Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-574-96

BETWEEN:

BRIAN CHRISTOPHER BRADLEY

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Intervenor

REASONS FOR ORDER

MacKAY J.:

This is an application for judicial review pursuant to s.18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, of the decision of the Canadian Human Rights Commission (the "CHRC" or the "Commission") dated February 19, 1996 dismissing the applicant's complaint of discrimination on the ground of age, against the Canadian Armed Forces ("CAF"). Having regard to all the circumstances of the complaint, the Commission determined that further proceedings were not warranted. It is common ground that this decision was made pursuant to s-s.44(3)(b)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*Act*").

An Originating Notice of Motion was filed March 8, 1996 by Mr. Bradley, who, though not a lawyer, acted throughout on his own behalf. An Amended Originating Notice of Motion was filed April 15, 1996, consistent with directions given on April 9, by this Court in dealing with an application for directions by the applicant.

The grounds upon which the applicant seeks judicial review are as follows:

i) that the CHRC erred in law by failing to properly apply the *Act,* in particular by failing to consider properly sections 2, 3, 7, 9 and 10, and particularly the prohibited grounds of discrimination under s-s.3(1);

ii) that the CHRC erred by failing to find or give careful consideration to the applicant's age, marital status and family status as significant factors in the refusal by the Canadian Armed Forces ("CAF") to continue the applicant's employment;

iii) that the CHRC erred by failing to provide the applicant with a complete summary of all the evidence provided to it by the CAF. In particular, the applicant urged at the hearing that the CHRC erred by failing to provide him with a copy of the CAF's letter, dated January 11, 1996, written in reply to the final investigation report;

iv) that the CHRC erred by considering evidence from the CAF which was misleading, it is said, on two or more occasions; and

v) generally, that the decision is contrary to law, in particular the *Act* and its purpose, and contrary to the evidence.

By way of relief, the applicant seeks an Order quashing or setting aside the decision dated February 19, 1996, as well as a declaration that sections 2, 3, 7, 9 and 10 of the *Act* apply so as to render adverse, differential treatment in employment on the basis of age unlawful, discriminatory and contrary to the *Act.* The applicant also seeks a declaration that the decision of the CHRC not to proceed further with this matter is unlawful, discriminatory and contrary to the *Act.*

By Order of this Court on April 9, 1996, the CAF and the CHRC were struck out as respondents, and the Attorney General of Canada named instead in that capacity. Subsequently by Order dated November 13, 1996, the CHRC was added as an Intervenor and given the right to file affidavit evidence, a memorandum of fact and law and to make oral submissions at the hearing. Provision to reflect the status of the Commission in the style of cause of this proceeding was not then made, but the Order now issued directs the style to be changed to include the CHRC as intervenor.

Relevant Provisions of the Act:

The relevant provisions of the *Canadian Human Rights Act* are as follows:

> 2. The purpose of this Act is to extend the laws of Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
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> 3. (1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.
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> ...
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> 7. It is a discriminatory practice, directly or indirectly,
> (a) to refuse to employ or to continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> 9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination
> (a) to exclude an individual from full membership in the organization;
> (b) to expel or suspend a member of the organization; or
> (c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.
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> ...
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> 10. It is a discriminatory practice for an employer, employee organization or organization of employers
> (a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal in accordance with section 49 to inquire into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in any such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

Facts:

The applicant, Brian Christopher Bradley, was a member of the CAF from December 1988 until he was released on March 30, 1993. The applicant was a Direct Entry Officer, and held the rank of Sub-Lieutenant.

In 1991, Mr. Bradley was assigned to the Technical University of Nova Scotia ("TUNS") for training as a Marine Engineer. During his training, however, he encountered academic difficulties and failed several courses. As a consequence, on June 1, 1992, a Course Review Board ("CRB") was convened at Canadian Forces Fleet School Halifax to consider his performance and potential.

Following its review of the applicant's case, the CRB issued a convening order as well as recommendations.[1] Following these recommendations, the applicant was removed from the Marine Engineering program at TUNS on the grounds of academic failure. He was subsequently assessed by the CAF as lacking the necessary Officer Like Qualities ("OLQ's") to be an effective leader and officer; as a result, he was not recommended for occupational transfer or for continued employment as an officer in the CAF. In September 1992, the applicant was recommended for release. He was eventually released from the CAF on March, 30, 1993. He was then forty three years of age.

On December 10, 1993, the applicant filed a complaint with the CHRC alleging that the CAF had discriminated against him on the basis of his age, contrary to section 7 of the *Act*. In his complaint, the applicant characterized the essence of his allegation as follows:

> I allege that the Canadian Armed Forces has discriminated against me by refusing to continue to employ me because of my age (43) contrary to section 7 of the Canadian Human Rights Act.
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> ...
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> A copy of a Career Review Board (CRB) Convening Order that I obtained from my personnel file contained a handwritten notation in the margin "43 years old". This indicated that my age was a factor in the decision to release me rather than redeploy me. Other officers have been permitted to continue training or to transfer to other occupations in spite of either failing the same courses with lower grades than mine and/or obtaining an overall average below mine. These other officers are substantially younger than I am.
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> ...

