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CASE SUMMARY: FEDERAL COURT REFERS COMPLAINT REGARDING DISCRIMINATION RELATED TO MEDICINAL MARIJUANA BACK TO THE CHRC FOR RE-DETERMINATION

Robert McIlvenna ("Applicant") complained to the Canadian Human Rights Commission ("Commission") that the Bank of Nova Scotia ("Bank") discriminated against him and his family in demanding repayment of a mortgage after his son and daughter-in-law said they were growing medical marijuana in the subject house.

Decisions reviewed; Human Rights Commission; Judicial review; Human rights complaints; Disability; Procedural fairness; Standard of review; Reasonableness

McIlvenna v. Bank of Nova Scotia, [2017] F.C.J. No. 728, 2017 FC 699, Federal Court, July 19, 2017, K.M. Boswell J.

In 2012, the Commission dismissed the complaint on the basis that the facts alleged did not constitute a discriminatory practice. The Federal Court of Appeal quashed the dismissal and remitted the matter back to the Commission for further investigation.

The Commission conducted a further investigation and dismissed the complaint again in June 2016. The applicant sought judicial review of the decision pursuant to s.18.1 of the Federal Courts Act, RSC, 1985, c. F-7.

In December 2009, the Applicant and his wife met with a Bank officer to ask for an increase in their line of credit to finish renovations to their home. At the time, the Applicant's son, wife and three children occupied the home.

Part way through the renovations, the Applicant and his wife returned to the Bank to seek a further extension of their line of credit. The Bank sent an appraiser to the home, who observed that it had been stripped to the studs and would be considered a "shell only". While the appraiser was there, the Applicant's son told him that he and his wife planned to grow medicinal marijuana on the second story addition to the home.

A few weeks later the Bank declined to increase the line of credit and advised the Applicant it would demand repayment of the entire mortgage, which it did via letter dated August 5, 2010.

On August 23, 2010, the Applicant complained to the Commission, alleging discrimination based on the disabilities of his son and daughter-in-law, who he said had each been prescribed medical marijuana and licensed by Health Canada to possess and grow it to treat their disabilities. He contended that he had been told that the Bank would be demanding repayment of the entire mortgage because marijuana was being grown in the house.

The Commission's investigator prepared a report that preferred the Bank's evidence that it had called in the mortgage due to the breach of several terms of the mortgage, and not because of the marijuana, over the evidence of the Applicant that the Bank had called in the mortgage based on the marijuana grow information. The Commission accepted the investigator's recommendation and dismissed the complaint.

On judicial review, the first issue was the appropriate standard of review. Reasonableness was held to be the appropriate standard for the question of whether to dismiss a complaint pursuant to s.44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c. H-6 ("Act").

The review of the Commission's investigation, as a procedural fairness question, might be reviewable on a correctness standard; the Court declined to fully decide this issue. Instead, the Court said, "the essential question to address with respect to the Commission's investigation is whether the Investigator overlooked or failed to investigate 'obviously crucial evidence'".

The Court held that the investigator had glossed over email evidence that confirmed that the Bank's representative had discussed the policy on "grow-ops" with another Bank employee, and that the Investigator should have fully investigated that policy in determining whether the Bank had reasonable explanation for calling in the mortgage. The investigation lacked thoroughness and was procedurally unfair.

The Commission's decision to accept the Investigator's recommendation was unreasonable because the investigation failed to properly consider the question of the Bank's grow-op policy.

The Commission's decision was unreasonable and procedurally unfair.

The Applicant sought a directed decision pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, which allows the Court to refer a Commission matter back for determination "in accordance with such directions as it considers appropriate…." The power is to be used sparingly, because of concerns that it allows a Court to accomplish indirectly what it is not authorized to do directly, namely to substitute its own decision for that of the tribunal. A directed decision is appropriate where the evidence on the record is so clearly conclusive that only one outcome is possible. A Court should only issue directions in the nature of a directed verdict where the "decision of the Court on the judicial review would be dispositive of the matter before the tribunal". Where factual matters are central to the decision and the evidence is ambiguous, a directed decision is not appropriate.

The Court declined to issue a directed decision and instead sent the matter back to the Commission for reconsideration and, if needed, further investigation. Costs were awarded to the Applicant.

This case was digested by Julie K. Gibson of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact her directly at jgibson@harpergrey.com or review her biography at http://www.harpergrey.com.