as it was close to its lending limit being maximized. The evidence gathered does not indicate that the respondent called in the complainant's mortgage based on his son's disability and the particular form of treatment for that disability.

[13] Based on this conclusion, the Investigator recommended that the Commission dismiss the complaint pursuant to paragraph 44(3)(b)(i) of the *Act* because further inquiry was not warranted.

[14] After release of the Investigator's Report, the parties provided written submissions to the Commission in response to the Report.

B. *The Applicant's Response*

[15] In his written submissions to the Commission dated March 31, 2016, the Applicant maintained that the recommendation in the Report should not be followed. The Applicant highlighted various inconsistencies in the statements provided by the individuals who had been interviewed and submitted that the numerous credibility concerns could only be resolved through an inquiry by the Canadian Human Rights Tribunal [the Tribunal]. The Applicant cited *Canada (Attorney General) v Davis*, 2010 FCA 134 at para 7, 189 ACWS (3d) 194, where the Federal Court of Appeal agreed with the Federal Court that a decision to refer a complaint to the Tribunal for further inquiry was reasonable because the record disclosed "a true debate: there is evidence in support of each side's position that is capable of being believed, and if believed, could be determinative of the merits of the complaint."

[16] The Applicant told the Commission that, although Ms. Joliat had denied his and his son's description of their meeting on July 15, 2010, she had referenced the growing of marijuana on several occasions. The Applicant also noted inconsistencies in the evidence about what was discussed at the December 2009 meeting; specifically, whether the Bank had encouraged the Applicant to proceed with the renovations to the home. The Applicant further noted that the Investigator had not explained why she preferred the Bank's evidence over that of the Applicant and his son.

[17] The Applicant highlighted several contradictions which, in his view, demonstrated that the Bank had failed to provide a plausible explanation for its actions. First, the Bank provided conflicting accounts of whether it knew of the Applicant's son's disability before calling in the mortgage. Second, the appraiser's statement that "all the Bank really wants to hear about is the value" was not credible because he failed to comment on the value of the mortgaged property in his initial letter. Third, although the Bank claimed it demanded repayment of the mortgage because of the alleged breach of the mortgage agreement, one of the Bank's employees stated that the renovations were not the basis for the Bank's decision. Fourth, the appraiser never provided the value of the home to the Bank until after the human rights complaint was filed, yet the Bank said it used the information from the appraiser's report to call in the mortgage. Fifth, the Bank did not explain why it relied on the "as-is" value of the home, rather than the assessed value after completion of the renovations. Lastly, Ms. Joliat's statement that repayment of the mortgage was demanded because the "use for the site was no longer the same as when the mortgage had been approved" may have been a reference to the fact that the property would be used to grow marijuana.

[18] The Applicant also submitted that several important issues had not been canvassed by the Investigator and that three individuals with relevant information had not been interviewed.

C. *The Bank's Response*

[19] In its submissions to the Commission dated April 29, 2016, the Bank concurred with the Report's recommendation. The Bank rebutted the Applicant's position that important issues and witnesses had not been canvassed, and stated that the investigation was procedurally fair because it was neutral and thorough. The Bank noted that the Investigator had interviewed witnesses who were involved in the main events which formed the basis of complaint: the December 2009 meeting to discuss the renovations; the June 2010 request for additional financing; the appraisal; and the July 2010 meeting where the Bank rejected the financing request and demanded repayment of the mortgage loan.

[20] The Bank cited *Gosal v Canada (Attorney General)*, 2011 FC 570 at para 86, 205 ACWS (3d) 1049, where Justice Gauthier dismissed complaints against a Commission investigation because the allegations did not "amount to anything more than speculation, conjecture or personal opinion." The Bank submitted that the Applicant was merely speculating that additional evidence might exist, pointing to *Larsh v Canada (Attorney General)*, [1999] FCJ No 508 at para 18, 166 FTR 101, where Justice Evans stated: "The applicant's contention that whenever credibility is a central issue in a human rights complaint it must be referred to the Tribunal does not seem consistent with the subjective wording of paragraph 44(3)(b)(i), nor with the expertise and experience of the Commission as the specialist agency charged with investigating and screening human rights complaints." The Bank further submitted that the Applicant's complaint

should not be referred to the Tribunal simply because there were contradictions in the statements of the individuals who had been interviewed.

