

e-document	ID -	
F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
12-DEC-2023		
Robert Mvondo		
WPG	-1-	

Court File No. T-2625-23

FEDERAL COURT

CLIFTON STARR

Applicant

and

**THE CANADIAN HUMAN RIGHTS TRIBUNAL,
BMO FINANCIAL GROUP,
and THE CANADIAN HUMAN RIGHTS COMMISSION**

Respondents

Application Under Section 18.1 of the *Federal Courts Act*

Notice of Application

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Federal Court, 363 Broadway, Room 400, Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: December 12th, 2023

Issued by: (Robert) Buye M'VONDO
(Registry Officer)

Address of local office: 363 Broadway, Suite 400
Winnipeg, Manitoba
R3C 3N9

TO: **The Canadian Human Rights Tribunal**
240 Sparks Street, 4th Floor West
Ottawa ON K1A 0X8

AND TO: **BMO Financial Group**
c/o Sunny Khaira & Armin Sohrevardi (Lawyers for BMO)
Hicks Morley
77 King Street West, 39th Floor
Box 371, TD Centre
Toronto, ON M5K 1K8

AND TO: **The Canadian Human Rights Commission**
344 Slater Street, 8th Floor
Ottawa ON K1A 1E1

APPLICATION

This is an application for judicial review of the Canadian Human Rights Tribunal (CHRT) decision 2023 CHRT 54. The decision was rendered by Tribunal Member Edward Lustig on November 16, 2023. The decision dismissed the Applicant's complaint against BMO Financial Group (CHRT file no. HR-DP-2829-22) which alleged discrimination based on race under sections 5(a) and 5(b) of the Canadian Human Rights Act (CHRA).

The applicant makes application for:

1. An order to quash the Canadian Human Rights Tribunal decision 2023 CHRT 54.
2. An order to send the complaint back to the Tribunal for reconsideration under the direction of the Court.
3. An order for the Tribunal to provide adequate reasons for its decision, and further, that those reasons acknowledge the specific allegations listed in the complaint and also acknowledge any direct evidence proving or disproving those allegations.
4. An order for the Tribunal to consider in its decision, statements made in the Applicant's written submissions about race based challenges in the work force and their effect on his financial health.
5. An order for the Tribunal to consider in its decision, common knowledge on Indigenous social conditions in Winnipeg's downtown core, including crime, homelessness, addictions, and poverty.
6. Alternatively, an order for the Tribunal to allow the Applicant to provide a written submission to discuss issues that were not allowed to be discussed at the hearing.
7. An order for the Tribunal to consider in its decision, the applicability of the *United Nations Declaration on the Rights of Indigenous Peoples Act* S.C. 2021, c. 14, and the applicability of Article 21 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

The grounds for the application are:

FAILURE TO OBSERVE PROCEDURAL FAIRNESS

1. The Tribunal unfairly hindered the Applicant's ability to provide evidence, in the form of testimony, which would have demonstrated both the Applicant's unique challenges as an individual Indigenous person in Winnipeg, and the collective challenges faced by Indigenous peoples in Winnipeg.

2. The Applicant was advised by Member Lustig that Indigenous issues and challenges were common knowledge. And further, he advised that he had taken judicial notice of Indigenous issues and challenges in general.
3. When examining witnesses, the Applicant was not allowed to ask questions relating to witness' direct experiences with, and perceptions of Indigenous people in general, in downtown Winnipeg.
4. Despite taking Judicial Notice, common knowledge issues relating to and affecting the lives, and perceptions of, Indigenous people in downtown Winnipeg were not considered in Member Lustig analysis.
5. Member Lustig acknowledged that "...Indigenous persons have been the targets of racism and discrimination in Canada over many years..." However, he failed to consider how persistent racism in the workplace could affect the Applicant's financial situation. And further, he failed to acknowledge how historic disadvantage has affected Indigenous peoples' relationship with the urban business community and society at large.

ERRORS IN LAW

1. The Applicant's complaint alleged that he had been subjected to discrimination when the Respondent refused to provide a *secured credit card*. The Respondent's defence was that company policy limited the product's availability to just newcomers to Canada and non-permanent residents, and further, their practice was justified as a Special Program under section 16 of the Canadian Human Rights Act (CHRA). The Tribunal failed to consider the legality of the Respondent's defence in the following ways:
 - a. Section 2 of the CHRA affirms 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. The Tribunal failed to consider the effects of denying equal access for all peoples to available financial products.
 - b. The prohibited grounds of discrimination listed in section 3(1) of the CHRA are: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Neither newcomer or non-permanent resident status are prohibited grounds.
 - c. Section 16 of the CHRA states: "It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group." The Tribunal

failed to consider whether or not the Respondent's policy actually does prevent disadvantages related to any prohibited grounds of discrimination.

