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WORKPLACE INVESTIGATIONS:
Guidance to the Canadian Human Rights Commission from the Federal Court

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Introduction

The goal of this paper is to discuss guidance from the Federal Court to the Canadian Human Rights Commission (the "Commission" or the "CHRC") with respect to how it may take into consideration a workplace investigation report conducted by or at the request of an employer ("internal investigation report").

This paper is set out in four parts. The first briefly outlines the statutory duty of the Commission to receive and deal with complaints of discrimination. The second part discusses how an internal workplace investigation report factors into the Commission's decision to exercise its discretion to decline to deal with a complaint. The third part lays out the authority to use an internal workplace investigation report in the course of the Commission's investigation into the complaint. It further details the guidelines for doing so in keeping with its duty to conduct its investigations in a procedurally fair manner. The fourth part concludes with a summary list of suggested considerations to be taken into account by administrative complaints-handling bodies when considering an internal investigation report conducted into an allegation of discrimination in the workplace.

I. Duty of the Canadian Human Rights Commission to Accept Complaints

The *Canadian Human Rights Act* (the *Act*) was passed by Parliament in 1977 to give effect, "*to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices.*"[1]

The Canadian Human Rights Commission is established to administer this *Act*[2] and, among other duties, to deal with any complaints regarding discriminatory practices filed with it subject to

[1] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 2.
[2] *Ibid.* at s. 26(1), s. 27(1).

statutorily enumerated exceptions.[3] At any stage after the filing of a complaint, the Commission may request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.[4] Commission members do not determine whether discrimination has actually occurred, but only if there is sufficient evidence before them to justify proceeding to the next stage. In determining whether or not to refer a complaint for further inquiry, the Commission members take into consideration all of the circumstances of the complaint, including an internal workplace investigation report where this exists.

There are two points in the Commission's dispute resolution process where it may factor an internal workplace investigation report into its decision: (i) at the pre-investigation stage, where it must make a determination on whether it is required to investigate the complaint or not, depending on whether the allegations of the complaint have been sufficiently addressed; and (ii) where it decides to proceed with an investigation of the complaint, it may rely on the evidence produced in the internal investigation report.

II. CHRC's Discretion to Refuse to Deal with Complaints Where Allegations Have Been Addressed Through Alternate Redress

Section 41(1)(d) of the *Act* gives the Commission the discretion not to deal with a complaint when it is plain and obvious[5] that the complaint is trivial, frivolous, vexatious or made in bad faith.[6] There are two Federal Court decisions which have clarified the Commission's role in exercising its discretion to refuse to deal with a complaint under this section solely on the basis that the allegations of discrimination have been addressed through another process.

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[3] *Ibid.* at s. 40, s. 40.1, s. 41.
[4] *Ibid.* at s. 49(1).
[5] *Hicks v. Canada (A.G.),* 2008 F.C.J No. 1333 at para. 22.
[6] The standard of review on judicial review would be reasonableness. *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190.

In *Boudreault v. Canada (Attorney General)*[7], the Federal Court decided that the Commission cannot refuse to deal with a complaint on the basis that it has already been dealt with by another process. Here, the Court reviewed a decision of the Commission not to deal with a complaint that was the subject of a decision of an appeal board established under the [now repealed] *Public Service Employment Act*.[8] The Court determined that the Commission must review the evidence itself and make its own decision as to the proper disposition of the case.[9] However, the evidence gathered through the other process, including documents and witness testimony, can be used by the Commission in arriving at its decision.

On the other hand, in *Canada Post Corp. v. Barette*[10], the Federal Court of Appeal reviewed a decision relating to an individual who had launched both a grievance and a human rights complaint against his employer. Upon receiving an unfavourable arbitration decision, the individual filed a human rights complaint, which prompted an objection from the employer on the grounds that the matter had been resolved in another forum. The Court decided that the Commission must, at least, turn its mind to the decision of the arbitrator to examine whether, in light of that decision and of the findings of fact and credibility made by the arbitrator, the complaint may not be such as to attract the application of s. 41(1)(d) of the *Act*.[11]