[21] The Bank maintained that the Investigator's recommendation was reasonable, and that it had provided a reasonable explanation for its decision to enforce the mortgage. In the Bank's view, the Applicant had breached the terms of the mortgage when he embarked on extensive renovations which left the home in a state of disrepair. This, the Bank said, imperiled its security for the loaned amounts and the appraiser's inspection revealed that the value of the property could not secure the amounts loaned to the Applicant. The Bank stated that the Commission could rely upon this rationale because it would have governed the Bank's actions even if the Applicant's property did not contain a "grow-op". The Bank dismissed the Applicant's arguments because they failed to acknowledge that the Bank's actions were a result of the appraiser's findings that the property was in a "shell" condition. The Bank denied knowing the extent of the renovations in December 2009 because, if it had known, it would have immediately ordered an appraisal.

D. *The Commission's Decision*

[22] On June 16, 2016, the Commission sent a letter to the Applicant stating that it had examined the Report and the parties' submissions and had decided to dismiss the complaint pursuant to subparagraph 44(3)(b)(i) of the *Act* because further inquiry was not warranted.

II. Issues

[23] This application for judicial review raises the following issues:

1. What is the appropriate standard of review?
2. Did the Commission breach its duty of procedural fairness by failing to conduct a neutral and thorough investigation?
3. Was the Commission's decision unreasonable?
4. If the Commission breached its duty of procedural fairness or rendered an unreasonable decision, what is the appropriate remedy?

III. Analysis

[24] In cases where the Commission accepts an investigator's recommendation and only provides brief reasons for its decision (as is the case here), the investigator's report forms part of the Commission's reasons for the purpose of judicial review: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37, [2006] 3 FCR 392 [*Sketchley*].

A. *Standard of Review*

[25] The Commission's decision to dismiss a complaint pursuant to subparagraph 44(3)(b)(i) of the *Act* is reviewed on the reasonableness standard: *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 47, 214 ACWS (3d) 529 [*Keith*]. Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339.

[26] The Commission has broad discretion to determine whether, having regard to all the circumstances of a complaint, an inquiry by the Tribunal into the complaint is or is not warranted (see: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 21 and 25, [2012] 1 SCR 364). The Commission's screening role was described by the Federal Court of Appeal in *Keith* as being:

> [43] …somewhat analogous to that by a judge at a preliminary inquiry in that it must decide if an inquiry by the Tribunal is warranted having regard to all the facts before it. The central component of the Commission's role is thus assessing the sufficiency of the evidence before it: i.e., it must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[27] The Federal Court of Appeal went on to explain the court's role in reviewing the Commission's decision to dismiss a complaint under paragraph 44(3)(b) of the *Act*:

> [48] … 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.

[28] The duty of procedural fairness requires that the Commission's decision be both neutral and thorough. In *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at para 49, 73 FTR 161 [*Slattery*], aff'd [1996] FCJ No 385, Justice Nadon stated that: "In order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness." Moreover, as the Federal Court of Appeal observed in *Sketchley*:

> [38] …the Commission's screening decision…is reviewed with a high degree of deference with respect to fact-finding activities: only errors evincing an error of law, patent unreasonableness in fact-finding, or a breach of procedural fairness will justify the intervention of a Court on review [citations omitted]…. Such errors belong, virtually by definition, to the category of investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions. …

[29] The parties disagree as to the appropriate standard to review the fairness of the investigation. When reviewing a decision on grounds of procedural fairness, the Applicant says, in view of *Sketchley* (at paras 52 and 53), that no deference is owed and the Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all the circumstances, and that a failure to comply with the duty of procedural

fairness is sufficient to set the decision aside. In contrast, the Respondent says that while questions as to the thoroughness and neutrality of the Commission's investigations are reviewed on the standard of correctness, recent decisions such as *Bergeron v Canada (Attorney General)*, 2015 FCA 160, 474 NR 366 (leave to appeal to SCC refused, [2015] SCCA No 438) [*Bergeron*] confirm that some deference is owed to the administrative decision-maker on some elements of the procedural decision-making.

