Federal Court  Cour fédérale

Date: 20191217

Docket: T-1783-18

Citation: 2019 FC 1610

Ottawa, Ontario, December 17, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ROBERT MCILVENNA

Applicant

and

BANK OF NOVA SCOTIA (SCOTIABANK)

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review challenges a decision by the Canadian Human Rights Commission [Commission] made under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [Act] dismissing the complaint of Robert McIlvenna thereby preventing the matter from proceeding to adjudication on the merits. Mr. McIlvenna asks that the Commission's decision be set aside accompanied by a direction that his complaint be referred directly to the Canadian Human Rights Tribunal [Tribunal] to institute an inquiry.

[2] This matter has been before the Commission since August 2010. It arises out of a 2009 decision by the Respondent, Bank of Nova Scotia [the Bank], to call Mr. McIlvenna's mortgage loan on a residential property located in Val Therese, Ontario.

[3] At the heart of this case is a factual disagreement about why the Bank called its loan. Mr. McIlvenna asserts that the decision was made because his son and daughter-in-law had used the property to grow medicinal marijuana and intended to continue that practise. The Bank contends that its decision was based on Mr. McIlvenna's undisclosed renovations to the house which, when the Bank was approached for additional financing, had been reduced to a shell. According to the Bank Mr. McIlvenna's renovations were unauthorized and in breach of the terms of its mortgage. The Bank also maintains that, to the extent that the decision turned on the use of the property to grow marijuana, it was only because Mr. McIlvenna's son had stated an intention to grow marijuana commercially.

I. Procedural History

[4] Mr. McIlvenna's case has been the subject of two earlier applications for judicial review. On March 14, 2012, his complaint was dismissed by the Commission under the authority of s 41 of the Act. That decision was upheld by Justice Roger Hughes of this Court, but, on appeal, the decision was quashed for the following reasons:

> [16] At this point in its process, the Commission cannot acceptably or defensibly resolve the live contest between Mr. McIlvenna and the report of the Bank's in-house counsel in favour of the latter, at least until it investigates further under section 43. But here, nonetheless, it purported to do so. In so doing, it must have engaged in some sort of weighing process that led it to favour the report of the Bank's in-house counsel. This it

> cannot do. During the section 41 stage, a weighing process of the sort conducted here is no part of its task.
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> [17] Only after investigating the matter under section 43 of the Act – for example, by interviewing those at the Bank who called in the loan and seeing whether any discriminatory grounds were reported to them and relied upon by them – can the Commission assess the evidence to see whether "an inquiry is warranted": *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 at paragraph 49. But even at the section 43 stage – well after the stage the Commission reached in this case – the Commission cannot go further and "determine if the complaint is made out": *Cooper* at paragraph 53.
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> [18] In this case, the Commission had not gotten anywhere near that point. It was only in the section 41 stage.
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> [19] It follows that the Commission's dismissal of Mr. McIlvenna's complaint on the basis of section 41 is unreasonable and cannot stand.

See *McIlvenna v Bank of Nova Scotia*, 2014 FCA 203, 246 ACWS (3d) 159.

[5] When the matter went back to the Commission, an investigation was launched. The complaint was again dismissed by the Commission acting under the authority of subparagraph 44(3)(b)(i) of the Act.

[6] Once again Mr. McIlvenna successfully challenged the Commission's decision. The decision of Justice Keith Boswell in *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2017 FC 699, [2017] FCJ No 728, thoroughly canvasses the relevant background evidence, which need not be repeated here. After determining that the Commission's investigation was inadequate and, thus, procedurally unfair, Justice Boswell considered whether the decision was reasonable in the face of the evidence. He concluded that it was not for the following reasons:

> [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).
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> [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.

[7] Mr. McIlvenna's complaint was returned once more to the Commission and a supplementary investigation was started. The assigned investigator, Jennifer Huber, recommended that the matter be referred for an inquiry before the Tribunal because "…the evidence suggests that the respondent may have treated the complainant and his family in an adverse differential manner in the provision of banking services based on circumstances related to his son's and daughter-in-law's disabilities".