2. In *F.H. v. McDougall*, 2008 SCC 53, the the Supreme Court of Canada ruled that, where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a witness will cause a trier of fact to conclude that the witness's evidence is not credible or reliable. The trier of fact must not consider the witness's evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. The Tribunal failed to consider the totality of the evidence and failed to recognize inconsistencies on the part of the Respondent when assessing the credibility of the Applicant and the Respondent's witnesses.
3. *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. established that the Tribunal has a duty to provide reasons for their decision. In their failure to consider the totality of the evidence, the Tribunal has also failed to provide adequate reasons for the decision.
4. In rendering their decision, the Tribunal did not consider the applicability of the *United Nations Declaration on the Rights of Indigenous Peoples Act* S.C. 2021, c. 14., which has the purpose of affirming the Declaration as a universal international human rights instrument with application in Canadian law. The Tribunal also did not consider Article 21 of the Declaration which states: *Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.* The Tribunal has failed to provide justification for the Respondent's practice of denying Indigenous access to available and highly beneficial financial products.

ERRONEOUS FINDINGS IN FACT

1. Paragraph 4 of the decision states: "*BMO's customer complaint escalation process did not provide for an Assistant Manager to elevate a customer complaint from an Assistant Manager to a branch Manager...*" This stage of the complaint resolution escalation process does not list specific escalation steps, it does not prohibit involvement of the Branch Manager, and in fact recommends the Branch Manager's involvement, but under slightly different titles of supervisor (Assistant Manager) and manager (Branch Manager). Also, the Tribunal ignored the Branch Manager's testimony that it would be appropriate to escalate concerns about an Assistant Manager's conduct to the Branch Manager. And further, the Tribunal ignored the fact I did have concerns about the Assistant Manager's conduct which could have been addressed by the Branch Manager.
2. Paragraph 4 of the decision also states: "*BMO's customer complaint escalation process... did provide for a customer to escalate a complaint to a non-branch official of the bank, regardless of the customer's race. Mr. Starr chose not to elevate his complaint in accordance with BMO'S customer complaint escalation process.*" However:

- a. The Tribunal ignored the fact that the Respondent's complaint resolution process provides various options, most of which were not appropriate for the circumstances.
 - b. The Tribunal also ignored the fact that the Respondent provided limited channels for communication, and that the one option that seemed appropriate to the Applicant did not suit his needs because of these limited channels for communication.
 - c. Finally, the Tribunal ignored the fact that the Respondent's complaint resolution process does not provide options for human rights concerns.
3. Paragraph 4 of the decision refers to the Respondent's "*complaint escalation process.*" However, the first words on the document are "*BMO Financial Group's Complaint Resolution Process.*" The main title, in the largest font, is: "We're here to help." The Tribunal's characterization of the Respondent's evidence is inaccurate and disturbingly provocative.
 4. Paragraph 8 of the decision describes testimony from the Applicant. Paragraph 8 states: "*(The Applicant) testified about a number of difficult personal experiences... leading up to the event that gave rise to his complaint... At one point he turned to drugs but testified that later he was directed by God to go to Winnipeg to help people.*" While the Applicant did make these statements, they are taken out of context. Also, these are issues related to the Applicant's early life on a First Nations reserve and were not directly related to his experiences with the Respondent. As noted above, the Tribunal limited the Applicant's ability to give testimony about his experiences in Winnipeg which were relevant to his involvement with the Respondent. Drug use 20 years ago and uncommon spiritual beliefs should not have any bearing on access to financial products.
 5. Paragraph 14 of the decision describes how to establish credit, according to a witness named Sean Frame. The Tribunal noted that: "*... a person establishes credit by applying/obtaining/using credit.*" However, the Tribunal ignored Mr. Frame's testimony that he does not know of any credit facilities that are available to customers who do not have a credit score, and are neither student or newcomer. The Tribunal also ignored a catch 22 in that a person needs to have credit to get credit, but can't establish credit without credit. The Tribunal also ignored that fact that the Respondent provides a solution to the catch 22 in exhibit C-21, which advises customers to use a secured credit card to establish credit.
 6. Paragraph 19 of the decision states: "*...access to a credit facility does not guarantee that a person with a poor credit will rebuild their credit... In fact, the general ability to access credit is not necessarily beneficial to a person being provided a credit facility for a person who has demonstrated poor financial habits...*" Absolutely zero evidence was submitted to suggest that I have poor financial habits. By acknowledging the Respondent's position, the Tribunal has accepted without proof that I do have poor financial habits and will be harmed by having tools for financial empowerment. This is an unfair, and possibly racist, assumption on the part of the Tribunal.