[30] In *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 11, [2017] FCJ No 638, the Federal Court of Appeal recently observed that: "The standard of review for matters of procedural fairness is currently in dispute in this Court. A number of different approaches have been identified and persist." These differing approaches were described in *Bergeron*, where the Court of Appeal stated:

> [67] The law concerning the standard of review for procedural fairness is currently unsettled. The unsettled nature of that law is shown by the Supreme Court's recent decision in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, a procedural fairness case. In that decision, the Supreme Court declared, without elaboration, that the standard of review is correctness but just ten paragraphs later it found that some deference should be owed to the administrative decision-maker on some elements of the procedural decision: at paragraphs 79 and 89.
>
> [68] Some cases of this Court have fastened onto the Supreme Court's statement of correctness in *Khela* without noting the later words of deference: see, e.g., *Air Canada v. Greenglass*, 2014 FCA 288, 468 N.R. 184 at paragraph 26. Those cases have not referred to other cases of this Court that suggest that the standard is not purely correctness and that some deference can come to bear.
>
> …
>
> [70] One might also query whether a failure to investigate thoroughly under the Act is a procedural defect, triggering whatever standard of review applies to procedural matters. A decision based on a deficient investigation can be characterized as

> one that is not substantively acceptable or defensible because it is based on incomplete information, thereby triggering the standard of review for substantive defects governed by *Dunsmuir*, above. As was the case in *Forest Ethics*, above, the line between a procedural concern and a substantive concern can be a blurry one. As this Court explained in *Forest Ethics*, there is much to be said for the view that the same standard of review—reasonableness with variable margins of appreciation depending on the circumstances (as described earlier in these reasons)—should govern all administrative decisions.
>
> [71] So what we have right now is a jurisprudential muddle. And now is not the time to try to resolve it. …

[31] Only twenty days after its decision in *Bergeron*, a differently comprised panel of the Federal Court of Appeal stated in *Eadie v MTS Inc*, 2015 FCA 173 at para 76, 475 NR 174 (leave to appeal to SCC refused, [2015] SCCA No. 406) that the question of whether the Commission's investigation was sufficiently thorough is an issue that should be reviewed on the standard of reasonableness. In contrast, in *El-Helou v Courts Administration Service*, 2016 FCA 273 at para 43, 273 ACWS (3d) 553, the Court of Appeal noted that, while there is some uncertainty concerning the standard of review for procedural fairness it was not necessary to resolve this uncertainty and, accordingly, it reviewed the procedural fairness issues "on the standard most generous to the appellant, that of correctness."

[32] I find it unnecessary in this case to determine whether a reasonableness standard of review, or a correctness standard of review with or without some degree of deference, should be applied. In my view, the essential question to address with respect to the Commission's investigation is whether the Investigator overlooked or failed to investigate "obviously crucial evidence." In *Gosal v. Canada (Attorney General)*, 2011 FC 570 at para 54, 205 ACWS (3d) 1049, this Court observed that: "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." This is consistent with this Court's earlier decision in *Slattery* where it was found that judicial review will be warranted "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence" (at para 56).

[33] I turn now to the question of whether the Investigator failed to investigate obviously crucial evidence.

B. *Did the Commission breach its duty of procedural fairness by failing to conduct a neutral and thorough investigation?*

(1) The Parties' Submissions

[34] The Applicant contends that the Investigator failed to consider obviously crucial evidence from the record which, had it been considered, would have led to a different conclusion and recommendation. According to the Applicant, the Investigator's conclusion - that there was no evidence that the Bank's decision to refuse the line of credit and demand repayment of the mortgage was based on his son's disability - is directly contradicted by two emails sent by Ms. Joliat. In the Applicant's view, these emails explicitly confirm that the use and growing of marijuana at the mortgaged property was the reason for the Bank's decision. In the first email dated July 15, 2010, the Applicant points to Ms. Joliat's repeated references to the presence of a "grow-op" in explaining the decision to call in the mortgage. The Applicant says this email shows that the Bank called in the mortgage because the use of the property no longer met the Bank's criteria and Ms. Joliat's reference to the changed "use" of the property refers to the

Applicant's son growing medicinal marijuana on a commercial scale. The Applicant notes that this email also confirms that the Bank decided to call in the mortgage before the Bank received the appraiser's letter of July 16, 2010, and before it received the appraiser's final report dated September 1, 2010. The Applicant further notes that, in a subsequent email dated September 9, 2010, Ms. Joliat explicitly stated that she had reviewed the Bank's policy on grow-ops with another Bank employee.

