Federal Court of Appeal | Cour d'appel fédérale

**Date: 20210514**

**Docket: A-55-20**

**Citation: 2021 FCA 95**

**CORAM:** **PELLETIER J.A.**
**NEAR J.A.**
**GLEASON J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**JOHN ENNIS and**
**TOBIQUE FIRST NATION**

**Respondents**

Heard by online video conference hosted by the Registry on March 17, 2021.

Judgment delivered at Ottawa, Ontario, on May 14, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: PELLETIER J.A.
NEAR J.A.

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## REASONS FOR JUDGMENT

**GLEASON J.A.**

[1] The appellant appeals from the judgment of the Federal Court in *Ennis v. Canada (Attorney General)*, 2020 FC 43 (*per* Phelan, J.) in which the Federal Court set aside a screening decision made by the Canadian Human Rights Commission on August 15, 2018. In that decision the Commission concluded, under subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *CHRA* or the Act), that an inquiry into the discrimination complaint of

the respondent, John Ennis, was not warranted. The Commission reached this decision following receipt of a report from an assessor, made under section 44 of the *CHRA*, in which the assessor recommended that the Commission reach the opposite conclusion.

[2] As is more fully discussed below, recommendations like that made by the assessor in this case do not bind the Commission. Moreover, the Commission's screening determinations are entitled to deference.

[3] In the decision under appeal, the Federal Court substituted its own analysis for that of the Commission and erred in failing to accord appropriate deference to the Commission's decision. The Federal Court also incorrectly found that the Commission had violated Mr. Ennis' procedural fairness rights by not providing him advance notice of its intended determination. The Federal Court's judgment therefore cannot stand, and, for the reasons more fully set out below, I would allow this appeal without costs, set aside the judgment of the Federal Court, and rendering the judgment that it ought to have made, would dismiss Mr. Ennis' application for judicial review, also without costs.

## I. Background

[4] Some background is necessary to place the issues in this appeal into context.

A. *The Statutory Context*

[5] The *CHRA* applies to Her Majesty in Right of Canada (except in matters respecting the Yukon Government or the Governments of the Northwest Territories or Nunavut, where territorial legislation governs human rights) and to persons, organizations and undertakings that are subject to federal jurisdiction in respect of activities that are likewise amenable to federal jurisdiction. Since June 2011, the *CHRA* has applied to band councils, established under the *Indian Act*, R.S.C. 1985, c. I-5.

[6] The *CHRA* prohibits a number of discriminatory practices, including, in sections 5 and 6, discrimination in the provision of residential accommodation on one of the grounds prohibited under the Act. Prohibited grounds of discrimination are listed in section 3 of the *CHRA* and include race, national or ethnic origin and disability.

[7] By virtue of subsections 40(1) and (2) of the *CHRA*, those to whom the Act extends protection and who believe they have been subjected to discriminatory treatment may file complaints with the Commission. The Commission is also empowered under subsection 40(3) to initiate a complaint itself if it has reasonable grounds for believing that a person has engaged in a prohibited discriminatory practice.

[8] Upon receipt of a complaint, the Commission may decline to deal with it under subsection 41(1) of the *CHRA*, which provides in relevant part as follows:

Commission to deal with complaint Irrecevabilité

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| 41(1) […] the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that | 41(1) […] la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants : |
| (*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available; | *a*) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts; |
| (*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act; | *b*) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale; |
| (*c*) the complaint is beyond the jurisdiction of the Commission; | *c*) la plainte n'est pas de sa compétence; |
| (*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or | *d*) la plainte est frivole, vexatoire ou entachée de mauvaise foi; |
| (*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint. | *e*) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances. |

[9] If the Commission does not dismiss the complaint under these or other provisions of the Act (that are not pertinent to this appeal), the Commission may opt to refer it to an investigator (whom it appears the Commission now calls an "assessor") for investigation. Section 44 of the *CHRA*, which is of central relevance to this appeal, deals with investigation reports and sets out in part the Commission's authority following receipt of a report. It provides in subsections 44(1) to (3) as follows:

Report

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.

Action on receipt of report

(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.

Idem

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

(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 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

Rapport

44(1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

*a*) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

*b*) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

Idem

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

*a*) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

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| (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 | (ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*); |
| (*b*) shall dismiss the complaint to which the report relates if it is satisfied | *b*) rejette la plainte, si elle est convaincue : |
| (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or | (i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié, |
| (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*). | (ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*). |

[10] Where the Commission determines that an inquiry into a complaint is warranted, the complaint is referred to the Canadian Human Rights Tribunal, which typically will hold a hearing into the complaint, during which the Commission may (but is not required to) participate as a party. Before the Tribunal, the burden lies on a complainant to establish a *prima facie* case of discrimination, following which the burden shifts to the respondent to make out a defence to the complaint.

[11] No appeal lies from a decision of the Commission to dismiss a complaint; such decisions are instead amendable to judicial review before the Federal Court.

B. *The Complaint, Report and Decision of the Commission*

[12] With this background in mind, it is necessary to next review the complaint, the assessor's report, the parties' submissions to the Commission and the Commission's decision in this case.

