Federal Court  Cour fédérale

Date: 20200114

Docket: T-1820-18

Citation: 2020 FC 43

Ottawa, Ontario, January 14, 2020

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JOHN ENNIS

Applicant

and

ATTORNEY GENERAL OF CANADA and TOBIQUE FIRST NATION

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision by the Canadian Human Rights Commission [Commission] made pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act]. The Commission's decision dismisses the complaint of the Applicant, John Ennis, despite the Investigator's Report recommending that the matter be referred to the Canadian Human Rights Tribunal [Tribunal].

The effect of the Commission's decision is to terminate the Applicant's right to an adjudication on the merits of his complaint.

[2] The Court has concluded that the Commission exceeded its role in deciding this matter, made an unreasonable decision and engaged in an unfair process.

II. Background

[3] The Applicant is a 50 year old member of the Tobique First Nation [TFN]. He suffers from bi-polar disorder and agoraphobia – generally an anxiety disorder characterised by symptoms of anxiety in situations where the person perceives their environment to be unsafe.

His father represented him in dealings with the Commission.

[4] The TFN is a band located in northwestern New Brunswick. It has an on-reserve population of approximately 2,500 members and a further approximately 570 members living off reserve.

[5] The TFN has been under various levels of government intervention and management through Indigenous and Northern Affairs Canada [INAC] since 1986, culminating in a period of third party management from 2007-2017.

The financial and other difficulties of the TFN play an important role in the Commission's investigation and ultimate decision.

[6] The Applicant through his father, Dan Ennis, in a complaint with the Commission alleged discrimination by INAC (or its predecessor) on the basis of race and disability in failing to provide adequate housing.

Dan Ennis, in his own right, made the same complaint against TFN. However, for ease of reference, John Ennis is referred to as the Applicant.

[7] The two complaints were brought pursuant to s 6 of the Act.

Denial of commercial premises or residential accommodation	**Refus de locaux commerciaux ou de logements**
6 It is a discriminatory practice in the provision of commercial premises or residential accommodation	**6** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de locaux commerciaux ou de logements :
(a) to deny occupancy of such premises or accommodation to any individual, or	**a)** de priver un individu de leur occupation;
(b) to differentiate adversely in relation to any individual,	**b)** de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

[8] The submissions in support of the two complaints were identical. The complaint is that the Applicant had been on the reserve housing wait list since 2003 due to a severe housing shortage; that while on the list, he had been forced to live in substandard and inadequate housing.

[9] The complaint went on to allege that the TFN's enforcement of INAC policies, specifically the third party management plan, had led to the denial of available housing based on grounds of race and disability.

[10] The Applicant further alleged the existence of systemic discrimination and that INAC policies (housing and third party management) have resulted in himself and Indians in general being treated in an adverse and differential manner. Aside from these specifics, there was a more general complaint of racism arising from actions imposed by one race (the dominant white race) on another (Indians).

[11] An investigation of the complaint was conducted by an assessor from the Commission [Assessor]. The Assessor spoke with and/or received submissions from the Applicant's father, the chief of the TFN, an INAC official and a third party manager. The Assessor was provided with various documents including from INAC showing the funding allocated to TFN for housing and a final report of a former third party manager.

[12] On September 20, 2017, the Assessor issued a s 49 Assessment Report [s 49 Report]. The Assessor's recommendation was that the matter proceed to a Tribunal inquiry as further inquiry was warranted in the circumstances pursuant to s 49(1).

Request for inquiry	**Instruction**
49 (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to	**49 (1)** La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des

all the circumstances of the complaint, an inquiry is warranted.	circonstances relatives à celle-ci, que l'instruction est justifiée.