[35] The Applicant maintains these two emails directly relate to the central issue in dispute, supporting his version of events and contradicting the Bank's position. According to the Applicant, the September 9, 2010 email confirms that the Bank has a policy related to "grow-ops" which was considered when it decided to call in the mortgage, and both emails contradict the information Ms. Joliat provided to the Investigator. The Applicant says Ms. Joliat denied making any statements about the growing of marijuana, yet her emails focus almost exclusively on this issue. In the Applicant's view, the Investigator's failure to consider these emails or even reference them in her Report reflects "a shocking and inexcusable lack of neutrality and thoroughness." The Applicant states that he could not have addressed this issue during the investigation because he was unaware of the existence of these emails until they were provided by the Commission in this application for judicial review. According to the Applicant, he requested that the Commission review the Bank's policies and internal documents, but the Bank's counsel dismissed this request as a "fishing expedition."

[36] The Bank maintains there is no evidence that the Investigator acted with a closed mind or had pre-determined the outcome of the complaint, and that the Investigator's alleged omissions

are not an indication of a lack of neutrality. The Bank says the investigation was thorough and the Applicant has not produced any evidence to show the Investigator did not take into account evidence that was fundamental to the outcome of the complaint. The Bank notes that the parties were provided with an opportunity to review the Report and make responding submissions. According to the Bank, the Investigator thoroughly investigated the complaint by interviewing six individuals and by reviewing all of the documentation and submissions. In the Bank's view, the Commission's decision was based on the Investigator's finding that the Bank had a reasonable explanation to call in the mortgage.

[37] As to the two emails from Ms. Joliat, the Bank notes that the Investigator explicitly referenced these emails in the Investigation Report and appropriately summarized the contents of the emails. According to the Bank, the emails do not indicate that the growing of marijuana was the governing factor in the decision to call in the mortgage but, rather, they show that the Bank focused on various issues concerning the mortgaged property, including the state of the house, the change in use, and the violation of terms of the mortgage. With respect to the changed "use" of the mortgaged property, the Bank says the Applicant's son confirmed on two separate occasions that the purpose of the renovations was to use the property to commercially sell medical marijuana. During the July 15, 2010 meeting with Ms. Joliat, the Bank maintains that the Applicant's son told her the government was allowing him to sell his marijuana, that he had a private investor willing to provide him financing, and that "he feels he lost a multimillion dollar business."

(2) Analysis

[38] The central question to address is whether the investigation lacked thoroughness because the Investigator failed to investigate obviously crucial evidence. In *Beauregard v Canada Post*, 2005 FC 1383, 294 FTR 27, Justice Gauthier stated that:

> 21 The Court must be circumspect in its analysis of what constitutes obviously crucial evidence in terms of the investigation. It cannot simply substitute its own or the applicant's opinion in order to determine whether certain evidence is crucial. The obviously crucial test implies that it should have been obvious to any reasonable or logical person that the evidence was crucial, given the relevant allegations in the complaint.

[39] The Bank correctly notes that the Investigator considered Ms. Joliat's emails since the Report made the following reference:

> Ms. Joliat provided a copy of an email she sent to the respondent's collection group after she met with the complainant and his son. In the email she says that during the meeting she continually emphasized the fact that the property had been altered and as such, no longer met the criteria for the Scotia Mortgage Corporation.

[40] The September 9, 2010 email sent by Ms. Joliat to Sally Watson stated the following:

> Here was my original writing to NCC...
>
> (By the way, in my conversations with Debbie Walsh, we did discuss the Bank's official policy on "grow-ops" detailed on an EO Circular 8, Jan 10th, 2006.)
>
> The scripting that I followed in my meeting with both Robert and Ryan McIlvenna was simply that we had been made aware through discussions with the bank's appraiser, that the property had been altered and as such, no longer met the criteria of Scotia Mortgage Corporation. Ryan did openly discuss his license to grow marijuana for his and his wife's medicinal purposes. I did not dwell on that aspect of our discussions and as Mr. Robert

McIlvenna would have to attest to, I continually brought it back to the scripting that the property no longer met our lending criteria. I was completely non-judgemental, expressing no opinion on the matter. The son was very confrontational (ie: “I’ll bring the bank down because of this!” throwing his cell phone at me, banging the doors as he left the office, etc.)....

----History----

From: CN=Estelle Joliat/OU=Domestic Branch/O=Scotiabank
Group Date: 7/15/10 15:01:59

Subject: STEP #710413596 Mr. Robert McIlvenna

Good Afternoon,

...