[8] Ms. Huber's investigation report confirmed that an initial meeting had been held on December 15, 2009, between Mr. McIlvenna and a Bank loans officer to discuss the possibility of additional financing on the mortgaged property. What exactly was said at this meeting is a matter of dispute but Mr. McIlvenna may have come away with the understanding that additional financing for proposed renovations was likely to be forthcoming.

[9] The investigation report states that when Mr. McIlvenna returned to the Bank to secure additional financing he disclosed that the house had been "gutted" by his son. This seems to have raised a concern about the Bank's mortgage security and an appraisal was commissioned. It was during the course of the appraisal that the use of the property to grow marijuana was discovered.

[10] Ms. Huber's report contains the following summary of evidence provided to her by Bank officials about the potential significance of marijuana cultivation to the decision to call the loan:

> 11. Estelle Joliat, (former) Community Branch Manager, states that the decision to recall the mortgage came from the Adjudication Centre and the National Collections Centre. She states that when she met with the complainant and his son on July 15, 2010, the decision to recall the mortgage had been made, Ms. Joliat states that during the meeting she informed the complainant that the reason the mortgage was being recalled was because the terms of the mortgage had been breached. She states that she focused her discussion on the fact that the use of the site was no longer the same as when the mortgage was approved: "*the use of the property had been changed. It was a single family dwelling. It had been torn down to a shell.*"
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> 12. Regarding her discussions with Debbie Walsh of the Adjudication Centre (referred to in her July 2010 email), Ms. Joliat states that Ms. Walsh did not indicate what "use" she was referring to when she stated that because the use of the property had changed, it no longer met lending criteria. However, Ms. Joliat states that "*I go back to the fact that this was a single family*

dwelling. The terms of the bank are such you need to advise the bank if you are making changes to the property. You cannot just tear down the house that the bank has as collateral to a debt.

13. Regarding her discussions with Ms. Walsh and the bank's "*official policy on grow-ops,*" Ms. Joliat states that when she learned that the house was no longer there (it was only a shell), she needed guidance. Ms. Joliat states that the only thing she found for guidance was the EO Circular, but that did not really apply. She explains that the policy was where the bank is considering a mortgage on a property that was formerly a grow-op. However, she states that this was not the situation they had: "*we had an existing mortgagee coming to us for additional finance.*" She states that when she spoke with Ms. Walsh and told her what the appraiser found (a shell of a house), she "*probably mentioned the circular to her*." However, Ms. Joliat states that she basically handed it over as it was not her decision to call in the mortgage.

14. Ms. Joliat denied that she informed the complainant and his son that "*growing marijuana at a mortgaged home was prohibited by Bank policy.*" She also denies that she informed them that "*the Bank does not allow marijuana in their communities.*" She states that she never said anything about marijuana.

15. Debbie Walsh (former) Senior Manager Adjudication Centre of Expertise, states that she was a senior manager at the time of the request for refinancing. She states that on the surface, the complainant's request for further financing "*seemed okay*" but after the appraiser visited the property, he advised that the home was being used to grow marijuana. Ms. Walsh states that according to the policy at the time "*we did not finance property that had marijuana growing in it. The only way was if it was completely remediated.*" She states that the complainant's son planned to continue growing marijuana in the house. Ms. Walsh states that given the length of time since the events in question, she does not recall specifically what she told Ms. Joliat. However, she states that her general line would have been "*it's very clear in the policy. We wouldn't be able to provide further financing. No additional funds. Based on the appraiser saying what it was used for: growing marijuana*."