A. *Section 49 Report*

[13] Given that the Commission rejected this Assessor's recommendation, the Assessor's perspective is important. The Assessor concluded on a number of points as follows:

- There were intersectional adverse impacts on the Applicant as a result of his disability. The fact of disability was not challenged nor was the allegation of living in substandard housing nor that he had been on a waiting list for over 10 years.
- The situation of insufficient housing on the reserve is of long-standing duration.
- Neither INAC nor TFN acknowledge any responsibility for this situation and both point to the other as being accountable. INAC also passed on responsibility to Health Canada and CMHC.
- It was not clear the extent to which INAC policies have directly resulted in the lack of adequate housing particularly for the Applicant (and others in the community), nor was it clear what the role of TFN was in the provision and management of housing in the community. This was an issue which the Assessor concluded needed further inquiry.
- There was conflicting evidence as to the funding of housing in the Applicant's community and a lack of clarity regarding who bears responsibility for the housing.
- There were problems obtaining information from TFN.

- The Applicant disagreed with much of INAC's contention about the allocation and spending of funds on housing; INAC obviously disputing that their actions or policies played a role in housing much less that it was responsible for any discrimination.
- There was a dispute between TFN and third party managers as to whether funds allocated for housing were in fact used to pay down TFN's debt.
- The Applicant had raised significant conflicts in the evidence and the need for expert evidence. It was the Assessor's conclusion that further inquiry by the Tribunal which can hear expert witnesses was warranted.
- Because of the acknowledged lack of housing in the TFN community, one of many indigenous communities suffering from underfunding for housing and related matters, there was a public interest to deal with the complaint without delay.
- There were underlying factors giving rise to the concerns raised in the complaint for which a screening body such as the Commission is not in a position to resolve and therefore inquiry by the Tribunal was warranted.

[14] Following the s 49 Report, the parties were provided with an opportunity to comment. The Applicant, represented by his father, essentially argued that INAC was lying about its position and activities in respect of TFN funding.

[15] INAC, on the other hand, produced an in-depth paragraph by paragraph submission contesting the findings of the Assessor. It raised the issue of alleged lack of information

including lack of detail with respect to the Applicant's disability; status on the TFN wait list; and the failure to provide funds to TFN because it was under third party management.

B. *Commission Decision*

[16] The Commission dismissed the complaint by holding that further inquiry was not warranted principally on, what it says is, the insufficiency of evidence. Some of the critical findings were as follows:

- Lack of details about the Applicant's housing including how housing was allocated and in what ways it was substandard.
- In respect of his disability, failure to show how the Applicant's disability gave rise to specific needs relative to housing.
- INAC had provided detailed information to show funding continued on an annual basis but the Applicant had not adduced sufficient evidence that his race as a member of TFN and the conduct of TFN and INAC had led to the stoppage or misuse of housing funds during third party management.
- While ministerial guarantees could have been available to TFN for housing, this fact could not be linked to a ground of discrimination because of TFN's financial difficulties.
- There were grounds for a referral to the Tribunal on the issue of authority of the Tribunal to order INAC to provide more funding for housing but only if the Applicant's request for an inquiry had been warranted.
- Had the Commission been satisfied that there was a *prima facie* case of discrimination, then the issue of TFN's policy giving priority to vulnerable

> persons such as those with disabilities as a "special program", would warrant an inquiry as to the application of s 16 of the Act.

[17] As a result, the complaint was dismissed and the Applicant is denied a hearing before the Tribunal on the merits of the complaint.

III. Standard of Review

[18] This judicial review, which arose in the context of *Dunsmuir v New Brunswick*, 2008 SCC 9, is to be decided under the analytical framework of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Despite the *Vavilov* decision, the essential standard of reasonableness as to the substance of the Commission's decision and correctness for procedural fairness – agreed to by the parties – remained unchanged in this context.

[19] *Vavilov* provides guidance as to a "reasonableness review", as set out particularly in paras 105-138. As stated at para 105:

> In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: …

[20] The Supreme Court's analytical framework for reasonableness review reflects much of the work of this Court in this area. Therefore, this Court's decisions relevant to the issues here are relevant and binding authority and have not been altered by *Vavilov* except to emphasise that reasonableness review is to be a vigorous review.