Our client, Robert McIlvenna came in a month ago and requested additional funds to ‘renovate’ a property on which we hold a STEP mortgage…

We requested an appraisal be done, and it’s at that point that we were made aware that the property had been used as a grow-op. The appraiser stated that the entire house had been torn down, with the exception of the shell, wiring, etc. probably due to mould and mildew. Ryan, openly told the appraiser that they were in the process of building a ‘bigger and better’ grow-op which will house 500 marijuana plants to be used for medicinal personal reasons which will have state-of-the-art ventilation, etc.

We then contacted Debbi Walsh, Sr. Mgr, ACE to discuss the situation. After she made a few inquiries, she confirmed that not only could we not fund the new request, but that in light of the fact that the use of this property no longer meets SMC criteria, we need to call in the mortgage balance.

I met with them today. … Mr. McIlvenna…understood the situation though very surprised. The son on the other hand, was not only furious, but immediately contacted his lawyer, placed him on speaker phone and told us that they would be suing us on discrimination. I tried to calm him down by explaining our position, to no avail. … Ryan claims that it’s a fully legal operation, for which he has proper licenses from Government of Canada. He claims to have all the documentation to prove this.... furthermore, the government is allowing him to ‘sell’ his product to other people and that he has a private investor willing to back him up with $280M financing. Again, he said it was illegal for us

> to call in the mortgage: "He'll see us in Court!" The whole situation is very bizarre – I can't imagine that the 'government" would allow an operation of this size without imposing strict controls, etc. ...

[41] The content of these two emails, in particular the email sent July 15, 2010, is obviously crucial evidence given the relevant allegations in the Applicant's human rights complaint and the contradictory statements by the Applicant and his son. A reasonable person would agree that this evidence was crucial because it lends credence to the Applicant's position that his son's growing of medical marijuana may have been a factor in the Bank's decision to call in the mortgage. Although the July 15, 2010 email is certainly not conclusive of exactly what was said during the July 15th meeting, at the very least it tends to corroborate the Applicant's claim that Ms. Joliat discussed the Bank's policy on grow-ops during their meeting and is crucial in determining the merits of the Applicant's claim.

[42] Moreover, the September 9, 2010 email confirms that Ms. Joliat discussed the Bank's official policy on "grow-ops" with another Bank employee. Yet, the Investigator glossed over this evidence, noting only that:

> 42. Ms. Joliat provided a copy of an email she sent to the respondent's collection group after she met with the complainant and his son. In the email she says that during the meeting she continually emphasized the fact that the property had been altered and as such, no longer met the criteria for the Scotia Mortgage Corporation.

[43] Given the nature of the Applicant's allegations, the Investigator should have fully investigated the Bank's policy on "grow-ops" in determining whether the Bank had a reasonable explanation for calling in the mortgage. The Report identifies only three pieces of documentary

evidence, none of which is the Bank's official policy on grow-ops. The Investigator's failure to assess and review this policy, as well as her cursory summary of the content of Ms. Joliat's emails in the face of the statements by the Applicant and his son, undermine the thoroughness of the investigation and the fairness of the process. This evidence is obviously crucial in the context of the Applicant's human rights complaint. The Investigator did not meet the obviously crucial test and the investigation proceeded in a procedurally unfair manner because of a lack of thoroughness.

C. *Was the Commission's decision unreasonable?*

(1) The Parties' Submissions

[44] The Applicant asserts that the Commission must refer the complaint to the Tribunal when it is presented with evidence that, if believed, could result in a finding of discrimination. According to the Applicant, the overlooked emails show that the Bank's decision to call in the mortgage was related to the presence of a grow-op, and this constitutes a reasonable basis to proceed to an inquiry before the Tribunal. The Applicant refers to jurisprudence which has established that discrimination does not need to be the only reason for discriminatory conduct so long as it is one of the factors in a decision (e.g., *Khiamal v Canada (Human Rights Commission)*, 2009 FC 495 at paras 79-80, 344 FTR 287). The Applicant says discrimination is rarely overt, and a complaint can succeed if the evidence demonstrates a "subtle scent of discrimination" (*Basi v Canadian National Railway*, 9 CHRR 5029, 1988 CanLII 108 (CHRT)). In the Applicant's view, even if the Bank presented evidence of other possible reasons for its

decision to call in the mortgage, there is still sufficient evidence to refer the complaint for a full hearing before the Tribunal.