16. Ms. Walsh further states that when she informed Ms. Joliat that "*the use of the property*" no longer meets lending criteria (as referenced in Ms. Joliat's July 2010 email), she was referring to the growing of marijuana. She states: "*because marijuana was being grown, it was not eligible. Our policy at the time was that the*

> *house has to be completely remediated. So it was that usage: the fact that it was being used to grow marijuana.*"
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> 17. Ms Walsh further explains that this was not the type of property that would suit the bank's portfolio. She states that the property would have issues, and would not be very marketable.
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> **Analysis**
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> 18. According to Ms. Joliat, she focused her discussions with the complainant and his son on the fact that the house had been torn down, thereby breaching the terms of the mortgage, However, Ms. Joliat confirms that she was not the decision maker at the time, but rather she had referred the matter to the Adjudication Centre for decision.
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> 19. Ms. Walsh, Senior Manager Adjudication Centre, indicates that although she did not have the authority to call in the mortgage, she did have the authority to deny further lending, She confirms that according to the policy at the time, the respondent did not finance homes that were used to grow marijuana. She further confirms that the change in the "*use of the property*"(referred to in her discussions with Ms. Joliat) was the growing of marijuana.
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> 20. In its decision, the Federal Court made numerous references to Ms. Joliat's emails and stated that the emails "*show that the [respondent] was considering the fact that the complainant's son intended to use the property as a grow-op when it decided to refuse an increase to the [complainant's] line of credit.*" (paragraph 52 of the decision).
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> 21. The evidence of Ms. Walsh clearly demonstrates that the son's growing of medical marijuana was a factor in the respondent's decision to recall the mortgage. As such, the evidence suggests that the respondent may have treated the complainant and his family in an adverse differential manner in the provision of banking services based on circumstances related to his son's and daughter-in-law's disabilities. Accordingly, further inquiry into this complaint is warranted.

[11] Ms. Huber sent her report to the Bank for response. At that point the Bank appears to have largely abandoned its assertion that the loan was called only because the house had been

substantially gutted with a resulting devaluation of its security. The Bank's new position was set out in a letter dated June 18, 2018:

> We note that the purpose of the Report is to gather and consider further evidence in order to determine whether Ryan McIlvenna's (the Complainant's son) intention to build a "bigger and better grow-op" may have been a factor in the Bank's decision to call in the mortgage. The Report concludes that there is evidence of this being a factor and, as such, recommends that the matter be referred to inquiry. The Bank disagrees with this conclusion and recommendation for the reasons that follow.
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> **Non-Discriminatory Reasons**
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> The Report refers to the evidence given by Debbie Walsh, former Senior Manager Adjudication Centre of Expertise ("ACE"). The Report focuses on her statement that "the use of property" no longer met the Bank's lending criteria because it was being used to grow marijuana. However, her explanation was more elaborate. She explained that the property would have "issues". As made clear in the Bank's policy/ E.O. Circular, the "issues" or concerns were the detrimental impact of marijuana growing on the building's structural integrity and the possibility of contamination. Ms. Walsh confirmed this when she indicated that the house would have to be "completely remediated". This explanation confirms that the reason for the Bank's decision was not the mere fact of marijuana growing, but the impact of that growing on the building, and the resulting prejudice to the Bank's equity. As such, the reasons for the Bank's decision were clearly unrelated to the medical situation of the Complainant's son.
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> **Commercial, Not Medicinal Growing**
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> The previous reports have referred to the evidence given by Ryan McIlvenna (the Complainant's son). He confirmed that the purpose of his "grow room" was commercial, not for his own medicinal purposes. For example:
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> - As noted in the appraiser's letter of July 16, 2010, he told the appraiser that he had a permit to grow "in excess of 200+plants". He never produced a copy of this permit, and the number of plants he alleges he was authorized to grow far exceeds what could be required for individual medicinal use;

- According to an email sent by Estelle Joliat, former Branch Manager, on July 15, 2010, he told her that "the government is allowing him to 'sell' his product to other people, and that he has a provide investor willing to back him up with $280M in financing";

- According to the investigation notes made on September 15, 2015 (during the second investigation), he told the investigator that "he feels he lost a multimillion dollar business and it has affected a normal man's right to raise his family".

The Bank submits that the Commission ought to consider the evidence that Ryan McIlvenna was planning to build a commercial, for-profit, growing operation at the property. This use is inconsistent with the terms of a residential mortgage. The development of a commercial enterprise is distinguishable from the situation of an individual using, or even growing for personal consumption, medicinal marijuana in their home. The evidence of a commercial operation suggests that there was a non-discriminatory reason for calling the mortgage.