Following receipt of the applicant's complaint, in January 1994, the CHRC appointed an investigator. On November 29, 1994, the CAF made

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1. The recommendations of the CRB, dated June 9, 1992 were that the applicant be: (a) removed from the course; (b) referred to the Base Personnel Selection Officer (BPSO) for assessment and recommendation with respect to retention in the CAF without recommendation for an occupational transfer (OT); and (c) provided interim employment pending the issue of a career decision by NDHQ.

written submissions to the investigator, outlining its position as to the reasons why the applicant was released from the CAF.

In its submissions, the CAF stated that the applicant had been described by his Commanding Officer as lacking "... the necessary officer-like qualities to be an effective officer and leader in the Canadian Forces". The letter continued, "[t]hroughout his career, [the applicant] has regularly been assessed as a poor leader who had difficulty earning the respect and cooperation of others". Notwithstanding the applicant's lack of OLQ's, however, the letter stated, the principal reason for his release was his training failure in his military occupation. Although the applicant had been considered for occupational transfer to three other areas within the CAF, the letter noted, he was found to be unsuitable for each. As a result, the letter stated, the applicant was accordingly released from the CAF because he was "not advantageously employable".

With respect to the reference in the applicant's complaint to a document containing a handwritten reference to his age, the CAF stated that the original document could not be found, however the copy in the applicant's personnel file contained no such notation. In any event, the letter stated, the document was not before the board which recommended his release. The CAF also indicated that the younger officer referred to by the applicant as also having failed training was similarly scheduled for release, but had been retained temporarily in the CAF to complete his period of "obligatory service".

An investigation report was completed on December 30, 1994. In the report, the investigator recommended that the complaint be dismissed on the basis that on the evidence the allegation of discrimination based on age was

unfounded. The report was provided to the parties, who were invited by the CHRC to make written comments in response. The applicant responded with written submissions dated January 22, 1995. In his submissions, the applicant advised the CHRC that he had learned that the young officer referred to had not, in fact, been released as suggested by the submissions of the CAF, but had instead been re-mustered to another occupation. The applicant also provided some documentation by which he attempted to refute the CAF's allegation that he lacked the required OLQ's.

In light of the new information submitted by the applicant, the CHRC re-opened the investigation. On January 31, 1995, the CHRC advised the parties that the process had been re-opened, and that the investigator would submit a revised report, to include the findings of the continued investigative process. This revised report would then be disclosed to the parties and an opportunity given for them to make further submissions in response.

Once the investigation was reopened, on February 15, 1995 the investigator requested further information from the CAF regarding the two specific areas identified in the applicant's January 22, 1995 submissions: i.e., (i) the issue of the employment status of the younger officer, and (ii) the matter of whether the applicant lacked the necessary OLQ's to be an officer in the CAF. The CAF replied to these requests by letter dated March 24, 1995.

In the letter, the CAF acknowledged that upon further review, it was learned that the younger officer referred to had "...indeed been retained in the [CAF] as an exception because of his officer-like qualities and previous performance", and, the letter noted, he had been offered an occupational transfer to another area within the CAF. With respect to the applicant's

leadership abilities, however, the CAF stated that in their view, their contention that the applicant was "not highly suited" to be an officer in the CAF had been sufficiently substantiated in its previous submissions of November 29, 1994. Finally, regarding the applicant's allegation that he had been discriminated against on the basis of his age, the CAF concluded:

> The fact remains that the former SLt Bradley was released from the CF solely because he was a training failure and not considered to be an ideal candidate for continued employment in the CF. Age had no bearing either directly or indirectly on the decision to release him.

Following receipt of these submissions, and in light of the new information submitted by the parties, a revised investigation report was completed, dated May 31, 1995. This revised report maintained the earlier recommendation of the investigator that the complaint be dismissed. This report was provided to the parties, who were invited to make submissions in response.

The initial two investigation reports, dated December 30, 1994 and May 31, 1995, although disclosed to the parties for comment, were not, however, provided to the Commission. Instead, the investigation was continued, and on July 24, 1995, the CHRC contacted the CAF requesting supplemental information regarding the complaint. In particular, the CHRC requested additional information regarding the status of the younger officer referred to above, as well as comparative data on previous students enrolled in the training program at TUNS. The CAF replied to this request for further information by letter dated August 24, 1995.

Following receipt of these submissions, a final investigation report was prepared, dated December 7, 1995, which incorporated the further information obtained from the parties. In the final report, however, the recommendation of the investigator was modified to recommend that a

conciliator be appointed to attempt to settle the complaint. The report was provided to the parties by letter dated December 7, 1995, which stated in part, as follows:

> As a result of [the applicant's] submission to the investigation report dated May 31, 1995, the investigation into his complaint against the Canadian Armed Forces was re-opened. The investigation report was subsequently amended and the recommendation to the Commission was changed to ask that a conciliator be appointed to attempt to bring about a settlement. The Commission may decide to accept, change or reject this recommendation.
> ...

In the letter, the parties were also invited to make further submissions regarding the latest report. The applicant responded by making written submissions, dated December 28, 1995, to the Commission. The CAF replied to the investigation report by making detailed submissions to the Commission by letter dated January 11, 1996.

In its submissions, the CAF responded to the final investigation report by reiterating its position as to the basis upon which the applicant had been released from the CAF. In particular, the CAF revisited its position with respect to the alleged pencilled in reference to the applicant's age on the Career Review Board's convening order, as well as the basis for its recommendation that the applicant be released. The CAF also responded to particular paragraphs in the investigation report by referring to documentation provided over the course of the investigation which, in its view, supported its position that the applicant lacked the necessary OLQ's to be an officer in the CAF. Finally, the submissions of the CAF concluded as follows:

> In conclusion, the contention that former SLt Bradley's release was discriminatory on the ground of age is centred around the assumption that the CRB members considered the complainant's age as a factor prior to rendering a decision to recommend release. There is no evidence, however, to support this assumption. Related documentation clearly shows that the recommendation for release was based solely on former SLt Bradley's academic failure and his unsuitability for either OT or reversion to NCM status due to his lack of education/operational background, poor OLQs/leadership ability and a lack of suitable vacancies. Consequently, former SLt Bradley was considered to be no longer advantageously employable in the CF and he was released.

> It remains the position of the CF that former SLt Bradley's release was justified and was not based on any of the proscribed grounds of discrimination. It is considered that the complaint is without foundation and, therefore, it is recommended that the complaint be dismissed.

Upon receiving the comments of the parties, the investigator examined the submissions and determined that they did not contain any new material, and therefore did not need to be cross-disclosed to the other party. On January 11, 1996, the investigator communicated this information by memorandum to her supervisor, who concurred with this assessment.

On January 12, 1996, the investigator contacted the applicant by telephone and advised him that the CAF had made submissions. In particular, the investigator informed the applicant of a statement made by the CAF in its submissions that unlike the younger officer referred to, the applicant was not entitled to obligatory service because he was a Direct Entry Officer ("DEO"). This was discussed with the applicant, who stated that it was his understanding that he had a nine year service contract, which the CAF failed to honour, and he also stated he was not aware of the difference between being a DEO and having obligatory service.

The submissions of the parties, the December 7, 1995 investigation report, the original complaint and related materials were then forwarded to the Commission which, following its review, decided to dismiss the complaint. The parties were advised of the Commission's decision by letter dated February 19, 1996, which stated, in part, as follows:

> ...
> The Commission has decided that, considering all the circumstances of the complaint, no further proceedings are warranted. Accordingly, the file on this matter has now been closed.

By Originating Notice of Motion dated March 8, 1996, the applicant applied for judicial review of that decision. The application came on for hearing before me in Halifax on December 10, 1996, at which time, having

heard the submissions of the parties, and of the CHRC as intervenor, I reserved my decision. I now dismiss the application for the reasons which follow.

Issues:

The issues raised by the applicant may be described as follows:

1. Whether the CHRC committed a reviewable error in dismissing the applicant's complaint pursuant to s-s.44(3)(b)(ii) of the *Act*, by:

   (i) failing to give a broad interpretation to the *Act*, and in particular to consider properly ss. 2, 3, 7, 9 and 10 of the *Act;* or

   (ii) failing to give careful consideration to the applicant's age, marital status and family status as significant factors in the CAF's decision to release him.

   In my opinion, the applicant's general submission that the decision is contrary to law, in particular, the *Act*, and contrary to the evidence, is dependant on the establishment of either i) or ii) of the above grounds:

2. Whether the CHRC committed a reviewable error by failing to observe procedural fairness by:

   i) considering evidence from the CAF which, it is said, was misleading; or

   ii) failing to provide the applicant with a complete summary of all the evidence before it; and, in particular, failing to disclose to the applicant the submissions of the CAF, dated January 11, 1996, written in response to the investigator's final report, which submissions were before the CHRC.

Analysis:

1. Did the CHRC Commit a Reviewable Error In Applying the *Act* to the Evidence?

a) <u>*Standard of Review:*</u>

As noted, the applicant alleges that the CHRC, in reaching its decision, committed reviewable error by failing to properly interpret and apply the *Act*, and by failing to give proper consideration to the applicant's age, marital and family status as significant factors in the CAF's decision to release him. The principal ground for his complaint, as argued at the hearing, concerned his perception that he was discriminated against on the basis of his age, 43 years, when he was released from the CAF. His concerns about marital and family status arose because of his perception that while serving in the CAF, his marital and family status were adversely affected by decisions concerning his transfers and his course of studies, and also by the decision that he be released. No evidence was advanced regarding how those latter factors, marital and family status, became grounds for his release, and since his complaint to the CHRC concerned only alleged discrimination on the grounds of age, only that factor, age, is here considered further.

In my view, in order to determine whether the CHRC committed any reviewable error, it is necessary first to identify the appropriate standard of review to be applied to the CHRC's decision to dismiss the applicant's complaint pursuant to s-s.44(3)(b)(i) of the *Act.*

In *Canada (Attorney General)* v. *Mossop*,[2] the Supreme Court of Canada held that by reason of their expertise in the areas of fact-finding and adjudication concerning human rights complaints, human rights tribunals should be accorded considerable deference on questions of fact. On questions of fact, the court is thus required to defer to tribunals appointed under the *Act*, and must review their decisions on a standard of reasonability,

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2. *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at 585.

in light of the evidence before the Commission, rather than on the more stringent standard of correctness.

Since *Mossop,* the same deference has been applied by this Court to the discretionary power of the CHRC itself to dismiss complaints pursuant to s-s.44(3)(b)(i) of the *Act* on the basis that, considering all the circumstances, further proceedings are not warranted.

In *Slattery* v. *Canada (Human Rights Commission),* Nadon J. stated as follows:

> ... In the spirit of the Supreme Court of Canada in *Mossop*, deference must prevail over interventionism in so far as the CHRC deals with matters of fact-finding and adjudication, particularly with respect to matters over which the CHRC has been vested with such wide discretion, as in the case of the decision whether or not to dismiss a complaint pursuant to subsection 44(3).
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> In light of the fact that the power vested with the CHRC under subsection 44(3) is discretionary in nature, I must accept the following guiding statement of McIntyre J. in *Maple Lodge Farms Ltd.* v. *Government of Canada*, [1982] 2 S.C.R. 2, at pages 7-8:
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>> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. ...[3]

The principle which flows from this statement is that the basis upon which this Court may interfere with a decision by the CHRC to dismiss a complaint pursuant to s-s.44(3)(b)(i) of the *Act* is extremely limited. As stated by McIntyre J. in *Maple Lodge Farms, supra,* "[w]here the statutory discretion has been exercised in good faith and ... reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere".[4] The court may appropriately intervene, however, where a discretionary power has been exercised in a manner that is

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3. *Slattery* v. *Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (F.C.T.D.) at 609-610; affirmed (1996) 205 N.R. 383 (F.C.A.).

4. *Maple Lodge Farms Ltd.* v. *Government of Canada*, [1982] 2 S.C.R. 2 at page 8.

discriminatory, unfair, capricious or unreasonable.[5] In the context of the CHRC, it has been held that the CHRC is "master of its own procedure", and judicial review of an investigation or decision by it is only warranted where such investigation or decision is clearly deficient.[6]

In the present case, I do not accept the arguments advanced by the applicant that the Commission erred either in its interpretation and consideration of the *Act* and its relevant provisions, or by failing to consider properly the significance of the applicant's age as a factor in the CAF's decision. Evidence relied upon by the applicant to establish how the Commission erred in its application of the *Act* and its relevant statutory provisions, was a handwritten marginal note, "43 years of age" that was found on a copy of a notice produced by a Course Review Board, convened in Halifax, that examined his record in academic courses and whether his studies in marine engineering should continue. That notice was not before the Career Review Board, convened in Ottawa, that decided he should be released from the CAF. In addition, there was evidence that a young person, whose terms of service were differently based, was treated somewhat differently. Clearly, neither of these circumstances were ignored in the course of the CHRC investigation. Each was explained by the comments of the CAF to the investigator's report. In my opinion, it was not unreasonable for the Commission to conclude there was insufficient evidence to found a case of discrimination on the basis of age. The CHRC conclusion cannot be said to be deficient in light of all the evidence before the Commission,

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5. *Garnhum* v. *Canada (Canadian Human Rights Commission)*,[1996] F.C.J. No. 1254 (October 2, 1996) (F.C.T.D.).

6. See *Mossop, supra,* note 2, and *Slattery, supra,* note 3.

i) *Failure to Interpret and Consider the Act Properly*:

As noted above, the decision by the Commission to dismiss a complaint is a discretionary one, falling within the sphere of its specialized expertise of fact-finding in a human rights context. It is a determination of mixed fact and law, reached by the CHRC on the basis of a preliminary assessment of the evidence with a particular purpose, to determine whether there is a reasonable basis for proceeding to the next stage, the appointment of a tribunal, or the appointment of a conciliator.

While the CHRC is under an obligation to act in a manner which is consistent with its statutory mandate, it is not required, at a preliminary stage of investigation, to set out a detailed analysis and interpretation of the various provisions of the *Act* that may be relevant to the complaint. The applicant raises specific provisions which he submits the Commission ignored or applied improperly, i.e., ss. 2, 3, 7, 9 and 10. That conclusion is dependent upon his perception and his argument that the CAF decision that he be released was discriminatory, based on his age. That allegation was fully investigated and the investigator's report, together with submissions of the parties were before the Commission when it made its decision. The CHRC was not persuaded that the evidence of discrimination contrary to the *Act* warranted any further proceedings, and it essentially dismissed the applicant's complaint. I am not persuaded that it erred in assessing the evidence or in applying the *Act*.

ii) *Failure to Consider the Applicant's Personal Status:*

I also cannot accept the argument advanced by the applicant that the CHRC erred by failing to give careful consideration to the applicant's age, family and marital status as significant factors in the decision by the CAF to release him. The perceived significance of these factors was a matter which

the applicant was given an opportunity to put forth in his submissions on the investigator's report, which were placed before the Commission in reaching its decision. Moreover, the applicant has adduced no evidence as to how these factors were in any way overlooked or underestimated by the Commission in making its decision.

For these reasons, in my view, these two arguments put forth by the applicant must fail. As stated above, unless the Commission has failed to act in good faith, has ignored relevant considerations, or acted for an improper purpose, this Court is not entitled to interfere. In this case, I am not persuaded, and no evidence is adduced to conclude that the manner in which the investigation was conducted, or the CHRC exercised its discretion, was unfair, capricious or unreasonable.

2) Procedural Fairness:

The applicant also submits that the CHRC breached procedural fairness in the manner in which it reached its decision to dismiss his complaint. In particular, the applicant alleges that the CHRC violated procedural fairness by: (i) considering evidence from the CAF which was misleading; (ii) failing to provide him with a complete summary of all the evidence; and, in particular, (iii) by failing to provide him with the submissions of the CAF, dated January 11, 1996, made in response to the final investigation report.

It is now a well-established principle that the Commission is subject to the rules of procedural fairness. The content of the duty of fairness in the context of a decision by the Commission to dismiss a complaint has been examined in a number of cases, most notably by the Supreme Court of

Canada in *Syndicat des émployes de production du Québec et de l'Acadie* v. *Canada (C.H.R.C.)*[7], ("*S.E.P.Q.A*").

In *S.E.P.Q.A.*, the CHRC decided to dismiss the complaint filed by the applicant as "unsubstantiated" pursuant to s-s.36(3) [the predecessor to s-s.44(3)(b)(i)] of the *Act*. Writing for the Court, Sopinka J. characterized the decision by the CHRC to dismiss the complaint as an administrative one, reached by the CHRC on the basis of a reasonable and preliminary assessment of the evidence:

> 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. It was not intended that there be a formal hearing preliminary to the decision as to whether to appoint a tribunal.[8]

With respect to the duty of fairness owed by the CHRC in deciding to dismiss a complaint, Sopinka J. held that given the nature of the Commission's function and in light of the relevant statutory provisions of the *Act*, "it was not intended that the Commission comply with the formal rules of natural justice", however, it is required to abide by the rules of procedural fairness.[9] In defining the content of procedural fairness owed by the Commission, Sopinka J. adopted the following statement of Lord Denning, M.R., in *Selvarajan* v. *Race Relations Board*[10] in which his Lordship stated as follows:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion... . In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings, or deprived of remedies or

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7. [1989] 2 S.C.R. 879.

8. *Ibid.*, at 899.

9. *Ibid.*

10. [1976] 1 All E.R. 12 (C.A.).

> redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.[11]

In *S.E.P.Q.A.,* Sopinka J. went on to apply these principles to the case before him, stating as follows:

> ... I agree with the reasons of Marceau J. that the Commission had a duty to inform the parties of the substance of the evidence obtained by the investigator and which was put before the Commission. Furthermore, it was incumbent on the Commission to give the parties the opportunity to respond to this evidence and make all relevant representations in relation thereto.
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> The Commission was entitled to consider the investigator's report, such other underlying material as it, in its discretion, considered necessary and the representations of the parties. The Commission was then obliged to make its own decision based on this information.[12]

The content of procedural fairness where the CHRC decides to dismiss a complaint has more recently been examined in the context of the current provision, s-s.44(3)(b)(i) of the *Act*, by the Federal Court of Appeal in *Slattery* v. *Canada (Human Rights Commission)*.[13] In that case, the Commission had dismissed the applicant's complaints on the basis that, pursuant to s-s.44(3)(b)(i) of the *Act*, the allegations were unfounded, and further inquiry was not warranted. The applicant sought judicial review of this decision, a matter heard by my colleague Mr. Justice Nadon, who determined that the rules of procedural fairness had not been violated. The applicant had been informed of the substance of the evidence gathered, and had been given an opportunity to respond to it. Furthermore, Nadon J. held that the

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11. *Ibid.*, at 19, as quoted in *S.E.P.Q.A.*, *supra,* note 7 at 899.

12. *Supra,* note 7 at 902.

13. *Supra,* note 3. I note that the discretion presently accorded to the CHRC to dismiss a complaint under s-s.44(3)(b)(i), is cast even more broadly than the former provision, s-s.36(3) which was considered in *S.E.P.Q.A.*.

investigation was not unfair in that it had been conducted in a manner that was both neutral and thorough.

The complainant appealed that decision to the Federal Court of Appeal, which upheld the decision of Nadon J. that there had been no breach of procedural fairness. Writing on behalf of the Court, Hugessen J.A., stated as follows:

> We are all of the view that the Commission fully complied with its duty of fairness to the complainant when it gave her the investigator's report, provided her with a full opportunity to respond to it, and considered that response before reaching its decision. The discretion of the Commission to dismiss a complaint pursuant to subparagraph 44(3)(b)(i) is cast in terms even broader than those which were considered by the Supreme Court of Canada in [*S.E.P.Q.A.*] ...
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> ...
>
> In our view, the defects of which the complainant alleges in the preparation of the investigator's report could not serve to vitiate the Commission's decision as long as these requirements [set out in *S.E.P.Q.A.*] were met.[14]

Since the *S.E.P.Q.A.* decision, the duty of fairness owed by the CHRC in dismissing a complaint under s-s.44(3)(b)(i) has been interpreted by this Court to require that the investigation upon which the decision is based be both neutral and thorough. This evolution in the jurisprudence was described in *Miller* v. *Canada (Canadian Human Rights Commission)*[15], in which Mr. Justice Dubé stated as follows:

> The *SEPQA* decision has been followed and expanded upon by several Federal Court decisions. These decisions are to the effect that procedural fairness requires that the Commission have an adequate and fair basis upon which to evaluate whether there was sufficient evidence to warrant the appointment of a Tribunal. The investigations conducted by the investigator prior to the decision must satisfy at least two conditions: neutrality and thoroughness. In other words, the investigation must be conducted in a manner which cannot be characterized as biased or unfair and the investigation must be thorough in the sense that it must be mindful of the various interests of the parties involved. There is no obligation placed upon the investigator to interview each and every person suggested by the parties. The investigator's report need not address each and every alleged incident of

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14. *Supra,* note 3 at 381.

15. (1996) 112 F.T.R. 195.

> discrimination, specially where the parties will have an opportunity to fill gaps by way of response.[16] [footnotes omitted from original]

His Lordship then proceeded to characterize the duty of fairness owed by the CHRC in dismissing a complaint pursuant to s-s. 44(3)(b)(i) as follows:

> The rule of procedural fairness requires that a complainant know the substance of the case against him or her. The complainant is not entitled to every detail but he should be informed of the broad grounds of the case. The complainant is not entitled to the investigator's notes of interviews or the statements obtained from persons interviewed. He must be informed of the substance of the case and he has every right to expect that the investigator's report fully and fairly summarize the evidence obtained in the course of his investigation. He must be given the opportunity to respond. He is also entitled to the disclosure of an opposing party's comments when those comments contain facts which differ from those set out in the investigative report. In order to constitute a reviewable error, the complainant must demonstrate that the information was wrongly withheld and that such information is fundamental to the outcome of the case.[17] [footnotes omitted from original]

In the present case, I am not persuaded that the CHRC has violated procedural fairness as alleged by the applicant.

i) <u>*Considering Misleading Evidence*</u>

I do not accept the applicant's argument that the Commission erred by considering evidence from the CAF which was misleading. In the present case, while there appears to have been some initial confusion on the part of the CAF as to the employment status of the younger officer referred to by the applicant, there is no evidence to suggest that the Commission relied on this earlier, and now incorrect, information in making its decision. This error the applicant brought to the attention of the investigator, who investigated the issue and ensured it was clarified before the matter went before the Commission for consideration. In fact, it was due to this information from the

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16. *Ibid.,* at 201.

17. *Supra,* at 203.

applicant that the investigation was re-opened, and further information sought from the CAF, on two occasions.

While this initially incorrect information may have been contained in the early submissions of the CAF, it had long since been clarified by the investigator by the time the December 7, 1995 investigation report was finally submitted to Commission for consideration. The investigator was vigilant in returning to the CAF to seek more information on this and other new issues as they arose. In my opinion, in these circumstances, it is simply not a tenable argument to suggest that despite the fact that the investigation was re-opened specifically to examine this new information, the CHRC in any way based its decision on earlier outdated information. In my view, such an allegation is untenable. It is tantamount to suggesting that the CHRC disregarded the final investigation report, which clearly it did not do.

Further, the applicant had an opportunity to address any "misleading" information which may have been placed before the Commission and to clarify the matter, by making written submissions in response.[18] In my view, while there were some inadequacies in the evidence originally provided by the CAF to the investigator, the applicant has failed to point to any "misleading evidence" which was contained in the final investigation report of December 7, 1995, the only report that was submitted to the CHRC. As a result, I find there is no basis upon which to suggest there was any misleading evidence upon which the Commission could be said to have relied in making its decision.

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18. *Slattery, supra,* note 3.

ii) *Failure to Provide Summary of All Evidence:*

I also reject the argument put forth by the applicant that the CHRC breached procedural fairness by failing to provide him with a complete summary of all the evidence before it. As noted in the jurisprudence referred to above, procedural fairness does not require that the CHRC systematically disclose to one party all the comments, in detail, that it receives from the other party.[19] It does require, however, that the applicant be fully apprised of the substance of the case relating to him and be given a fair opportunity to respond to it. In my opinion, this duty was satisfied by the CHRC in the present case. The applicant was provided with a copy of the December 7, 1995 investigation report. As he had been with the earlier reports which were not provided to the CHRC, he was given a full opportunity to respond to that final report, and he did so, by filing written submissions, dated December 28, 1995. These submissions, along with the final investigation report, and the CAF's submissions were before the Commission when it made its decision.

It is true that the CHRC did not accept the investigator's recommendation, that is, that a conciliator be appointed, but the Commission is not bound by any such recommendation. The applicant was clearly advised of this when the investigation report was sent to him for comment. The Commission's decision is not in error because it chose not to follow the investigator's recommendation.

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19. See *Mercier* v. *Canada (Human Rights Commission* [1994], 3 F.C. 3, 167 N.R. 241 (F.C.A.).

iii) *Cross-Disclosure of Final Submissions:*

Much of the argument at the hearing concerned the issue of "cross-disclosure", that is, whether the Commission breached the rules of procedural fairness by not disclosing to the applicant the letter of January 11, 1996 that constituted the submissions of the CAF concerning the investigator's final report, on the grounds that it disclosed no new evidence. It is to this final argument that I now turn.

With respect to the issue of the disclosure, in general, as stated above, the jurisprudence has held that the rules of procedural fairness do not require that the CHRC systematically disclose to one party the detailed comments it receives from the other, yet disclosure of the substance of those comments is required when those comments introduce new facts which differ from those contained in the investigation report. This issue of cross-disclosure was examined by the Federal Court of Appeal in *Mercier* v. *Canada (Human Rights Commission)*.[20]

In that case, the complainant had filed a complaint with the CHRC alleging that while employed with the Canadian Penitentiary Service (the "Service") she had been discriminated against on the basis of sex and mental disability. Upon completion of the investigation report, the investigator recommended that a conciliator be appointed, and invited the parties to submit any comments within thirty days. The complainant replied, by making written submissions within the specified time frame.

Following expiration of the thirty day period, however, and without informing the applicant, the Service filed detailed comments in which it

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20. *Ibid.*, at 14 [F.C.].

endeavoured to refute some of the findings of the investigation report and to question the credibility of the applicant, on the basis of facts which, in some cases, were not included in the report.[21] These comments were not disclosed to the applicant. The matter was then referred to the Commission, which decided to dismiss the complaint pursuant to s-s.44(3)(b)(i) of the *Act* on the grounds that in the circumstances, further inquiry was not warranted. Among the arguments advanced by the applicant on judicial review was that the Commission had breached procedural fairness by not disclosing the comments of the Service.

In *Mercier*, Mr. Justice Décary, writing for the Court, enunciated the test for cross-disclosure as follows:

> In the case at bar, the appellant certainly was never in a position to foresee, *a fortiori* to counter, the decision the Commission was going to make, nor to know or even suspect the grounds on which it would decide not to follow its investigator's recommendation. The investigation report was in fact favourable to her. The Service's comments were filed without her knowledge and outside the time limit which the Commission had imposed and described as mandatory. These comments were much more than argument based on the facts set out by the investigator in his report; on the contrary, they were replete with facts that did not appear in the file that had until then been before the Commission, and went so far as to attack the appellant's credibility.
> ...
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> I am not saying that the rules of procedural fairness require that the Commission systematically disclose to one party the comments it receives from the other; I am saying that they require this when those comments contain facts that differ from the facts set out in the investigation report which the adverse party would have been entitled to try to rebut had it known about them at the stage of investigation, properly speaking. ...[22]

This test was recently applied by this Court in *Madsen* v. *Canada (Attorney General)*.[23] In *Madsen*, the applicant alleged the Commission had violated procedural fairness by failing to disclose to him the submissions of the adverse party (CEIC) provided in response to the investigation report.

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21. *Ibid.*, at 8.

22. *Ibid.*, at 13-14.

23. (1996), 106 F.T.R. 181.

These submissions, the applicant alleged, contained at least three new allegations not contained in the record, and in at least two instances, he submitted, the allegations were false and without factual basis. Mr. Justice Heald, after referring to the test for cross-disclosure formulated by Décary J.A. in *Mercier*, framed the issue as follows:

> Applying the *Mercier* test to the facts in the case at bar, I am of the view that if either party's second submissions contained facts that differed from those set out in the investigation report, conciliation report or earlier submissions, then the rules of procedural fairness may have required the CHRC to cross-disclose the second set of submissions and to permit the parties to file a third set of submissions. However, I must also express my agreement with the Federal Court of Appeal, that the rules of procedural fairness do not require the CHRC to "systematically disclose to one party the comments it receives from the other." (Ibid at 253-254). Otherwise, the submissions/reply process could conceivably continue *ad infinitum*.[24]

In *Madsen,* after reviewing the record, Heald J. held that the applicant had been denied procedural fairness since the submissions of the CEIC did in fact raise three new factual issues as well as alleged false information, not contained in the investigation report or other materials, regarding which the applicant should have been given an opportunity to respond. His Lordship concluded:

> I am of the view that the rules of procedural fairness, in the circumstances of this case, required the CHRC to disclose the CEIC's May 9, 1994, submissions to the applicant, and to have the allowed him an opportunity to respond. The applicant has met the test in *Mercier,* in establishing that the May 9, 1994, submissions contained factual allegations that differed from the facts set out in the investigation report, conciliation report or earlier submissions. I reject the intervenor's submission that the "new facts" were irrelevant to the CHRC's decision. They directly impacted on the applicant's credibility, thus undermining the validity of his submissions as a whole. The applicant ought to have been given an opportunity to refute these allegations, and a denial of this opportunity was a denial of procedural fairness.[25]

As noted above, the Commission is only required to cross-disclose submissions when they present new facts which differ from those set out in the investigation report or other materials upon which those submissions are based. In the present case, having reviewed the correspondence and the

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24. *Ibid.,* at 190.

25. *Ibid.,* at 192.

submissions of both parties over the course of the investigation of this complaint, I am not persuaded that the January 11, 1996 submissions of the CAF raise any new issues or facts to which, the applicant should have been entitled to respond or rebut prior to consideration by the CHRC of the investigator's report and the comments of the parties.

In my view, the January 11, 1996 submissions of the CAF, unlike the circumstances in *Mercier and Madsen,* raise no new facts not already referred to in the file, nor do they seek to attack the applicant's credibility. Rather, these submissions merely consist of clarification of the CAF's views, known from the investigation report, and responses in argument to the facts outlined in the investigation report. As stated by Décary J.A. in *Mercier*, these are not facts, but are simply "argument based on the facts set out in the investigators report".

I am not persuaded in this case that the CHRC committed any reviewable error or breached procedural fairness in dismissing the applicant's complaint pursuant to s-s.44(3)(b)(i) of the *Act.* Under that provision, the CHRC is granted a broad discretionary power, in the exercise of which the Commission, in light of its specialized expertise, is entitled to considerable deference by the courts. This Court may not intervene merely because it might have exercised the discretion differently.

At the conclusion of the hearing the applicant asked for costs in this matter, and having reserved judgment, I invited him and counsel for the respondent to make written representations, bearing in mind Rule 1618 of the *Federal Court Rules* which provides:

> No costs shall be payable in respect of an application for judicial review unless the Court, for special reasons, so orders.

The jurisprudence is clear. As hearing judge I would have to find special reasons to award costs in this proceeding.[26] A party's financial difficulties are not special reasons.[27] A person appearing as their own representative at hearings is not entitled to costs related to solicitors' fees and disbursements.

In this case, the applicant claims costs on principles illustrated by cases that did not concern matters of judicial review to which, in this Court, Rule 1618 applies. The major portion of costs here claimed is for expenses for legal advice, claimed *in toto* as if on the basis of solicitor and client costs. Those are not costs recoverable in an ordinary action by a person appearing on his or her own behalf. There is no case made out of special reasons that would here support an award of costs. In accord with Rule 1618, no costs are awarded.

On the basis of the reasons stated above, the application for judicial review is dismissed, as is the applicant's request for costs.

JUDGE

OTTAWA, Ontario
July 29, 1997

26. *Everett* v. *Canada (Minister of Fisheries and Oceans)* (1994), 169 N.R. 100, 25 Admin. L.R. (2d) 112 (F.C.A.).

27. *Canada* v. *Thwaites,* [1984] 3 F.C. 38, 21 C.H.R.R. D/224 (F.C.T.D.).