[21] As a matter of legal and personal note, counsel for the Applicant was the very Mr. Dunsmuir of *Dunsmuir* Supreme Court of Canada fame just as that decision was overtaken by *Vavilov*.

[22] Two preliminary matters must be decided. Firstly, the style of cause should be amended to substitute the Attorney General of Canada as Respondent.

Secondly, two letters – one from Chief Bear and another from Chief Perley – attached as exhibits to the Applicant's affidavit, must be struck from the record. Those letters post-date the date of the Decision.

[23] On the matter of the s 49 Report, as the Applicant's Record contains only portions thereof, the Court has relied upon the s 49 Report found in the Certified Tribunal Record.

IV. Analysis

A. *Role of Commission*

[24] The scope of the Commission's authority under s 44 of the Act is well settled and has been recently reinforced and encapsulated in *Mcilvenna v Bank of Nova Scotia (Scotiabank)*, 2019 FC 1610 [*Mcilvenna*].

[25] The Commission has a discretion to dismiss a complaint if it is satisfied "that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted".

The Commission is owed deference in respect of its decision *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10.

[26] The role of the Commission is that of assessing the "sufficiency of the evidence" before it. In *Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at p 899, the Court commented on this point and distinguished the function of weighing the evidence to determine a matter from some weighing to assess sufficiency. The role is to determine whether there is a reasonable basis in the evidence to proceed further.

> 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:
>
> > 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]
>
> *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 (SCC)

[27] A sufficiency analysis is not designed to take sides or determine points in a complaint. This is not a balance of probabilities matter but a question of whether a reasonable basis for a referral to the Tribunal exists. Credibility and weight are usually the preserve of the Tribunal.

[28] In *Tutty v Canada (Attorney General)*, 2011 FC 57, the Court also commented upon the closeness of the function of an assessor and the decision of the Commission.

> [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.
>
> [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

[29] In the present case, there is quite the opposite situation. The assessor (often called the investigator) who did the work described by the Court and the Commission which did not, reached opposing conclusions.

[30] In effect, while the Assessor directly or by implication found the evidence to be sufficient, the Commission did not. The Commission questions the s 49 Report and the thoroughness of the investigation.

[31] I concur with Justice Barnes' conclusion at para 17 of *Mcilvenna* that the Commission's dismissal of a complaint in the face of an investigator's evidence based on contrary recommendation is deserving of careful scrutiny by a reviewing court. As pointed out in *Vavilov*, for a decision to be reasonable, it must be justifiably and demonstrably so.

[32] In that regard merely saying a matter is a "sufficiency of evidence" conclusion does not make it so. A court must determine whether this is so even if the Commission believes that it was limiting itself to its proper role.

[33] Further, not every conflict in the evidence is sufficient for a referral to a tribunal. It requires some level of relevance and importance on an objective basis; otherwise the screening function would become meaningless and any conflict of evidence would justify an inquiry.

B. *Reasonableness*

[34] The Commission concluded that there was insufficient evidence of adverse impact because there were no further details provided about the housing in which the Applicant lived. The Assessor, on the other hand, concluded that there was sufficient evidence of intersectional, adverse impacts due to disability. The Assessor should be presumed to know the conditions alleged otherwise he/she could not find adverse effects.

[35] Absent an explanation by the Commission as to its reason for departing from the conclusions of the Assessor, which were based on a broader and more in-depth consideration of adverse impacts, it is not possible to conclude that the Commission's conclusion was reasonable.

[36] While the Commission may refuse to accept an Assessor's conclusion, the Commission has a duty, particularly in such cases, to explain its rationale for such departure.

[37] The Commission further failed to inquire whether such evidence was available. If it was and it was not produced, the Commission ought to have returned the s 49 Report for further detail.

[38] The Commission also failed to consider a relevant issue – whether being on a wait list for 10 years in the mental condition of the Applicant caused adverse impacts. If the Commission did consider that issue, there is nothing that would suggest it did.

[39] In respect of the failure to show specific needs arising from the Applicant's disabilities, the Commission failed to consider whether the security of proper housing – given the Applicant's mental condition – is a specific need.