II. The Commission's Decision

[12] The Commission rejected Ms. Huber's recommendation and dismissed Mr. McIlvenna's complaint. After reviewing the history of the matter, the Commission held that the evidence did not establish that the cultivation of medical marijuana was a factor in the Bank's decision to call the loan. Rather, the Commission found that the decision "was ultimately based on the Complainant's breach of the terms of the mortgage…and the resulting loss of value of the security".

[13] It is very clear from the Commission's review of the evidence that the dismissal of the complaint was based on its acceptance of the Bank's initial explanation for calling the loan. The Commission's reasons acknowledge the existence of differing versions about what was said at

the meetings between Bank officials and Mr. McIlvenna but ultimately it resolved those differences in favour of the Bank. In particular, the Commission discounted the evidence given to Ms. Huber by Bank employee Debbie Walsh about the significance of the presence of marijuana to the decision. The Commission's assessment of that evidence was the following:

> With regards to what Ms. Walsh meant by "use of the property", Ms. Joliat told the Investigator Ms. Walsh did not indicate what "use" she was referring to, but she (Ms. Joliat) interpreted that to mean that the terms of the mortgage required clients to advise the Respondent when making changes to the property, and that "you cannot just tear down the house that the bank has as collateral to a debt" (Supplementary Investigation Report at para. 12). Ms. Walsh was interviewed by the Investigator. She stated that given the length of time since the events in question, she did not recall specifically what she told Ms. Joliat. She however told the Investigator that the Respondent "did not finance property that had marijuana growing in it [unless] it was completely remediated, and that in a case like this one, her "general line" would have been that "we wouldn't be able to provide further financing. No additional funds. Based on the appraiser saying what it was used for: growing marijuana". Ms. Walsh further stated that:
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> > [...] when she informed Ms. Joliat that "the use of the property" no longer meets lending criteria (as referenced in Ms. Joliat's July 2010 email), she was referring to the growing of marijuana. She states: "because marijuana was being grown it was not eligible. Our policy at the time was that the house has to be completely remediated. So it was that usage: the fact that it was being used to grow marijuana."
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> The Commission gives little weight to Ms. Walsh's statement, for two reasons. First, on her own admission, Ms. Walsh does not recall what she told Ms. Joliat with regards to this specific case. Second, it is unclear what "policy" Ms. Walsh is referring to; the Respondent states that at all material times, it "did not have a policy with respect to mortgage financing over residential property where the current or intended future use was to produce medical marijuana […] the policy pertains to providing mortgage financing over "residential properties that were *formerly* used to produce illegal substances" (Supplementary Investigation Report at para. 7).

The Respondent provided the Commission with a copy of its policy on “Properties Formerly Used to Produce Illegal Substances". Upon review of the policy, it appears that it has no bearing on this case as it is clearly meant to apply to the *initial financing* of properties that are known to have been *formerly* used as marijuana grow operations. The very first paragraph of the policy states as follows:

> The Bank's involvement in providing residential mortgage financing over properties that are known to have been formerly used as marijuana grow operations or clandestine laboratories to produce illegal drugs such as methamphetamine (i.e., crystal meth), cocaine, and ecstasy should be avoided whenever possible. Exceptions may be considered by the LDC only in situations that meet all of the following requirements:
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> [...]
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> - The reason for the loan is to purchase the property, and the property will be owner-occupied by the applicant as a principal residence.

The policy thus did not apply to the property at issue here. First, this was not about the initial financing of a property because the mortgage had already been approved, and the property was already owned by the Complainant. Second, the issue was not that the property had “formerly” been used to produce “illegal substances”; the issue was the current use of the property, once financed, and its effect on the value of the security held by the Respondent. Thus, any reference to the “policy” by Ms. Walsh, or by Ms. Joliat at the July 15, 2010 meeting with the Complainant and his son, can only be understood as having been made for information only as this policy had no bearing on the Respondent's decision to recall the mortgage.