7. Paragraph 22 of the decision describes the testimony of a witness for the Respondent. It states: *“Mr. Khouvongsavanh testified that... Mr. Starr reacted by accusing him of discriminating against him... and that he would be hearing from his lawyer... because of Mr. Starr’s reaction he went to find the Assistant branch Manager Ms. Chenee Lubi to speak to Mr. Starr.”* However, the Tribunal ignored Mr. Khouvongsavanh’s testimony that the alleged threat of lawyer involvement happened during a later encounter. Therefore, an alleged threat of legal action could not have influenced his actions at that point. The tribunal also ignored Mr. Khouvongsavanh’s evidence that there was no change in the Applicant’s demeanour in reaction to anything he was being told at that point. In paragraph 23, the Tribunal ignores fact that the Applicant asked to speak to a supervisor, and this omission reinforces the Respondent’s false claim that Mr. Khouvongsavanh was compelled to take action because of the Applicant’s antagonism.
8. Paragraph 24 of the decision states: *“There was no evidence that BMO had actually offered anyone else a secured credit card without the restrictions in the policy.”* Paragraph 61 states: *“Further, there was no evidence that BMO ever issued a secured credit card to anyone without the restrictions.”* Both statements are false. The Tribunal ignored the following evidence:
 - a. During the hearing in September 2023, the Applicant submitted exhibit C-21 which was a printout from the Respondent’s website advising customers to discuss secured cards with the Respondent, and without mention of any restrictions of limitations based on the customer’s citizenship status. The Tribunal completely ignored the existence of exhibit C-21 in its decision.
 - b. During the hearing in September 2023, the Applicant submitted exhibit C-16, which was a printout from the Respondent’s website providing credit related advice for customers. Exhibit C-16 is referenced in paragraphs 16 and 63 of the decision. However, the Tribunal dismisses the information in the exhibit as an error on the part of the Respondent.
 - c. The Applicant testified that he was offered a secured credit card by the Respondent at a different branch. The Tribunal acknowledged this evidence at various points in the decision, but Tribunal decided that: *“I accept the evidence of BMO that it would have been a mistake...”*
 - d. During the hearing in September 2023, the Applicant submitted exhibits C-11 and C-17. Both exhibits demonstrated that the Respondent was using links in exhibits C-16 and C-21 to direct secured credit card customers to a product called a Pre-paid Mastercard. Although the Respondent’s witnesses testified that a secured credit card and a pre-paid Mastercard are two different products, no witness could explain why the Respondent linked the products together on the website. Although the Respondent’s witnesses testified that using a pre-paid Mastercard had no effect on credit score, no witness could explain why the pre-paid Mastercard had options to monitor credit score

9. Paragraph 28 of the decision again discusses the Respondent's complaint resolution process and brochure. Paragraph 28 states: *"The process described in the brochure... describes the same steps that were taken in this case ie) escalating the complaint from the CSR to the Assistant branch Manager and if not resolved there providing the brochure to the customer... There is no provision or requirement in the process as described in the brochure for a complaint to be escalated to a branch Manager in a branch that has an assistant branch Manager. Mr. Starr makes the point that there is nothing in the escalation process to prevent a complaint being escalated from an Assistant branch Manager to the branch Manager if the customer has concerns about the Assistant branch Manager"* The Tribunal is mistaken about what the Respondent's literature says. It does not describe an escalation of the complaint from a CSR to Assistant manager, and it does not specifically say that a brochure must be handed to a customer. The Tribunal has embellished the facts for the Respondent's benefits. And, as previously mentioned, the Tribunal ignored the Branch Manager's testimony which stated that it would be appropriate to talk to the Branch Manager when a customer has concerns about an Assistant Manager. And further, the Branch Manager testified that she is the Assistant Manager's boss, and the the Assistant Manager reports to the Branch Manager.
10. Paragraph 36 of the decision describes the Applicant's submissions, and includes a claim that the Applicant questioned the credibility of two witnesses that he called. This is false. At no point in the Applicant's testimony or in any written submissions did he question the credibility of the witnesses that he called.
11. Paragraph 40 of the decision describes the Respondent's submission that a secured credit card is not "designed" to rebuild credit. The Tribunal accepts this as a fact. However, the Respondent's witness Chenee Lubi testified that use of a secured credit card would have the effect of rebuilding a person's credit score. To say that a product has been "designed" in a certain way suggests that the product has specific features and functions. Witness Sean Frame testified that he does not know of any features or functions that make the Respondent's product different from the secured credit card offered by other financial institutions. In this case, the product's "design" does not produce a different or unique effect. The Respondent has simply made a decision to deny access to the product to certain people. There is no evidence to suggest that the Respondent invented secured credit cards and no evidence to suggest that there are features or functions in the product's design to make it different from other secured credit cards. Yet, the Tribunal accepts that there are limitations is the product's features, functions, and design that make the product unsuitable for the Applicant's needs.
12. Paragraph 45 of the decision describes the Respondent's submissions. It states: *"The non-discriminatory nature of the denial to Mr. Starr of access to a secured credit card is further apparent from the fact that based on BMO's secured credit card policy, an Indigenous person (as defined in the policy) who was a newcomer to Canada, held an official document proving the status and recency to Canada (i.e. within the last 5 years) and did not have a credit history in Canada could apply for a secured credit card from BMO. Given that the same eligibility criteria were applied to Mr. Starr without any consideration of his race, it could not have been the case that he was denied a secured credit card on the basis of his race."* However, the policy in question does not define what an Indigenous person is, and it does not even contain the word "Indigenous." A finding of fact cannot be made from a patently false submission.