[45] The Applicant maintains that the Commission was faced with only one reasonable outcome in light of the facts and the law, noting that the Commission had evidence that the Bank, in making its decision to call in the mortgage, considered its policy on grow-ops and the fact that the mortgaged property was used as a grow-op. In the Applicant's view, the Commission unreasonably accepted the Bank's explanation that it based its decision on devaluation of the mortgaged property, even though its decision to call in the mortgage was made prior to receiving the appraiser's letter of July 16, 2016, and his final report. The Applicant says the Bank typically relies on an "as if complete" valuation of property being renovated when determining whether to grant additional funding to a client; yet, in this case, the Bank deviated from this usual method of valuation and instead relied on an "as is" valuation to call in the mortgage.

[46] The Bank says the Commission reviewed the Report and the parties' reply submissions and reasonably concluded not to refer the Applicant's complaint to the Tribunal because it accepted the Bank's non-discriminatory explanation for its impugned conduct. The Bank maintains that the Commission's decision is reasonable for three reasons: (1) the Commission completed a thorough and neutral investigation prior to making its decision; (2) the evidence indicated that calling in the mortgage was due to a breach of contract and did not appear to be based on a prohibited ground of discrimination; and (3) the Applicant lacked standing to

commence the complaint. According to the Bank, the Commission must dismiss a complaint under subparagraph 44(3)(b)(i) if it determines that an inquiry is not warranted.

[47] The Bank rejects the Applicant's argument that the evidence sufficiently established a link between calling in the mortgage and a prohibited ground of discrimination. In the Bank's view, Ms. Joliat's emails do not unequivocally confirm that the presence of marijuana at the mortgaged premises influenced the Bank's decision to call in the mortgage. Although the emails confirm that the Bank was aware of the presence of marijuana, they do not, according to the Bank, establish that it failed to take into account Ryan McIlvenna's legal right to grow marijuana, nor do they show that it acted on any negative assumption because of his use of medical marijuana. The Bank says any link between Ryan McIlvenna's disability and the decision to call in the mortgage is entirely speculative, and that the Investigator recognized this when she concluded that it was unclear whether the Bank's conduct was linked to the disability.

[48] The Bank also rejects the Applicant's argument that it deviated from its usual practice by relying on an "as is" valuation of the property. According to the Bank, while it usually requests appraisers to determine the value of a property as if the renovations were complete, it is not unusual for an appraiser to informally communicate to the Bank any information the appraiser believes is relevant about the state of the property, especially if such information is urgent. The Bank says its standard practice is to call in a mortgage loan when there is a concern that the Bank's security is endangered, and in this case the Applicant's property was "stripped to the studs" and was "a shell only." In the Bank's view, the status of the Applicant's property was a flagrant departure from the mortgage terms and conditions and a serious financial risk to the

Bank, and the Commission reasonably concluded that the Bank's decision to call in the mortgage was based upon a breach of contract and not a prohibited ground of discrimination.

[49] Lastly, the Bank argues that the Commission did not have jurisdiction to address the Applicant's complaint because the Bank's decision to call in the mortgage was directed towards the Applicant and his wife, neither of whom suffered from a disability at the time. According to the Bank, it is settled law that a party to a legal proceeding cannot rely upon the violation of another person's rights, and the Applicant cannot rely on his son's disability to ground his complaint.

(2) Analysis

[50] I begin by noting that the Bank's argument about the Applicant's lack of standing to make the complaint based on his son's disability does not need to be addressed because that issue was not canvassed by the Commission.

[51] The Commission's decision to accept the Investigator's recommendation was unreasonable because, for the reasons stated above, the Investigator's Report did not sufficiently address or consider the Bank's policy on grow-ops, nor did it fully engage with or address the crucial and contradictory content of Ms. Joliat's emails. As noted by the Federal Court of Appeal in *Sketchley*: "Where a proper inquiry into the substance of the complaint has not been undertaken, the Commission's decision based on that improper investigation cannot be relied upon, since a defect exists in the evidentiary foundation upon which the conclusion rests" (para 112).

[52] In this case, the Commission was required to determine whether there was a reasonable basis in the evidence for proceeding to an inquiry before the Tribunal. The Commission was tasked with assessing the sufficiency of the evidence (*Keith* at para 43). The Commission's analysis, as evidenced by the Report, essentially ignores the evidence contained within Ms. Joliat's two emails. These emails show that the Bank was considering the fact that the Applicant's son intended to use the property as a grow-op when it decided to refuse an increase to the Applicant's line of credit and to call in the mortgage. These emails also lend credence to the Applicant's narrative about the comments made by Ms. Joliat during their meeting in July 2010. Despite this evidence, the Report found that the evidence gathered "does not indicate that the respondent called in the complainant's mortgage based on his son's disability and the particular form of treatment for that disability." At a minimum, these emails show that Ryan McIlvenna's intention to build a "'bigger and better' grow-op" may have been a factor in the Bank's decision.