In summary, other than the statements of the Complainant and his son, there is no evidence to support the Complainant’s contention that the Respondent decided to recall its mortgage *because* the property was used for the specific purpose of cultivating medical marijuana. Rather, the evidence shows that the Respondent was concerned with a material breach of the terms of the mortgage, as well as the loss of value of its security. The mere fact that the Respondent knew that the property was being used and transformed for the purpose of growing medical marijuana is not

> sufficient, in the Commission's view, to conclude that that was a factor in its decision.
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> [Emphasis added]

[14] The Commission went on to dismiss the complaint on the alternative basis that Mr. McIlvenna had failed to inform the Bank of his intentions and the need for accommodation. Mr. McIlvenna's conduct is criticized for falling well short of the duties and obligations said to be owed to the Bank. The Commission concluded this aspect of its decision as follows:

> In essence, the Complainant put the Respondent in front of a *fait accompli*; at the time the Respondent found out the property had sustained major structural changes to accommodate a commercial-grade medical marijuana operation, the property had already lost value without any assurances that it would ever regain that value. The Complainant never gave a meaningful opportunity to the Respondent to accommodate his son's and daughter-in-law's needs, as he never communicated those needs to the Respondent. Rather, the Complainant and his son went ahead with the work without the knowledge of the Respondent and in full breach of their contractual obligations. As such, it is clear that the Complainant did not meaningfully participate in the accommodation process.
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> This human rights complaint appears to the Commission to be an attempt on the part of the Complainant to justify *ex post facto* his contractual breaches once the was faced with their consequences. Referring this complaint for further inquiry would not further the objectives of the *CHRA.*

III. Analysis

[15] The scope of the Commission's authority under subparagraph 44(3)(b)(i) of the Act is fairly well settled. That provision allows the Commission to screen out a complaint if it is satisfied "that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted". It is also settled law that in carrying out this authority the

Commission is owed deference: see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 40, [2012] 1 SCR 364, and *Joshi v Canadian Imperial Bank of Commerce*, 2014 FC 552 at para 54, 242 ACWS (3d) 155.

[16] In *Tutty v Canada (Attorney General)*, 2011 FC 57, 197 ACWS (3d) 189, I described the role of the Commission acting under s 44 in the following way:

> [12] The Commission's screening function under s 44 of the Act has been compared to the role of a judge presiding over a preliminary inquiry. The role was described by the Supreme Court of Canada in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 (SCC) at para 53 as follows:
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> > 53 The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:
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> > > The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[Emphasis added]

> [13] In screening complaints, the Commission relies upon the work of an investigator who typically interviews witnesses and reviews the available documentary record. Where the Commission renders a decision consistent with the recommendation of its investigator, the investigator's report has been held to form a part of the Commission's reasons: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37.
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> [14] As noted in the above authorities, the Commission's decision to dismiss or refer a complaint inevitably requires some weighing of the evidence to determine if it is sufficient to justify a hearing on the merits. It is this aspect of the process that has been said to require deference on judicial review. Deference is not required, however, in the context of a review of the fairness of the process including the thoroughness of the investigation. For such issues the standard of review is correctness.

[17] I accept that the exercise of the Commission's screening authority inevitably requires some assessment of the evidence acquired by its investigator. That said, it is not within the Commission's authority to decide if a complaint is made out on the merits or to weigh the evidence in accordance with the balance of probabilities. Indeed, in *Dupuis v Canada (Attorney General)*, 2010 FC 511 at para 12, 190 ACWS (3d) 1193, Justice Luc Martineau said that questions of credibility are normally left to the Tribunal to assess. He also observed at paragraph 13 that the dismissal of a complaint without a hearing "has far-reaching consequences for a person who claims to be the victim of a discriminatory practice". I would add that the Commission's dismissal of a complaint in the face of an investigator's evidence-based contrary recommendation is deserving of careful scrutiny by a reviewing court.

[18] Here the Commission found that Mr. McIlvenna's son had made major structural changes to the property to "accommodate a commercial-grade medical marijuana operation". This

finding was made on the strength of certain statements attributed to Mr. McIlvenna's son by the Bank's appraiser and its officials. If the property was to be used in this way, the Bank would have had a sound commercial reason to call its loan. Such a use was, at least implicitly, contrary to the Bank's financing policy which was based on a reasonable assessment of the risks associated with large scale marijuana grow-ops.