13. Paragraph 61 of the decision states: *“If he (the Applicant) really was offered a secured credit card by a CSR at the Portage Avenue branch he could have obtained the name of the person and subpoenaed them to testify as he did with the Mr. Khouvongsavanh and applied for the secured credit card being offered to him.”* The Applicant did not subpoena the witness named Mr. Khouvongsavanh. This is a false statement. The Tribunal is suggesting that actions should have taken based on other events that did not happen.
14. Also, regarding Paragraph 61, the Tribunal ignored the fact that, as stated in the original complaint, the Respondent’s main branch was also the Applicant’s preferred branch because of location and convenience. In ignoring this fact, and in suggesting that it would have been appropriate for the Applicant to accept services at the Portage Avenue branch, the Tribunal has abandoned the principles of fairness and equal access. There is no provision in the CHRA that allows federally regulated businesses to establish apartheid branches to serve customers who are unwelcome at other branches.
15. Paragraph 64 of the decision describes the testimony of BMO branch manager, Amanda Mosher. Paragraph 64 states: *“I accept her evidence that she did not then speak to him (the Applicant), see him, know him or receive a request to meet with him and could therefore not have refused a meeting with him. As such, there could have been no discrimination against Mr. Starr based on his race for allegedly being refused a meeting by Ms. Mosher.”* However, the Tribunal ignores the fact that in the original complaint filed with the Canadian Human Rights Commission and in the Statement of Particulars filed with CHRT, the Applicant alleges having seen Mr. Khouvonogsavanh speak to a woman in an office with glass walls after making the request to speak to the branch manager. The Tribunal also ignored Mr. Khouvongsavanh’s admission under oath that it is possible that he spoke to the branch manager. The Tribunal also ignored Ms. Mosher’s testimony that her office did in fact have glass walls and was visible from the areas described in the Applicant’s complaint and Statement of Particulars. These are critical facts clearly listed in the Applicant’s allegations, however, direct evidence proving the Applicant’s observations and allegations was ignored by the Tribunal.

This application will be supported by the following material:

1. The Canadian Human Rights Act
2. The United Nations Declaration on the Rights of Indigenous Peoples Act
3. Official CHRT transcripts from the hearing which took place in September 2023
4. Official CHRT transcripts from case management conference calls
5. CHRT Decision 2023 CHRT 54
6. The Applicant’s original complaint of discrimination filed with the Canadian Human Rights Commission and the Respondent’s response to the complaint.
7. The Applicant and the Respondent’s Statements of Particulars filed with CHRT

8. The Applicant's and the Respondent's written closing arguments from the hearing in September.
9. File No. HR-DP-2829-22 hearing exhibits C-11, C-16, C-17, C-21, C-22, and C-19/R-2.
10. Past decisions from CHRT, including, but not limited to: 2016 CHRT 2.
11. Past decisions of the Federal Court to be identified at a later date.
12. Various human rights decisions to be identified at a later date.
13. Such other materials that this Honorable Court may permit.
- 14. The Applicant Affidavit to be sworn or Affirmed.

The applicant requests the Canadian Human Rights Tribunal to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Canadian Human Rights Tribunal to the applicant and to the Registry:

1. Official transcripts from the hearing which took place on September 25-27, 2023.
2. Official transcripts from all case management conference calls related to CHRT file no. HR-DP-2829-22

Date: December 12, 2023



Clifton Starr (Applicant)
4-201 Furby Street
Winnipeg MB R3C 2A6
Tel: 431-336-7594