[53] In light of my finding that the Commission's decision is unreasonable and was procedurally unfair, I turn now to address the appropriate remedy.

D. *If the Commission breached its duty of procedural fairness or rendered an unreasonable decision, what is the appropriate remedy?*

(1) The Parties' Submissions

[54] The Applicant requests that this Court order a directed verdict against the Commission pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, which authorizes the Court to "refer back for determination in accordance with such directions as it considers to be appropriate."

According to the Applicant, the extraordinary circumstances of this case warrant the exceptional measure of a directed verdict referring the matter back to the Commission for re-determination with a direction that the Commission refer the Applicant's complaint to an inquiry before the Tribunal. This direction is required, the Applicant says, because the Commission was presented with overwhelming evidence to warrant an inquiry and, as a result, there was only one reasonable outcome available to it. The Applicant highlights this evidence, pointing to the appraiser's letter which referenced the presence of marijuana, Ms. Joliat's numerous statements about the Bank's views on marijuana, the fact that the Bank decided to deny an increase in the line of credit and call in the mortgage prior to receiving the valuation of the property, and the contemporaneous internal emails which state that the Bank considered its policy on grow-ops and decided to call in the mortgage because the "use" of the property changed.

[55] The Bank says the Applicant's request for a directed verdict is akin to asking this Court to issue a *mandamus* order to compel the Commission to refer his complaint to the Tribunal for an inquiry. The Bank maintains that this Court should not issue a directed verdict or a writ of *mandamus* because the Commission's decision under subsection 44(3) of the *Act* is purely discretionary and was based on good faith in light of the relevant considerations.

(2) Analysis

[56] The authority of the Court to issue what amounts to a directed decision arises from the language of paragraph 18.1(3)(b) of the *Federal Courts Act*, which provides that the Court may on judicial review "…quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate… a decision, order, act or proceeding of a

federal board, commission or other tribunal." It is generally recognized that the Court should exercise considerable restraint in issuing directions that amount to a directed decision, because it gives rise to concerns about the Court accomplishing indirectly what it is not authorized to do directly - namely, substituting its own decision for that made by the administrative decision-maker by compelling the decision-maker to reach a specific conclusion (see *Turanskaya v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1776 at para 6 (FC), 111 FTR 314 (aff'd [1997] FCJ No 254, 145 DLR (4th) 259). Furthermore, while directions the Court may issue when setting aside a tribunal's decision can include directions in the nature of a directed verdict, "this is an exceptional power that should be exercised only in the clearest of circumstances" *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at para 14, 222 FTR 160 [*Rafuse*].

[57] Additionally, as the Supreme Court of Canada observed in *Giguère v Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 SCR 3:

> 66 A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless: [citations omitted]… Such is also the case when, once an illegality has been corrected, the administrative decision-maker's jurisdiction has no foundation in law. …The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable…. It is also accepted that a case may not be sent back to the competent authority if it is no longer fit to act, such as in cases where there is a reasonable apprehension of bias. [citations omitted]

[58] However, it is firmly established in the jurisprudence that there are occasions when the Court may issue directions amounting to a directed verdict. The Federal Court of Appeal remarked in *Turanskaya v Canada (Minister of Citizenship and Immigration),* [1997] FCJ No 254 at para 6, 145 DLR (4th) 259, that: "The 'directions' which the Trial Division is authorized to give under paragraph 18.1(3)(b) will vary with the circumstances of a particular case. If, for example, issues of fact remain to be resolved it would be appropriate for the Trial Division to refer a matter back for a new hearing before the same or differently constituted panel depending on the circumstances."

[59] In *Ali v Canada (Minister of Employment and Immigration),* [1994] 3 FC 73, 76 FTR 182 [*Ali*], Justice Reed noted that in *Punniamoorthy v. Canada (Minister of Employment & Immigration*, [1994] F.C.J. No. 104, 113 D.L.R. (4th) 663, the Federal Court of Appeal asked itself various questions when addressing a request to render a judgment with directions:

> 19 The type of questions which the Court of Appeal asked itself were: ... Is the sole issue to be decided a pure question of law which will be dispositive of the case? Is the legal issue based on uncontroverted evidence and accepted facts? Is there a factual issue which involves conflicting evidence which is central to the claim?