[19] The problem with this aspect of the Commission's decision is that this evidence concerning the commercial use of the premises to grow marijuana was disputed by Mr. McIlvenna. The scope of the disagreement is contained in a letter from Mr. McIlvenna's counsel to Ms. Huber in response to the Bank's earlier submissions. That letter contradicted the Bank's position in the following way:

> Third, the Bank incorrectly claims that Ryan McIlvenna's statements regarding the financial impact of the Bank's discrimination suggest that the marijuana he intended to grow on the property was for commercial rather than medicinal purposes. Rather, Ryan McIlvenna's statements, which are misrepresented by the Bank, were with respect to financing for other business ventures, which could not proceed when he and his family lost the ability to build equity in their home. For instance, after the Respondent called in the mortgage the McIlvennas could no longer secure funding for an Aquaponic farm. Ryan McIlvenna never planned to use his home for a commercial marijuana operation and did not suggest he would. Moreover, the Bank provides no basis for its claim that the number of plants he was authorized to grow far exceeds what could be required for individual use by Health Canada, nor has the Bank ever requested a copy of Ryan McIlvenna's Health Canada permit or that of Stacey Holmes. Instead, the Bank decided to immediately call in the mortgage based on the mere existence of marijuana on the property, all the while purporting to rely on a breach of the mortgage agreement.

[20] Clearly, the Commission was in no position to resolve this evidentiary dispute and exceeded its s 44 authority by doing so.

[21] A similar problem arises from the Commission's finding that Mr. McIlvenna had imposed a *fait accompli* by disclosing his renovations only after-the-fact. Those renovations were found by the Commission to have been carried out without the knowledge of the Bank and "in full breach of their contractual obligations". This finding is unreasonable because it fails to account for Mr. McIlvenna's evidence that he met with Bank officials before the renovations commenced to discuss financing options. Ms. Huber's report also included some evidence from the Bank that two preliminary meetings did take place in December 2009 (see p 441 of Applicant's Record, Vol. II). Furthermore, Mr. McIlvenna's counsel set out a factual narrative very different from the Commission's finding that the Bank had no knowledge about what was planned for the property:

> 10. First, there are inconsistencies in the evidence of Robert and Ryan McIlvenna and the statements of Sharon Lavallee, the Senior Personal Banking Officer. As the Investigator notes, Robert McIlvenna maintains that at the initial December 10, 2009, meeting he and his wife were led to believe that they should proceed to complete 40% of the project prior to seeking additional funding from the Bank. Indeed, Ms. Lavallee told the McIlvennas that, by adding equity from their own sources, she did not see a problem in getting a loan to complete the construction as both parents would gain from the partnership. Jocelyn McIlvenna, who has yet to be interviewed, maintains that it was clear to everyone at this meeting that the McIlvennas would begin the renovations and return for funding when they were 40% complete – this is why the Bank requested and was given the name of the builder the McIlvennas intended to use.
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> 11. The Bank's suggestion that it was surprised that renovations were initiated does not fit with the fact that a written description of the project was provided to the Bank by Ryan McIlvenna, including plans that were later provided by the Bank to the appraiser (see para 37). Nor does it fit with the McIlvennas' understanding from Ms Lavallee that the approval of the remaining 60% would be "routine" given their income and previous experience with a major renovations. The McIlvennas' understanding also fits with the document they were given by the Bank in December 2009 setting out how the Bank would assess the percentage of the project that was completed, and the appraiser's

> conclusion that the project was 40% complete at the time the request for further funds was made. Indeed, this was the reason – including to have the home appraised – that the McIlvennas returned to the Bank in June 2010, and not, as Ms Lavallee states, because they had run out of funds.

[22] Notwithstanding this evidence indicating that the Bank was aware of the planned renovations, the Commission concluded that Mr. McIlvenna had wilfully breached the terms of the mortgage by presenting the Bank with a *fait accompli*. No mention is made of Mr. McIlvenna's evidence in the Commission's decision and it may have been overlooked; but in any event, this was a material credibility issue that the Commission had no authority, and was in no position, to resolve.