(1) The Complaint

[13] Mr. Ennis is a member of the Tobique First Nation (the TFN) in Nova Scotia. In a complaint authored by his father, who represented him in his dealings with the Commission, Mr. Ennis alleged he suffered from two mental health disorders and that he had been subject to discrimination by Indian and Northern Affairs Canada or its predecessors (collectively termed INAC in these Reasons) and by the TFN by reason of the failure to provide him for over ten years with adequate on-reserve housing. As a result, he alleged that he had been forced to live in sub-standard housing, both on and off reserve. Mr. Ennis further claimed that such failure was in large part the result of a twenty-year period during which the affairs of the TFN were subject to third-party management as, according to him, INAC policy applicable to third-party management prevented allocation of funds to the TFN for construction of housing on the reserve. He further alleged systemic discrimination more generally, claiming that INAC policies, and especially those regarding third-party management, resulted in differential adverse treatment of indigenous people generally and in respect of housing in particular.

[14] Following receipt of his complaint, on December 12, 2016, the CHRC appointed an assessor under section 43 of the *CHRA* to conduct an investigation and make a report to the Commission under section 44 of the *CHRA*. The assessor interviewed Mr. Ennis and his father and received submissions and information from INAC, from representatives of third-party managers and, to a certain extent, from the TFN, although it appears that the assessor encountered difficulties in obtaining details from the TFN. The assessor completed her report on September 20, 2017 and in it recommended that the Commission refer Mr. Ennis' complaint to the Tribunal.

(2) The Assessor's Report

[15] The assessor commenced her report by setting out the background to the complaint, noting that, while the primary grounds raised in the complaint were race, national and ethnic origin, it appeared that there were "intersectional, adverse impacts on the [respondent] as a result of his disability" (at paragraph 4). The assessor further noted that the TFN had been under various, increasing levels of intervention since 1986, culminating in a period of third-party management between 2007-2017 due to concerns related to default under financial agreements and INAC's concern that funds provided by INAC could be seized by creditors. She also noted that the situation of insufficient and substandard housing on the TFN reserve was longstanding and that "[n]either INAC or TFN acknowledge any responsibility, and both point to the other as being accountable" (at paragraph 6).

[16] In the next section of her report, the assessor posed and answered five questions.

[17] The assessor first asked whether there was information to support the allegations in the complaint. In answering this question, the assessor first set out Mr. Ennis' allegations that the TFN and INAC controlled the availability of housing in the community, that under third-party management INAC denied funds to the TFN for housing and that, as a result, the Mr. Ennis was required to live in sub-standard housing both on and off reserve. The assessor next noted that the parties agreed that, along with a shortage of housing generally, there have been ongoing issues related to mould, radon and overcrowding on the TFN reserve. She further stated that INAC's information indicated that the percentage of houses on the TFN reserve in need of repair significantly exceeded the provincial average.

[18] The assessor next summarized the positions and submissions she said she had received from the TFN and INAC regarding the other bearing responsibility for on-reserve housing. She also set out and summarized the information provided by INAC and the third-party managers, that they alleged demonstrated that funds continued to be made available to the TFN for construction and repair of houses on the TFN reserve during the period of third-party management. She noted, though, that during this period the Band could not access ministerial loan guarantees.

[19] The assessor concluded that it was unclear whether INAC's polices resulted in the lack of housing and what role the TFN had in provision of housing in the community. She went on to state that it "appeared" that INAC's policies and third-party management have had an effect on several of the housing issues faced by the community and that, in any event, as INAC provided most of the funding for the community, "its participation would be needed to fashion any appropriate remedy, if the complaint is substantiated".

[20] In the next section of her report, the assessor asked whether the complaint raised questions of credibility, conflicting evidence, the need for expert evidence or other factual issues that could only be resolved by the Tribunal. In this section, the assessor noted her inability to obtain information from the TFN regarding its allegations of lack of funds for housing during the period of third-party management. She also summarized the information received from INAC and representatives of third-party managers, which indicated that funds were available during this period for housing.

[21] The assessor then quoted from a report of one of the third-party managers, which indicated that, prior to third-party management, INAC's funds for capital expenditure had been spent by the Band on other priorities, sometimes with the knowledge of INAC, which led to deficits. The assessor next quoted from a June 2011 report from the Auditor General of Canada and from the Standing Senate Committee Aboriginal People's 2015 Report, which both noted that lack of agreement and clarity around responsibility for housing on-reserves has contributed to continued housing shortages on many reserves.

[22] The Assessor concluded as follows in respect of these evidentiary issues:

> The complaint raises significant conflicts in the evidence and the need for expert evidence, including how INAC's policies operate and how the band manages its finances. [...] TFN takes the position that it does not have a responsibility to provide housing. INAC takes the position that it has shared responsibility for housing, but it does not – as a general rule – provide funding to First Nations for the construction of new housing. All of this must be situated within the different regime for land ownership on Indian Reserves, which in itself is a creation of the *Indian Act* and government policy. As such, further inquiry by a Tribunal, with the jurisdiction to hear expert witnesses, is warranted.

[23] In the next section of her report, the assessor addressed the public interest in the complaint, noting that, according to submissions previously made by the Commission to the UN Committee on the Elimination of Racial Discrimination and on the Rights of Persons with Disabilities, "the intersection of being Indigenous and having a disability creates significant unmet housing needs" (at paragraph 35 of the report). She also noted that the parties had recognized that there was a lack of adequate housing in the TFN community and that many indigenous communities deal with underfunding for housing, overcrowding, mould contamination, access to roads, water, sewage systems and power. She therefore concluded that it was in the public interest to deal with the complaint as soon as possible.

[24] The assessor next considered whether INAC and the TFN had addressed Mr. Ennis' allegations and noted that INAC had moved the community out of third-party management. However, she went on to state that "[i]t is not clear that INAC has addressed the issue of underfunding for housing in the community". She also noted that the TFN had recently developed a housing policy that appeared to be transparent and fair but that there are far more families seeking housing than the Band could provide.

[25] Finally, the assessor answered the question as to whether further assessment was warranted and concluded that it was not. She accordingly recommended that the Commission refer the complaint to the Tribunal.

(3) The Parties' Submissions in Response to the Report

[26] The Commission provided a copy of the assessor's report to the parties and invited submissions in respect of it for its consideration. The report, itself, contained a warning in its introduction, indicating that it was not a decision of the Commission and that it was the Commission, as opposed to the assessor, which was charged with determining whether an inquiry into the respondent's complaint was warranted.

[27] The TFN declined to make submissions to the Commission, and Mr. Ennis filed a brief two-page submission that did no more than repeat the generalized allegations made in his original complaint. INAC, on the other hand made a detailed submission of the maximum length allowed by the Commission.

[28] In its submission, INAC made the following principal points:

- Mr. Ennis' complaint raised disability as an alleged ground of discrimination, yet the assessor relegated disability as being secondary to the complaint and, as indicated in its submissions to the assessor, INAC lacked information about his age, alleged disability, the details of the waiting list that the TFN placed him on and his particular housing needs.
- INAC disputed that it had denied responsibility for housing on the reserve and noted that the principles of self-government meant that it could not allocate a house to Mr. Ennis. It also summarized the detailed information it and the third-party managers had provided to the assessor that contradicted the assertions of Mr. Ennis and the TFN and which demonstrated that funds had been advanced to the TFN during the period of third-party management, some of which could have been devoted to the provision of housing. It also noted that the Band Council had built some houses during the period of third-party management. INAC stated that the TFN also had access to its own source of revenue and to monies from a land claim settlement. This, coupled with the housing policy of the TFN that the assessor found to be fair and equitable, meant that there was no factual foundation for the complaint.
- The TFN was placed in third-party management due to financial difficulties faced by the Band, which imperilled the entire community, and it was those difficulties, not any race-based distinction, which foreclosed the Band's ability to access ministerial loan guarantees during the period of third-party management. Limiting access to loan guarantees when there is a high risk of default is not a discriminatory act. Such

guarantees were once again available when the period of third-party management ceased in 2017.

- Neither a general housing shortage nor inadequate housing is sufficient to establish a *prima facie* case of discrimination under the *CHRA*. Mr. Ennis had not provided any evidence to substantiate that he had been denied housing due to race or disability and that neither the TFN nor INAC has a positive duty to provide every resident with housing.

[29] The Commission provided a copy of INAC's submission to Mr. Ennis, for reply. He states in the affidavit he filed in support of his application for judicial review that he filed a reply to INAC's submission with the Commission. Once again, this is a brief document that does little more than repeat the generalized assertions made in his complaint. It is unclear whether Mr. Ennis' reply was placed before the Commission as it was not contained in the documents the Commission disclosed under Rule 318 of the *Federal Courts Rules*, SOR/98-106. Given that the reply added nothing of substance that Mr. Ennis had not already alleged in his complaint and his original submissions to the Commission, it matters not whether the reply was before the Commission: *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 at paras. 116-117; *Palonek v. Canada (National Revenue)*, 2007 FCA 281, 368 N.R. 358 at paras. 17, 25; *Yu v. Canada (Citizenship and Immigration)*, 2007 FC 155, 2007 CarswellNat 303 at paras. 18-19, 22-23. The present circumstances are distinguishable from those in *Bergeron v. Canada (Attorney General)*, 2017 FC 57, 22 Admin. L.R. (6th) 310 [*Bergeron*], where the missing submissions were material, not duplicative, and necessary to allow the Commission to properly consider the matter.

(4) The Commission's Decision

[30] The Commission issued reasons for its decision to dismiss Mr. Ennis' complaint. They centred on the determination that, while INAC's funding decisions and role in the oversight of housing on-reserves is amenable to review under sections 5 and 6 of the *CHRA*, there was insufficient evidence to warrant further inquiry into Mr. Ennis' complaint. The Commission offered several reasons for this conclusion.

[31] First, as concerns the adverse impact alleged by Mr. Ennis, the Commission noted that no details had been provided about where he had been living, including by whom the housing he alleged was sub-standard was allocated or as to how it was sub-standard. The Commission therefore concluded there was insufficient evidence to warrant inquiry into these aspects of the complaint.

[32] Second, with respect to the grounds of discrimination, the Commission noted that Mr. Ennis had not provided evidence regarding how his claimed disabilities gave rise to a specific need for housing. It therefore concluded there was insufficient evidence to warrant an inquiry into the allegations of discrimination based on disability.

[33] Third, with respect to the remaining grounds of race and national or ethnic origin, the Commission noted there were no allegations that INAC and the TFN had prioritized persons of different race or ethnic origin, and that the complaint therefore centred on provision of housing on-reserve to members of the TFN. The CHRC held that this may be sufficient to ground a claim of discrimination in appropriate cases, as for example, where the federal government fails to

provide substantively equal access to analogous services to those provided to people off reserve, as was determined to have occurred in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, [2016] 2 C.N.L.R. 270, 83 C.H.R.R. D/207 [*First Nations Caring Society*].

[34] Turning to the specifics of the complaint, the CHRC found that the focus of the complaint was on: (i) the fact that Mr. Ennis had been on a waiting list for on-reserve housing for years; (ii) that only members of the TFN are affected in this way, and (iii) the TFN primarily had a waiting list because funds for housing were not available during the period of third-party management. Assuming, without deciding, that being on such a waiting list could be seen as an adverse impact linked to race or national or ethnic origin, the Commission determined that the evidence did not warrant further inquiry into Mr. Ennis' key allegations about the consequences of third-party management, given the complete lack of evidence provided by Mr. Ennis and the TFN to substantiate their allegations as compared to the detailed evidence provided by INAC and the third-party managers. The Commission found that such evidence showed that funds were available for housing during the period of third-party management, and there was no evidence to link the non-availability of ministerial loan guarantees during the period of third-party management to a prohibited ground of discrimination. Thus, while in an appropriate case a claim of inadequate on-reserve housing might warrant inquiry, there was insufficient evidence brought by Mr. Ennis or the assessor to merit an inquiry into Mr. Ennis' complaint.

[35] The Commission concluded as follows:

> In reaching these conclusions, the Commission in no way downplays the very real concerns that exist regarding housing on-reserve, generally. In 2015, the Senate

> Standing Committee on Aboriginal Peoples recognized concerns with the shortage and deterioration of on-reserve housing, and the Respondents have acknowledged that problems of this kind exist in the community at Tobique. The Commission has encouraged the federal government to develop concrete and specific strategies to urgently address the housing situation on First Nations reserves, as noted at paragraph 35 of the Report. However, the existence of these general concerns does not necessarily mean that every complaint relating to residential accommodation on-reserve warrants further inquiry before the Tribunal. There still needs to be sufficient evidence to warrant an inquiry into the particular allegations made by a complainant.

## II. The Decision of the Federal Court

[36] While recognizing that the standard of review applicable to the Commission's decision was reasonableness, the Federal Court actually engaged in correctness review and substituted its opinion for that of the Commission. And, it erroneously held that the Commission had violated Mr. Ennis' procedural fairness rights in failing to provide him advance notice of its intended decision.

[37] The Federal Court commenced its analysis by correctly setting out the applicable principles from the case law. It noted, with reference to the decision of the Supreme Court of Canada in *Halifax (Regional Municipality) v. Nova scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 [*Halifax*] and of the Federal Court in *Tutty v. Canada (Attorney General)*, 2011 FC 57, 382 F.T.R. 227, that the Commission is to be accorded deference in respect of its screening decisions under section 44 of the *CHRA*. The Federal Court also noted, as was held by the Supreme Court of Canada in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, 62 D.L.R. (4th) 385 and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193, that the role of the Commission, in making screening decisions under section

44 of the *CHRA*, is to assess the sufficiency of the evidence before it. The Federal Court further correctly held that deference was not required in respect of its review of the fairness of the process undertaken by the Commission.

[38] However, in applying these principles, the Federal Court stated at paragraph 31 that, for a decision to be reasonable, "it must be justifiably and demonstrably so." It continued in the following paragraph: "[i]n that regard merely saying a matter is a 'sufficiency of evidence' conclusion does not make it so. **A court must determine whether this is so** even if the Commission believes it was limiting itself to its proper role." (emphasis added). The Federal Court then set out why it disagreed with the Commission's determinations as to the sufficiency of the evidence.

[39] The Federal Court first considered the Commission's determination on adverse impact. The Federal Court held that the Commission ought to have accepted the assessor's analysis as "[t]he Assessor should be presumed to know the conditions alleged otherwise he/she could not find adverse effects." (at paragraph 34). The Court continued by holding that the Commission had failed to provide a rationale for its decision to depart from the assessor's conclusions "which were based on a broader and more in-depth consideration of adverse impacts" (at paragraph 35). The Federal Court also held that it was incumbent on the Commission to have inquired whether evidence was available to substantiate Mr. Ennis' allegations, and, if so, that it "ought to have returned the s. 49 Report for further detail" (at paragraph 37).

[40] The Federal Court next considered "the failure to show specific needs arising from [Mr. Ennis'] disabilities" and held that the Commission had "failed to consider whether the security of proper housing – given [Mr. Ennis'] mental condition – is a specific need" (at paragraph 39). To the extent the assessor had considered this issue, the Federal Court stated that the assessor's analysis was to be preferred or, if it had not been considered, stated that it was incumbent on the Commission to return the complaint to the assessor for further inquiry.

[41] Turning to the alleged systemic problems with INAC funding and the interplay (or lack thereof) between INAC and the TFN, the Federal Court held that the Commission had erred in accepting INAC's version of events in the face of a determination by the assessor regarding the lack of clarity as to the extent to which INAC's policies had led to inadequate on-reserve housing. The Federal Court stated that, in so holding, the Commission had engaged in an improper weighing of the evidence. The Federal Court concluded in this regard:

> 48. The Commission's criticism of the Applicant in not rebutting INAC's evidence is unfair. A complainant is not generally in a position to secure that type of information nor can a complainant be expected to analyze such information. It is within the powers of the Commission's Assessor to secure and analyse that evidence. It was unfair to impose this evidentiary and analytical burden on a complainant in these circumstances.
>
> 49. At this stage of the process it is for the Assessor to pursue that line of inquiry. The Assessor did exactly that and could not resolve the matter. It is for the Tribunal not the Commission to resolve lack of clarity.

[42] Finally, the Federal Court stated that the Commission had denied Mr. Ennis procedural fairness in departing from the assessor's report without notice to Mr. Ennis. It noted that:

> 53. The answer to the unfairness of the absence of notice and an opportunity to respond to the Commission's concerns is not in creating a further level of procedure. The resolution is in the Commission staying within its mandate as a screening body not an adjudicative-evidence weighing body.

## III. Analysis

[43] In this appeal, in accordance with the decision of the Supreme Court of Canada in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, this Court is required to determine whether the Federal Court selected the appropriate standards of review and, if so, whether it applied such standards correctly. In other words, we are required to step into the shoes of the Federal Court and re-conduct the requisite analysis.

[44] In the instant case, the Federal Court selected the appropriate standards of review, namely, the deferential reasonableness standard for review of the merits of the Commission's decision and no deference, sometimes called correctness review, for review of procedural fairness issues.

[45] In this regard, it is well settled that administrative decision-makers are not afforded deference in respect of procedural fairness issues: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 34-56; *Wong v. Canada (Public Works and Government Services)*, 2018 FCA 101, 2018 C.L.L.C. 230-038 at para. 19 [*Wong*]; *Ritchie v. Canada (Attorney General)*, 2017 FCA 114, 19 Admin. L.R. (6th) 177 at para. 16 [*Ritchie*].

[46] It is likewise well settled that the deferential reasonableness standard applies to the merits of Commission decisions to refer or to decline to refer human rights complaints to the Tribunal for further inquiry: *Halifax* at paras. 17-53; *Attaran v. Canada (Attorney General)*, 2015 FCA 37,

380 D.L.R. (4th) 737 at paras. 9-14 [*Attaran*]; *Hood v. Canada (Attorney General)*, 2019 FCA 302, 2020 C.L.L.C. 230-017 at paras. 24-27; *Harvey v. Via Rail Canada Inc.*, 2020 FCA 95, 2020 CarswellNat 1671 at para. 10; *Wong* at para. 19; *Ritchie* at para. 16; *Jean v. Canadian Broadcasting Corp.*, 2016 FCA 81, 2016 CarswellNat 12015 at para. 5. This conclusion is indeed mandated by the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], the current leading authority on judicial review, in which that Court confirmed that the reasonableness standard applies to administrative decisions that are not subject to appeal, save in exceptional circumstances, none of which would apply to screening decisions made by the Commission.

[47] Thus, the Federal Court selected the appropriate standards of review. Where it erred was in its application of those standards.

A. *The Merits of the Commission's Decision*

[48] Turning first to the Federal Court's review of the merits of the Commission's decision under the reasonableness standard, the Supreme Court of Canada underscored in paragraph 81 of *Vavilov* that the reasons of an administrative decision-maker are the starting point for reasonableness review where, as here, reasons are given. The requisite inquiry involves asking whether the decision-maker's decision was a reasonable one. The reviewing court is therefore not to ask what decision the court would have made. "Reasonableness review is methodologically distinct from correctness review": *Vavilov* at para. 12. To use the words of the majority in *Vavilov*:

> 83. […] the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. **The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.** The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable. [Emphasis added.]

[49] Rather than proceeding in this fashion, the Federal Court instead asked itself how it would have ruled on whether there was sufficient evidence to send the complaint to the Tribunal for further inquiry. As noted, the Federal Court described its role in paragraph 32 of its reasons as being charged with determining whether the evidence before the Commission was sufficient to warrant inquiry, stating that its role was to determine "whether this is so".

[50] With respect, this approach is erroneous. It is not for the Federal Court (or this Court on appeal) to question whether there was sufficient evidence before the Commission to warrant referral of Mr. Ennis' complaint to the Tribunal for inquiry. Such a question is identical to asking whether the Commission was correct in its conclusion as to the sufficiency of the evidence. This is correctness and not reasonableness review.

[51] Under reasonableness review, contrary to the approach taken by the Federal Court, the question for the reviewing court is rather whether the Commission's determination that the

evidence was insufficient was a reasonable one that it was open to the Commission to have made. In asking itself the wrong question, the Federal Court fell into error. This led to its erroneously re-evaluating the sufficiency of the evidence that was before the Commission.

[52] This erroneous approach is evident at several places in the Federal Court's reasons. For example, it stated:

> 35. Absent an explanation by the Commission as to its reason for departing from the conclusions of the Assessor, which were based on a broader and more in-depth consideration of adverse impacts, it is not possible to conclude that the Commission's conclusion was reasonable.
>
> […]
>
> 37. The Commission further failed to inquire whether such evidence was available. If it was and it was not produced, the Commission ought to have returned the s 49 Report for further detail.
>
> 38. The Commission also failed to consider a relevant issue – whether being on a wait list for 10 years in the mental condition of the Applicant caused adverse impacts. If the Commission did consider that issue, there is nothing that would suggest it did.
>
> 39. In respect of the failure to show specific needs arising from the Applicant's disabilities, the Commission failed to consider whether the security of proper housing – given the Applicant's mental condition – is a specific need.
>
> 40. Again, to the extent that the Assessor did not address that issue, it was unreasonable for the Commission not to inquire or cause the Assessor to inquire. To the extent that the Assessor's conclusion of intersectional, adverse effects reflects the Applicant's needs, the Commission has failed to explain why it did not accept the Assessor's conclusion.
>
> [...]
>
> 45. In my view, given the Assessor's conclusions particularly as to lack of clarity and INAC's further and substantive financial submissions in response to the s 49 Report, the Commission engaged in an improper weighing of evidence as between the Assessor's analysis and INAC's position.
>
> 46. While it is not sufficient for success for a complainant to merely allege someone is lying (as the complainant's father did), it was clear that the Commission accepted INAC's version of events without the benefit of expert and

> other evidence which the Assessor said was necessary to bring clarity to the situation.
>
> [...]
>
> 48. The Commission's criticism of the Applicant in not rebutting INAC's evidence is unfair. A complainant is not generally in a position to secure that type of information nor can a complainant be expected to analyze such information. It is within the powers of the Commission's assessor to secure and analyse that evidence. It was unfair to impose this evidentiary and analytical burden on a complainant in these circumstances.
>
> 49. At this stage of the process it is for the Assessor to pursue that line of inquiry. The Assessor did exactly that and could not resolve the matter. It is for the Tribunal not the Commission to resolve lack of clarity.

[53] What the Federal Court instead ought to have done is to have asked itself whether the Commission's decision was one that it reasonably could have made.

[54] As noted by the Supreme Court of Canada in *Vavilov*, there are two types of fundamental flaws that may render a decision unreasonable: either a flaw of rationality in the reasoning process or instances where the decision is untenable in light of the factual and legal constraints that bear upon it (at para. 101). Most challenges, including the present one, centre on the second of these potential flaws.

[55] The Supreme Court provided a non-exhaustive list in *Vavilov* of factual and legal constraints against which administrative decisions may be measured to ascertain if they are tenable. These constraints include:

- the decision-maker's governing legislation, which may, for example, (i) set boundaries on the decision-maker's powers (at para. 108), (ii) require or allow the decision-maker to draw on its unique expertise, which may be different from that of a

court (at paras. 31, 93), (iii) contain definitions, principles or formulas that prescribe the exercise of discretion (at paras. 108-109) or (iv) be drafted in narrow or open-ended language (at para. 110);

- other statutory or common law, which may constrain the decision-maker, depending on context (at paras. 111-114);

- principles of statutory interpretation, which mean that the administrative decision-maker's interpretation "must be consistent with the text, context and purpose of the provision" (at para. 120);

- the evidence before the decision-maker, but it is not for the reviewing court to re-weigh the evidence. Rather, it may intervene only where "the decision-maker has fundamentally misapprehended or failed to account for the evidence before it" (at para. 126);

- the parties' submissions to the administrative decision-maker, which require the decision-maker to address key arguments made (at paras. 127-128);

- the decision-maker's past practices and decisions, which the administrative decision-maker cannot depart from without adequate explanation (at paras. 129, 131); and

- the impact of the decision on the affected individual(s) (at paras. 133-135).

[56] Here, the relevant statutory language is open-ended, providing minimal constraint on the Commission, which Parliament has charged with determining whether an inquiry into a human rights complaint is warranted: see for example *Public Service Alliance of Canada v. Canada*

*(Treasury Board)*, 2005 FC 1297, [2006] 3 F.C.R. 283 at para. 28. As was noted by this Court in *Ritchie* at paras. 38-39, the Commission's screening decisions are deserving of considerable deference. To similar effect, in *Wong* at para. 24, this Court reiterated that decisions of the Commission determining that an inquiry into a human rights complaint is not warranted "are entitled to substantial deference as they involve an exercise of discretion by the CHRC and are entirely factually-infused". In other words, "the Commission is given a great deal of discretion in determining the disposition of 40/41 Reports", discretion that "derives from judicial recognition of the Commission's expertise in performing its important screening and gate-keeping role": *Bergeron* at para. 74.

[57] The Federal Court has similarly stated that "[t]he Commission has broad discretionary power and enjoys a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report": *Egueh-Robleh v. Canadian Institutes of Health Research*, 2019 FC 1079, 2019 CarswellNat 12985 at para. 20; see also *Anani v. Royal Bank of Canada*, 2020 FC 870, 2020 CarswellNat 4322 at para. 50 [*Anani*]; *Mulder v. Canada (Attorney General)*, 2020 FC 944, 2020 CarswellNat 4633 at paras. 69-70.

[58] Most of the other above factors listed in *Vavilov* likewise provide little constraint on the breadth of discretion given to the Commission in making screening decisions.

[59] Insofar as concerns the relevant authorities, the case law establishes that the Commission is not bound by the recommendations made by an investigator. As noted by the Federal Court in

*Wang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2005 FC 654, 272 F.T.R. 208 at para. 30:

> [...] Not only is the Commission under no obligation to follow the Investigator's recommendation, it has to evaluate the complaint having regard to all circumstances. Faced with conflicting evidence, it was in the Commission's discretion to decide as it did in dismissing the applicant's complaint.

[60] Likewise, in *Bradley v. Canada (Attorney General)*, 135 F.T.R. 105, 1997 CarswellNat 1327 at para. 53, the Trial Division of the Federal Court stated:

> 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.

[61] The same principle was applied in *MacLean v. Canada (Human Rights Commission)*, 2003 FC 1459, 243 F.T.R. 219 at para. 50, where the Court held that the Commission was not bound to adopt the initial investigator's report which favoured further inquiry into the complaints. Similarly, in *Bastide v. Canada (Attorney General)*, 2005 FC 1410, [2006] 2 F.C.R. 637 at paras. 2, 19-22, and 51 aff'd 2006 FCA 318, 365 N.R. 136 at paras. 4-9, leave to appeal to SCC refused, 31732 (8 March 2007), the courts refused to interfere with the Commission's decision to dismiss the complaints "on the ground that the respondent had established a *bona fide* occupational requirement under section 15 of the Act", despite the investigator's report recommending the appointment of a tribunal to hear the complaints. In particular, this Court observed at paragraph 9 of its decision that "[i]f the Commission enjoys a wide latitude to allow a complaint and to request that an inquiry be instituted to examine its merits, it has the same latitude to refuse to do so and to dismiss the complaint".

[62] In addition, so long as the investigation is sufficiently thorough and has examined the critical evidence, the Commission is not required to return a file for further investigation if the Commission concludes that the factual basis put forward by the parties and the investigator provides insufficient grounds to justify further inquiry, even where additional evidence might be uncovered if a further inquiry were undertaken. Indeed, were it otherwise, the Commission's screening role would be substantially undermined. On this point, the British Columbia Court of Appeal has stated that a "mere possibility" of discrimination is not enough to require a hearing: as gate keeper, the Commission must make a preliminary assessment of the case and determine whether the evidence takes the case "out of the realm of conjecture", such that the matter warrants the time and expense of a full hearing: *Lee v. British Columbia (Attorney General)*, 2004 BCCA 457, 2004 C.L.L.C. 230-036 at para. 26.

[63] In a somewhat similar vein, contrary to what counsel for Mr. Ennis asserted before us, the Commission is not bound to refer a complaint to the Tribunal in cases where it has declined an earlier request by the respondent to dismiss the complaint under subsection 41(1) of the *CHRA*. The inquiries under that subsection and section 44 of the *CHRA* are separate and distinct.

[64] The case law also firmly recognizes that, to make out a case of discrimination, a complainant must establish a nexus between the disadvantage suffered and one of the prohibited grounds listed in the *CHRA* to establish a *prima facie* case of discrimination. In other words, the claimed disadvantageous treatment must be shown to arise because of one of the prohibited grounds. As has been noted by the Supreme Court of Canada and this Court, the relevant test requires complainants to demonstrate that (i) they have a characteristic protected from

discrimination under the relevant human rights legislation, (ii) they experienced an adverse impact with respect to the service at issue, and (iii) the protected characteristic was a factor in the adverse impact: see *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 at para. 33; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591 at para. 24; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795 at para. 86 (*per* Justice Abella); *Attaran* at paras. 19-24; *Johnstone v. Canada (Border Services Agency)*, 2014 FCA 110, 459 N.R. 82 at paras. 75-76 and 81-84.

[65] In assessing the sufficiency of the evidence, the Commission is charged with determining whether there is enough evidence in respect of the requisite nexus, the claimed grounds of discrimination and the alleged prejudice suffered by a complainant to warrant a referral to the Tribunal for inquiry: see for example *Love v. Canada (Privacy Commissioner)*, 2015 FCA 198, 475 N.R. 390 at paras. 23-26; *Anani* at paras. 48, 68-72; *Stukanov v. Canada (Attorney General)*, 2021 FC 49, 2021 CarswellNat 345 at paras. 40-47; *Hartjes v. Canada (Attorney General)*, 2008 FC 830, 334 F.T.R. 277 at paras. 23-30; see also, by analogy with British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210, *Edgewater Casino v. Chubb-Kennedy*, 2014 BCSC 416, 21 C.C.E.L. (4th) 314 at paras. 39-41, aff'd 2015 BCCA 9.

[66] It is eminently reasonable for the Commission to decline to refer a matter where, as here, there is no evidence to support a *prima facie case* of discrimination. To require it to do otherwise would lead to an inquiry that would most probably fail as the complainant in such a case has been incapable of marshaling the evidence to support his or her claim at the screening stage, where a complainant is required to provide evidence to support a referral. Referring such cases to

the Tribunal, especially where the Commission need not participate in the hearing before the Tribunal, would put an undue strain on limited adjudicative resources and limit access to justice for the many complainants who have valid cases, who will have to wait longer to have them adjudicated. Ultimately, determinations of whether any particular case raises issues and evidence sufficient to warrant inquiry are both policy-laden and inherently factual. Such determinations are ones for the Commission, as opposed to the Court, to make.

[67] While the finality of a decision to dismiss a complaint means that the decision has an important impact for the complainant, this factor, in and of itself, does not transform reasonableness review into correctness review. As was noted by Justice Mainville, writing for this Court in *Keith v. Canada (Correctional Service)*, 2012 FCA 117, 431 N.R. 121:

> 47. The decision of the Commission to dismiss a complaint under paragraph 44(3)(*b*) of the Act is a final decision made at an early stage, but in such case — contrary to a decision refusing to deal with a complaint under section 41 — the decision is made with the benefit and in the light of an investigation pursuant to section 43. Such a decision should be reviewed on a reasonableness standard, but as was said in *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) at paragraph 59, and recently reiterated in *Halifax* at paragraph 44, reasonableness is a single concept that "takes its colour" from the particular context. In this case, the nature of the Commission's role and the place of the paragraph 44(3)(*b*) decision in the process contemplated by the Act are important aspects of that context, and must be taken into account in applying the reasonableness standard.
>
> 48. In my view, a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(*b*) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.
>
> 49. This formulation ensures that both the decision of the Commission and the process contemplated by the Act are treated with appropriate judicial deference having regard to the nature of a dismissal under paragraph 44(3)(*b*). The pre-

> *Dunsmuir* jurisprudence of this Court dealing with judicial review of Commission decisions dismissing complaints pursuant to paragraph 44(3)(*b*) of the Act supports such a formulation: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 (F.C.A.).

[68] Returning to the particulars of the instant case, in my view, it was reasonable for the Commission to have determined that there was insufficient evidence to support an inquiry. Such conclusion was open to it based on the facts and applicable law. There was no evidence of how Mr. Ennis' claimed disabilities created a specific unaddressed need for housing nor, more importantly, of what housing he had been living in nor by whom it had been provided. Thus, it was open to the Commission to have dismissed the portion of the complaint that was grounded on disability.

[69] Likewise, given the evidence put forward by INAC and the third-party managers as compared to the complete lack of evidence marshalled by the respondents to substantiate their allegations, it was open to the Commission to have determined that an inquiry was not warranted into the complaint on the grounds of race or ethnic origin. In short, there was no evidence to support the requisite nexus between the claimed grounds of discrimination and the lack of housing. Unlike the situation in *First Nations Caring Society*, there was no evidence in this case to indicate that the federal government had failed to provide substantively equal access to housing to Mr. Ennis analogous to that provided to non-indigenous people. With respect, the mention by the assessor that it was unclear what role third-party management played in housing supply is not evidence of the requisite nexus; contrary to what the Federal Court held, the Commission was not required to adopt the assessor's conclusion on this point.

[70] Similarly, the Commission was not required to refer the matter to the Tribunal merely because INAC would be a necessary party to any remedy. Were it otherwise, every case would need to be referred to the Tribunal.

[71] Thus, the conclusion reached by the Commission was open to it in light of the case before it.

[72] There is some suggestion in the Federal Court's reasons that the Commission's decision was unreasonable due to the failure to provide adequate reasons. There is no merit to this suggestion as the Commission in fact provided cogent reasons in support of its determination. Moreover, reasons need not be perfect. As noted by the majority in *Vavilov* at para. 91, "[a] reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection."

[73] The Federal Court therefore erred in concluding that the Commission's decision was unreasonable.

B. *Procedural Fairness*

[74] I turn finally to the procedural fairness issue. The Federal Court, as noted, raised as an additional reason for its intervention the fact that it was procedurally unfair for the Commission to have not given Mr. Ennis advance notice that it intended to reach a different conclusion from that reached by the assessor.

[75] With respect, there is no merit in this position. A litigant is not entitled to advance notice of a likely adverse ruling nor to an opportunity to provide submissions based on a draft decision. Rather, in terms of disclosure, procedural fairness instead only normally requires that a decision-maker not decide based on undisclosed evidence (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 92) or base an adverse determination upon a new legal issue without giving the parties the opportunity to make submissions on the point (*I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524 at pp. 321, 338; *Arsenault v. Canada (Attorney General)*, 2016 FCA 179, 486 N.R. 268 at paras. 20-33). Neither occurred here.

[76] In the context of proceedings before the Commission, this Court has described procedural fairness requirements in *Canada (Attorney General) v. Davis*, 2010 FCA 134, 403 N.R. 355 at para. 6 as follows:

> The Commission must act in accordance with natural justice. This requires that the investigation report upon which the Commission relies be neutral and thorough and that the parties be given an opportunity to respond to it: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 (CanLII), [2006] 3 F.C.R. 392 (F.C.A.) applying *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.

[77] Similarly, the Federal Court has noted in *Deschênes v. Canada (Attorney General)*, 2009 FC 1126, 2010 C.L.L.C. 230-034 at para. 10:

> [...] Procedural fairness dictates that the parties be informed of the substance of the evidence obtained by the investigator which will be put before the Commission and that the parties be provided the opportunity to respond to this evidence and make all relevant representations in relation thereto: *SEPQA*, *above*; *Lusina v. Bell Canada*, 2005 FC 134, at paragraphs 30 and 31 (*Lusina*).

[78] These requirements were met in the instant case. Moreover, the parties were specifically put on notice, in the warning contained in the introduction to the assessor's report, that it was not binding. Mr. Ennis was therefore on notice that it was the Commission that would rule on whether his complaint ought to be referred to the Tribunal, and he was afforded the opportunity to make submissions to the Commission. In addition, it is clear from the Commission's reasons that it duly considered the submissions of all parties who made them.

[79] Thus, there was no denial of procedural fairness.

## IV. Proposed Disposition

[80] In light of the foregoing, I would allow this appeal, set aside the judgment of the Federal Court, and rendering the judgment that it ought to have made, would dismiss Mr. Ennis' application for judicial review. As the appellant has not sought costs, I would award none, either before this Court or in the Federal Court.

"Mary J.L. Gleason"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
D. G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-55-20 |
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| **PLACE OF HEARING:** | BY ONLINE VIDEO CONFERENCE |
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| **CONCURRED IN BY:** | PELLETIER J.A.<br>NEAR J.A. |
| **DATED:** | MAY 14, 2021 |

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