[40] Again, to the extent that the Assessor did not address that issue, it was unreasonable for the Commission not to inquire or cause the Assessor to inquire. To the extent that the Assessor's conclusion of intersectional, adverse effects reflects the Applicant's needs, the Commission has failed to explain why it did not accept the Assessor's conclusion.

[41] A critical point of the complaint and of the s 49 Report, both as to discrimination and adverse effect, is the systemic problems with INAC funding and the interplay (or lack thereof) between INAC and TFN. The Assessor concluded at paragraph 13 of the s 49 Report that "it was

not clear the extent to which INAC's policies have directly resulted in the lack of adequate housing in the community and in particular for J.E.". J.E. is a reference to the Applicant.

[42] The Assessor also pointed to the lack of clarity in respect of TFN's role in the provision and management of housing.

[43] The Commission found that while neither the Applicant nor TFN had provided documents or other evidence with respect to housing funds stoppage, INAC had provided detailed rebutting information. The Commission further concluded that neither the Applicant nor TFN provided specific documents or figures to contradict INAC facts or figures.

[44] The Applicant argues that the Commission has reversed the onus and imposed a standard of proof on a complainant inconsistent with the Act.

[45] In my view, given the Assessor's conclusions particularly as to lack of clarity and INAC's further and substantive financial submissions in response to the s 49 Report, the Commission engaged in an improper weighing of evidence as between the Assessor's analysis and INAC's position.

[46] While it is not sufficient for success for a complainant to merely allege someone is lying (as the complainant's father did), it was clear that the Commission accepted INAC's version of events without the benefit of expert and other evidence which the Assessor said was necessary to bring clarity to the situation.

[47] In my view, the Commission engaged in the very type of evidence weighing which the courts have said it cannot do.

[48] The Commission's criticism of the Applicant in not rebutting INAC's evidence is unfair. A complainant is not generally in a position to secure that type of information nor can a complainant be expected to analyze such information. It is within the powers of the Commission's assessor to secure and analyse that evidence. It was unfair to impose this evidentiary and analytical burden on a complainant in these circumstances.

[49] At this stage of the process it is for the Assessor to pursue that line of inquiry. The Assessor did exactly that and could not resolve the matter. It is for the Tribunal not the Commission to resolve lack of clarity.

[50] Therefore, I have concluded that the Commission overstepped its role, reached inadequately explained conclusions and therefore reached unreasonable conclusions.

C. *Procedural Fairness*

[51] An issue of procedural fairness arose in that the Commission departed from the s 49 Report without notice to the Applicant.

[52] As can be seen by the record, the Applicant, having secured a recommendation from the Assessor that the matter proceed to a Tribunal, had no indication that this result was in jeopardy. Absent a "target" – an adverse finding – it is difficult to see what more the Applicant could say

to the Commission in response to the s 49 Report that the Assessor had not said – except perhaps "me too".

[53] The answer to the unfairness of the absence of notice and an opportunity to respond to the Commission's concerns is not in creating a further level of procedure. The resolution is in the Commission staying within its mandate as a screening body not an adjudicative-evidence weighing body.

Had the Commission done so, issues of procedural fairness would not have arisen.

V. Conclusion

[54] For all these reasons, the judicial review will be granted, and the Commission's decision will be quashed. Any reconsideration must be performed by different members of the Commission.

JUDGMENT in T-1820-18

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the Commission's decision is quashed. Any reconsideration must be performed by different members of the Commission.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1820-18
STYLE OF CAUSE:	JOHN ENNIS v ATTORNEY GENERAL OF CANADA AND TOBIQUE FIRST NATION
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	DECEMBER 10, 2019
JUDGMENT AND REASONS:	PHELAN J.
DATED:	JANUARY 14, 2020

APPEARANCES:

David H. Dunsmuir	FOR THE APPLICANT
Melissa A. Grant	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

David H. Dunsmuir Barrister and Solicitor Fredericton, New Brunswick	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA