Federal Court of Appeal | Cour d'appel fédérale

Date: 20140917

Docket: A-306-13

Citation: 2014 FCA 203

CORAM: **NADON J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

ROBERT MCILVENNA

Appellant

and

BANK OF NOVA SCOTIA (SCOTIABANK)

Respondent

Heard at Ottawa, Ontario, on September 16 and September 17, 2014.
Judgment delivered from the Bench at Ottawa, Ontario, on September 17, 2014.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 17, 2014).

STRATAS J.A.

[1] Mr. McIlvenna appeals from the judgment dated June 18, 2013 of the Federal Court (*per* Justice Hughes): 2013 FC 678.

[2] In the Federal Court, Mr. McIlvenna applied to quash the decision dated March 14, 2012 of the Canadian Human Rights Commission to dismiss his complaint. Mr. McIlvenna had

complained to the Commission that the respondent Bank had engaged in discrimination contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[3] Mr. McIlvenna secured a mortgage loan from the respondent Bank over his home. Later, the Bank called in the loan. In his complaint to the Commission, Mr. McIlvenna targeted the Bank's conduct.

[4] Mr. McIlvenna complained that the Bank discriminated on the basis of physical disability. He alleged that the Bank called in the loan when it learned that cannabis grew in the home. A Bank branch official told him that was the reason. And an appraiser retained by the Bank also reacted adversely upon hearing that cannabis was being grown in the home. But the cannabis was being grown under a federal licence for medical reasons. Mr. McIlvenna's son and daughter-in-law had been prescribed to use cannabis because of their physical disabilities.

[5] The Commission inquired into whether the complaint should be screened out and dismissed under section 41. As matters evolved, the Commission's main concern was whether there was any basis for believing that a discriminatory reason lay behind the Bank's decision.

[6] The Commission asked the Bank certain questions relevant to its section 41 inquiry. An in-house counsel of the Bank replied. She reported that the decision-makers at the Bank – not the persons Mr. McIlvenna was dealing with – called in the loan. She said they relied upon the loan agreement, which forbade unauthorized extensive renovations to the home. The home was indeed undergoing such renovations, at least in part to facilitate the growing of cannabis. On his

visit, the Bank's appraiser noted the home had been gutted, rendering the Bank's security for the loan inadequate.

[7] On this evidence, the Commission dismissed the complaint under section 41. The parties agree that a recommendatory report dated November 29, 2011 submitted to the Commission can be taken to set out the reasons for the Commission's dismissal. The report concluded as follows (at paragraph 40):

> As noted above, the threshold on the complainant to demonstrate a link to a ground [of discrimination] is a low one. However, the threshold does not appear to be met in the present case. Several terms of the mortgage agreement were breached and as such, the respondent exercised its right to call the mortgage. As such, it appears plain and obvious that the decision to call the mortgage was not based on a prohibited ground of discrimination.

[8] The Federal Court found that the Commission's decision was reasonable. After noting (at paragraphs 4 to 6) that the Commission had conducted investigations, the Federal Court concluded (at paragraph 22) as follows:

> I am satisfied that this decision was reasonable. While no doubt [the Bank] was made aware that the changes made and proposed to be made were to accommodate the growing of allegedly approved medical marijuana, those changes were substantial and were made without the consent of [the Bank] and had the effect of considerably reducing the value of the property. [The Bank] said that the alleged disabilities of [Mr. McIlvenna's] son played no part in its decision to call the mortgage. It was reasonable for the Commission to conclude that there was no discrimination against [Mr. McIlvenna], the mortgagor, in that respect.

[9] On appeal, after the end of the hearing in this Court, we adjourned until the following morning for the delivery of our reasons. These are our reasons.

[10] The parties agree that the standard of review is reasonableness. Thus, in this case, we are to assess whether the Federal Court was correct when it ruled the Commission's decision reasonable: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212 at paragraph 18.

[11] In our view, the Federal Court erred. The Commission's decision is unreasonable.

[12] The Federal Court reviewed the Commission's decision as if a proper investigation had been conducted and it assumed that no further investigation was required. Proceeding in that way, it reviewed the substantive basis for Commission's decision on the record before it.

[13] The real question is whether it was reasonable for the Commission to decide that it was "plain and obvious" on the material then before it that the complaint must fail. Plain and obvious is the standard for dismissal at this early stage of proceedings under the Act (section 41 alone): *Canada Post Corp. v. Canada (Human Rights Commission)* (1997), 130 F.T.R. 241 (T.D.) at paragraph 3, aff'd (1999), 245 N.R. 397 (C.A.). Another way of putting the question is whether in these circumstances it was reasonable for the Commission to proceed without an investigation under section 43 of the Act and dismiss the matter under section 41.

[14] Under section 41 of the Act, the Commission is entitled to dismiss a complaint, among other things, for lack of jurisdiction or because it is frivolous or vexatious, *e.g.*, the complaint contains a bald or idle allegation of discrimination utterly implausible or incapable of acceptance

in the circumstances: see, *e.g.*, *Hartjes v. Canada (Attorney General)*, 2008 FC 830; *Boiko v. National Research Council*, 2010 FC 110.

[15] But that is not the case before us. Here, there was a live contest in the record before the Commission:

- on the one hand, Mr. McIlvenna's account of potentially discriminatory grounds relied upon by persons who were associated with the Bank and who directly or indirectly supplied information to the decision-makers on the loan; and

- on the other hand, the say-so of the Bank's in-house counsel who reported what the decision-makers on the loan told her.

[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.

[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.

[18] In this case, the Commission had not gotten anywhere near that point. It was only in the section 41 stage.

[19] It follows that the Commission's dismissal of Mr. McIlvenna's complaint on the basis of section 41 is unreasonable and cannot stand.

[20] Before the Commission, the Bank has asserted that Mr. McIlvenna does not have standing to complain. Rather, it says that his son and daughter-in-law alone have standing. The Commission has not ruled on that issue and we do not comment upon it.

[21] Therefore, we shall allow the appeal with costs here and below, set aside the judgment of the Federal Court, quash the decision of the Commission, allow the application for judicial review, and remit the matter to the Commission for further investigation of Mr. McIlvenna's complaint.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-306-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HUGHES DATED JUNE 18, 2013, DOCKET NO. T-841-12	
STYLE OF CAUSE:	ROBERT MCILVENNA v. BANK OF NOVA SCOTIA (SCOTIABANK)
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	SEPTEMBER 16 AND SEPTEMBER 17, 2014
REASONS FOR JUDGMENT OF THE COURT BY:	NADON J.A. TRUDEL J.A. STRATAS J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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