[23] The Commission's decision contains another reviewable error. The Commission mischaracterized and unreasonably discounted the evidence given to Ms. Huber by Ms. Walsh. Ms. Walsh reportedly told Ms. Huber that Mr. McIlvenna's request for further financing seemed okay until she learned of the presence of marijuana on the property. At that point and on the strength of the Bank's marijuana policy, Ms. Walsh declined to advance further financing. Contrary to the Commission's interpretation, Ms. Walsh's evidence was not the least bit unclear about the policy she was applying. She may have misunderstood the Bank's policy on grow-ops but she was not in doubt that it had to be applied. In the face of this evidence it is not surprising that the Bank's final submission to Ms. Huber acknowledged that the decision was based on the proposed use of the property to commercially cultivate marijuana and made no mention of the condition of the property. It was not open to the Commission to resolve this issue on its merits at the screening stage. This was a credibility-based determination that far exceeded the

Commission's s 44 discretion and, to make matters worse, it was a finding that ran counter to the evidence given to Ms. Huber by Ms. Walsh.

[24] As the aforementioned authorities have held, the Commission's decision in this case strays well beyond the boundaries for screening out complaints under s 44 of the Act. The decision is therefore set aside.

[25] Mr. McIlvenna also seeks to have his complaint referred directly to the Tribunal. I am satisfied that this is one of those rare situations when the Court must direct the Commission to refer the complaint for adjudication. Mr. McIlvenna's complaint has been in the hands of the Commission for almost a decade. The Commission has, in that time, summarily dismissed the complaint on three occasions on essentially the same basis. Notwithstanding several material evidentiary disagreements between the parties that the Commission had no ability or authority to resolve it has, repeatedly, purported to do so. For reasons that have not been expressed it is apparent that the Commission does not like this complaint and wants to be rid of it. In my view, the Commission has shown itself to be unfit to resolve this matter such that the Court must now direct it to act: see *Giguère v Chambre des notaires du Québec*, 2004 SCC 1 at para 65, [2004] 1 SCR 3.

[26] It also seems to me that there is nothing to be gained by sending this matter back to the Commission for reconsideration. Justice Boswell declined to refer the complaint to the Tribunal because the Commission's investigation was inadequate. That is not the situation before me. Ms. Huber's investigation was thorough and she appropriately recommended that the case go to

the Tribunal to resolve the identified evidentiary conflicts. In light of those conflicts contained in what is now a voluminous record and considering the Commission's very limited authority to weigh the evidence, there exists no basis to further delay the inevitable.

[27] Nothing in these reasons, however, should be taken to lend support to the merits of Mr. McIlvenna's complaint. In the face of the above-referenced evidentiary conflicts, the outcome of the case remains in doubt.

[28] This is also an appropriate situation to award costs on a substantial indemnity basis. Costs are awarded to the Applicant payable at seventy-five percent of solicitor-client fees and full indemnity for his reasonable disbursements.

JUDGMENT in T-1783-18

THIS COURT'S JUDGMENT is that the Application is allowed, and the Commission's decision is set aside.

THIS COURT FURTHER ADJUDGES and DECLARES that the Commission shall refer the underlying complaint to the Tribunal for adjudication including the outstanding issue of the Complainant's standing.

THIS COURT FURTHER ADJUDGES and DECLARES that costs are payable to the Applicant in the amount of seventy-five percent of his solicitor-client fees and full indemnity for his reasonable disbursements.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1783-18
STYLE OF CAUSE:	ROBERT MCILVENNA v BANK OF NOVA SCOTIA (SCOTIABANK)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 27, 2019
JUDGMENT AND REASONS :	BARNES J.
DATED:	DECEMBER 17, 2019

APPEARANCES:

Mr. Andrew Astritis	FOR THE APPLICANT
Mr. George G. Vuicic Mr. Jason Mercier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.l.r. Ottawa, ON	FOR THE APPLICANT
Hicks Morley Hamilton Stewart Storie LLP Ottawa, ON	FOR THE RESPONDENT