[60] In *Xie v Canada (Minister of Employment and Immigration)* (1994), 75 FTR 125, 46 ACWS (3d) 708 [*Xie*] Justice Rothstein opined that:

> 17 …A reading of subsection 18.1(3) shows that there is nothing in the subsection that indicates that the Court has the jurisdiction to substitute its opinion for that of the tribunal whose decision is under judicial review, and make the decision that the tribunal should have made. If Parliament had intended the Court to substitute its decision for that of the board, commission or tribunal whose decision is under judicial review, it could easily have put words in the Act to that effect. (See for example section 52 of the

> *Federal Court Act* in respect of appeals to the Federal Court of Appeal.) As such words do not appear in the Act in respect of judicial reviews to the Federal Court, I am of the view that this Court does not have jurisdiction to substitute its decision for that of the tribunal in a judicial review.
>
> 18 While the Court does have jurisdiction to refer a matter back for redetermination in accordance with such directions as it considers appropriate, it seems to me that the Court should only issue directions to a tribunal in the nature of a directed verdict, where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal. While such cases undoubtedly will arise, as a general rule, the Court should leave to tribunals, with their expertise in the matters over which they have jurisdiction, the right to make decisions on the merits based on the evidence before them.

[61] Although *Ali* and *Xie* are not contradictory, there is a difference in emphasis between the two cases that should be noted when the Court is called upon to render a directed verdict: *Ali* says a directed decision is appropriate where (in the Court's view) the evidence on the record is so clearly conclusive that only one result or outcome is possible; whereas *Xie* suggests that, because it is the tribunal that has statutory authority to make the decision, the Court should only issue directions to a tribunal in the nature of a directed verdict where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal.

[62] This Court has been reluctant to issue directed decisions where factual matters are central to the decision and there is ambiguity in the evidence (see, e.g.: *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 at para 53, 372 FTR 40; and *Xin v Canada (Citizenship and Immigration)*, 2007 FC 1339 at para 6, 163 ACWS (3d) 447). This is the case in the matter now before the Court, where there is ambiguity in the evidence and competing versions of events in

the Investigator's Report. In my view, this case is not one in which the uncontested evidence on the record is so conclusive that there is only one possible conclusion.

[63] The Applicant's request that the matter be sent back to the Commission for re-determination, with a direction that the Commission refer the Applicant's complaint to an inquiry before the Tribunal, is not appropriate in the circumstances of this case. Even though there are reasons to grant judicial review, as discussed above, the matter must be referred back to the Commission. The Commission's authority under subsection 44(3) of the *Act* to refer a complaint to the Tribunal or to dismiss it is purely discretionary, and it is not the Court's function to make that decision for the Commission by issuing the direction requested by the Applicant. Consequently, the Court is confined to referring the matter back to the Commission for reconsideration and, if necessary, further investigation.

IV. Conclusions

[64] The Applicant's application for judicial review is allowed. The Commission's decision to dismiss the complaint was procedurally unfair and unreasonable because the Investigator's Report did not sufficiently address or consider the Bank's policy on grow-ops, nor did it fully engage with or address the content of Ms. Joliat's emails when compared with the statements by the Applicant and his son.

[65] The Commission's decision dated June 16, 2016, is set aside and the matter is returned to the Commission for redetermination and, if necessary, further investigation in accordance with the reasons for this judgment.

[66] The Applicant has requested his costs in his memorandum of fact and law. In view of the application having been granted, the Applicant is entitled to his costs from the Respondent in such amount as may be agreed to by them. If the parties are unable to agree as to the amount of such costs within 20 days of the date of this judgment, either the Applicant or the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules,* SOR/98-106.

JUDGMENT in T-1176-16

THIS COURT'S JUDGMENT is that: the Applicant's application for judicial review is granted; the Commission's decision dated June 16, 2016, is set aside and the matter is returned to the Commission for redetermination and, if necessary, further investigation in accordance with the reasons for this judgment; and that the Applicant is entitled to costs in such amount as may be agreed to by the Applicant and the Respondent, provided that if they are unable to agree as to the amount of such costs within 20 days of the date of this judgment, either the Applicant or the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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