Thus while the Commission cannot rely on the decision of another process to dismiss a complaint but must make up its own mind (*Boudreault*), it also has the responsibility to examine whether it is in the public interest to deal with the complaint before carrying out its own investigation into the matter (*Barette*).[12]

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[7] *Boudreault v. Canada (Attorney General)*, [1995] F.C.J. No. 1055.
[8] *Public Service Employment Act*, R.S.C. 1985, c. P-33, s. 31.
[9] *Ibid* at para. 17.
[10] *Canada Post Corp. v. Barette*, [2000] 4 F.C. 145.
[11] *Ibid* at para. 25.
[12] The Supreme Court of Canada has recently given guidance on the exercise of discretion of a human rights body in relation to a matter that has already been heard by another administrative body with concurrent jurisdiction over human rights. *British Columbia Workers Compensation Board v. Figliola*, 2011 SCC 52. Although themes of judicial economy and administrative efficiency were addressed in *Figliola*, the decision is not directly relevant to the subject of human rights bodies' consideration of workplace investigations as part of a human rights investigation.

A complaint may be considered trivial in circumstances including where pursuing the matter would not constitute a justifiable expenditure of public resources. To make this determination, the Commission may consider a workplace investigation report, among other relevant documentation, and by applying the following factors:

- Has the respondent already addressed the complainant's concerns?
- Have substantial and comprehensive remedies already been provided by the respondent?
- Would pursuing the complaint constitute a waste of public resources?

The Commission will also consider whether the complaint is made in bad faith within the meaning of s. 41(1)(d). Factors that will be looked at in making this determination include:

- Have the issues in the complaint been the subject of another body's decision? If so:
    - What is the nature of the alternate redress mechanism that was used, including was there a hearing on the issues, was the complainant permitted to present his or her case, was the decision-maker independent?
    - What did the decision-maker decide?
    - Did the decision address all of the human rights issues raised in the complaint?
    - If the complaint was successful (or partially successful) under the alternate redress procedure, what remedies were awarded?

Consideration of Workplace Investigations in a Section 41(1)(d) Analysis

The Commission may determine, based on the outcome of the assessment applying the above factors, whether a complaint which has previously been the subject of a workplace investigation requires investigation by the Commission or not. The decision of the Federal Court of Canada in *Chan v. Canada (Attorney General)* serves to illustrate a circumstance where the Commission decided not to deal with the complaint pursuant to s.41(1)(d) of the *Act*, "because an independent investigator had already conducted a thorough investigation of the Appellant's allegations"[13],

[13]*Chan v. Canada (Attorney General)*, [2010] F.C.J. No. 1530 at para. 1.

and therefore "it would not be in the public interest, or in the interest of administrative efficiency for the Commission to now deal with this complaint following the other process."[14]

In this case, Ms. Chan filed a harassment complaint against Elections Canada, her employer at the material time of her complaint.[15] Elections Canada commissioned an independent investigation which concluded that all of Ms. Chan's allegations were unfounded. Ms. Chan later filed a complaint with the Canadian Human Rights Commission alleging harassment and discrimination on the ground of race.[16] The Commission decided not to deal with Ms. Chan's complaint for the following reasons:

> *"a. The Complaint has already been considered through alternate redress;*
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> *b. The Elections Canada internal harassment complaint process allowed for an investigation by an independent, external investigator, who appears to have conducted his investigation in a similar way that a Commission investigator would;*
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> *c. The independent investigator (i.e. Textus) reviewed documentary evidence, spoke to relevant witnesses (many of whom the complainant suggested) and provided the parties with the opportunity to comment on a draft report outlining its findings;*
>
> *d. There is nothing to suggest that the internal harassment investigation omitted evidence or information that the Commission should now consider."*[17]

On judicial review of the Commission's decision, the Court considered whether it was reasonable for the Commission to rely on the workplace investigation report in the way it did.[18] As there was no evidence placed before it that the workplace investigation and report lacked neutrality or objectivity, the Court could not say that the Commission placed unreasonable reliance on it.[19]

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[14] *Ibid.* at para. 12.
[15] *Ibid.* at para. 6.
[16] *Ibid.* at para. 7.
[17] *Ibid.* at para. 32.
[18] *Ibid.* at para. 39.
[19] *Ibid.* at para. 40.

Furthermore, the Court considered to what extent the Commission could rely on the internal investigation report as the basis for its decision to dismiss a complaint. It ruled that where the Commission determines the complaint had been dealt with so as not to require further investigation by the Commission, it must make up its own mind to do so after having first reviewed the process and findings of the workplace investigation together with the complainant's comments on the report.[20]

In summary, the Commission may exercise its discretion to refuse to deal with a complaint which has previously been the subject of a workplace investigation. It has the discretion not to investigate a complaint where an independent investigator had already conducted a thorough investigation of the allegations of discrimination. However, the Commission has the obligation to review the process and findings of the internal investigation together with the complainant's comments on the report, before it decides not to deal with the complaint.

III. Consideration of Workplace Investigations in the CHRC Investigation Process

The term "investigation" under the *Canadian Human Rights Act* refers to the stage of the complaint process in which evidence is gathered and analyzed to determine the merits of a complaint of discrimination, for the purposes of making a recommendation to the members of the Commission on the disposition of a complaint.[21] That is, it may decide whether, having regard to all the circumstances of the complaint, an inquiry is warranted.

The nature of the evidence obtained through the investigation may include the review of a workplace investigation report. The authority to rely on an internal investigation report as a factor in arriving at the Commission investigators' conclusions has been confirmed by the Federal Court. The *extent* to which Commission investigators may rely on internal investigation reports has been the subject of judicial scrutiny.

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[20] *Ibid.* at para. 50.
[21] *Canadian Human Rights Act, supra, s.43, 44, 49.*

Authority to Consider Workplace Investigation Reports

The Commission's discretion to consider workplace investigation reports was first discussed in *Singh v. Canada (Attorney General).*[22] In this case, Human Resources Development Canada (HRDC) conducted an internal investigation into the complaint made by its employee, Ms. Singh, of discriminatory comments made by co-workers. HRDC concluded Ms. Singh's allegations were unfounded.[23] The Public Service Commission (PSC) conducted an investigation and came to the same conclusion in its report.[24] HRDC later refused to renew Ms. Singh's contract, citing unsatisfactory work performance as the reason for doing so. Ms. Singh filed a complaint with the Canadian Human Rights Commission alleging her employer's refusal to continue to employ her was a pretext to cover up the fact that her contract was not renewed for discriminatory reasons.[25] In addition she alleged the discriminatory remarks made by other employees created a toxic work environment. The Commission conducted its investigation into the complaint, relying heavily on the findings and statements made in the PSC report.[26] Ms. Singh's complaint was dismissed upon the Commission's determination that the evidence did not support her allegations of discrimination.

Upon application for judicial review of this decision, Ms. Singh challenged the Commission's reliance on the PSC report, arguing it lacked thoroughness and jurisdiction. The Federal Court agreed the Commission has discretion to consider such reports as that produced by the PSC and there is no requirement to revisit issues fully dealt with in such a report. Regarding the issue of jurisdiction, the Court ruled that, "it is an error of law for the Commission's investigator to base his conclusions on that of another board that has already conducted an inquiry involving the same parties and facts."[27] However, this was not found to be the case before the Court here as

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[22]*Singh v. Canada (Attorney General),* [2001] F.C.J. No. 367.
[23]*Ibid.* at para. 4.
[24]*Ibid.* at para. 5.
[25]*Ibid.* at para. 7.
[26]*Ibid.* at para. 16.
[27]*Singh, supra* at para. 17.

"the investigator relied only on certain evidence before the PSC on matters within the jurisdiction of the PSC and did not rely on the PSC's conclusions."[28]

Extent of Reliance on Workplace Investigation Reports

The Federal Court considered the extent to which a Commission investigator can rely on a workplace investigation report in *Tomar v. Toronto Dominion Bank.*[29] In this case, the complainant was dismissed from his position as financial advisor with the bank for cause as an internal investigation had revealed, "he had breached the bank's Code of Conduct and Ethics, acted contrary to the bank's interest and failed to follow the most basic due diligence requirements."[30] Mr. Tomar filed a complaint with the Canadian Human Rights Commission alleging discrimination as the reason for his dismissal. The Commission dismissed the complaint on the recommendation of the Commission investigator not to refer the matter to the Canadian Human Rights Tribunal.

Upon judicial review of the Commission decision, the Federal Court considered whether the Commission investigator relied too heavily on the evidence of the employer, including the workplace investigation report and the processes used by the bank during its internal investigations. The Court stated its satisfaction that as the investigation was conducted in a fair and even-handed manner, resulting in a neutral and thorough report, the Commission's reliance on the internal workplace investigation report was not misplaced in this case.[31]

Duty to Verify the Accuracy of Workplace Investigation Reports

In meeting its duty to conduct a thorough investigation, the Commission is required to consider the degree of accuracy of any internal workplace investigation report, and whether it reflects the statements of witnesses for both parties, prior to relying on it as evidence to be taken into

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[28]*Singh, supra* at para. 17. Ultimately, the application for judicial review was allowed as the Court determined that the investigator's report contained a fundamental omission – it did not inquire into whether or not there was an aspect of discrimination involved in the failure to renew Ms. Singh's contract (*Singh, supra* at para. 24).
[29]*Tomar v. Toronto Dominion Bank*, [2009] F.C.J. No. 782 at para. 32.
[30]*Ibid.* at para. 10.
[31]*Ibid.* at paras. 37, 46.

consideration in establishing the complaint. This duty was established in *Coward v. Canada (Attorney General).*[32] In this case, the Canadian Armed Forces (CAF) conducted an internal investigation into the complaint of Mr. Coward, a former sergeant, who alleged the CAF discriminated against him for failing to provide him with the necessary medical treatment because of his colour. The report concluded the allegations were unfounded.[33] He then filed a complaint with the Canadian Human Rights Commission. In the course of the Commission's investigation into the complaint the same witnesses were contacted as referred to in CAF's internal report.[34] The Commission accepted the Investigator's recommendation to dismiss the complaint.

Upon judicial review of its decision, the Federal Court considered whether the Commission breached procedural fairness by relying on the evidence collected by CAF, itself.[35] The Court determined that although the Commission investigation report referred to the statements put forth in CAF's own internal report, this does not suggest that the Commission did not investigate the allegations in a fair and thorough manner.[36] This is because the Commission investigator considered the evidence presented on behalf of both the parties, and in the course of doing so, verified that the CAF report accurately recorded the statements of witnesses.

Undue Reliance on Workplace Investigation Reports

The decision of *Pezzente v. Rogers Communications Inc.*[37], is an example where the Commission was found to have breached procedural fairness in placing an undue reliance on a workplace investigation report. In this case, Rogers conducted an internal investigation into the complaint of Ms. Pezzente, a former employee, about the sexual harassment she was experiencing in the workplace.[38] The report concluded there was no harassment. Ms. Pezzente thereafter filed a

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[32]*Coward v. Canada (Attorney General)*, [1997] F.C.J. No. 1101.
[33]*Ibid.* at para. 23.
[34]*Ibid.* at para. 26.
[35]*Ibid.* at para. 34.
[36]*Ibid.* at para. 50.
[37]*Pezzente v. Rogers Communications Inc.*, [2005] F.C.J. No. 1209.
[38]*Ibid.* at para. 3.

complaint with the Canadian Human Rights Commission alleging sexual discrimination against her employer.[39] Her complaint was investigated and subsequently dismissed by the Commission.

The complainant sought judicial review of this decision, arguing the Commission's investigation of her complaint breached procedural fairness for failing to meet the test of thoroughness.[40] The Federal Court agreed and listed as a factor in its decision, the Commission's action of relying solely on the internal investigation and in adopting Rogers' conclusion as its own without having conducted a diligent investigation of the complainant's allegations.[41] This included the investigator's failure to interview witnesses who may have corroborated the claim of discrimination.[42]

Similarly, in *Sanderson v. Canada (Attorney General),*[43] the Federal Court found the Commission investigator had placed undue reliance on the internal workplace investigation report for having limited the scope of the Commission investigation to that which was the subject of the internal investigation. In this case, the Department of Indian and Northern Affairs (DIAND) appointed an investigator to address Ms. Sanderson's grievance in which she alleged harassment in the workplace on the basis of her gender.[44] The internal investigation report concluded she had been treated in a sexually discriminatory manner.[45] Shortly thereafter Ms. Sanderson applied for another position with DIAND but was unsuccessful and soon resigned from her position.[46]

Ms. Sanderson filed a complaint with the Canadian Human Rights Commission alleging she had been adversely discriminated against in the workplace based upon her national or ethnic origin,

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[39]*Ibid.* at para. 5.
[40]*Ibid.* at para. 22.
[41]*Ibid.* at para. 18.
[42]*Ibid.* at para. 19.
[43]*Sanderson v. Canada (Attorney General),* [2006] F.C.J. No. 557.
[44]*Ibid.* at para 14.
[45]*Ibid.* at para 15.
[46]*Ibid.* at para 19, 20, 21.

her race and sex and that DIAND had failed to provide her with a harassment-free workplace.[47] An investigation carried out by the Commission concluded that she had been harassed and discriminated in the workplace on the basis of her sex.[48] However, as the Commission investigator found that following receipt of the internal investigation report DIAND took appropriate steps to remedy the situation, and because the investigator did not find evidence to support Ms. Sanderson's other allegations, the Commission investigator recommended her complaint be dismissed.[49]

In her application for judicial review of the Commission decision, Ms. Sanderson argued that the investigator erred in placing undue weight on a report prepared by another investigator in connection to a grievance she filed.[50] The Court agreed and found that Ms. Sanderson was denied procedural fairness on the basis that the Commission's investigation was not sufficiently thorough for two reasons[51]: (i) the Commission investigator failed to interview key witnesses and instead relied on their testimony given during the internal investigation of Ms. Sanderson's grievance;[52] and, (ii) the Commission investigator confined his analysis of Ms. Sanderson's human rights complaint to what was alleged in her grievance and therefore disregarded the investigation of her claim of racial or ethnic discrimination.[53]

IV. Conclusion

The discussion above has laid out guidance from the Federal Court with respect to how an internal workplace investigation report conducted into an allegation of discrimination may factor into the Commission's decision to investigate a complaint or not; and the extent to which the evidence produced in the internal investigation report may be relied upon by the Commission's investigator when an investigation is undertaken.

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[47] *Ibid.* at para 22.
[48] *Ibid.* at para 24.
[49] *Ibid.* at paras 27, 28.
[50] *Ibid.* at para 3.
[51] *Ibid.* at para 71.
[52] *Ibid.* at para 55.
[53] *Ibid.* at para 63.

By way of summary, a list of suggested considerations to be taken into account by administrative complaints-handling bodies, relying on the Federal Court's guidance to the CHRC as an example in such circumstances, follows:

In exercising its discretion to deal with the complaint

Administrative complaints-handling bodies:

- May exercise their discretion to refuse to deal with a complaint which has previously been the subject of a workplace investigation and an independent investigator has already conducted a thorough investigation of the allegations of discrimination.
- Must make up their own mind to do so after having first reviewed the process and findings of the workplace investigation together with the complainant's comments on the report.

In relying on the evidence produced by the internal investigation

Investigators of administrative complaints-handling bodies:

- Have the authority to rely on an internal investigation report conducted in a fair and even-handed manner, resulting in a neutral and thorough report, as a factor in arriving at their conclusions.
- May refuse to rely on an internal investigation report if, for example, the above conditions are not met.
- Are not required to revisit issues fully dealt with in an internal investigation report.
- Should not base their conclusions on the internal investigation report without having undertaken a diligent investigation of the complainant's allegations, including interviewing witnesses who may have corroborated the claim of discrimination.
- Are required to consider the degree of accuracy of any internal workplace investigation report prior to relying on it as evidence to be taken into consideration in establishing the complaint.
- Must not confine their analysis of the human rights complaint to only what was alleged in the complainant's internal investigation report if there are other allegations.