Date: 20071123

Docket: T-2219-06

Citation: 2007 FC 1232

BETWEEN:

MR. GLEN MORRISON

Applicant

and

HSBC BANK OF CANADA

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 30th of October, 2007, of an application for judicial review of a decision of the Canadian Human Rights Commission (the "Commission") wherein the Commission dismissed the Applicant's complaint against HSBC Bank of Canada (the "Respondent"). As is the norm with decisions such as this that come before the Court, the decision is very brief. Its substance reads as follows:

> Before rendering their decision, the members of the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, to dismiss the complaint because:
>
> - the evidence does not support the complainant's allegations that the Respondent discriminated against him; and
> - the evidence does not support a link between the alleged incidents and grounds of discrimination.

The decision under review is dated the 30th of November, 2006.

BACKGROUND

[2] The Applicant attests that he is a Canadian citizen of Caribbean descent, that he has reason to believe that he was profiled, targeted, stereotyped and made to feel like a "common criminal" and differentially treated because of his race, colour, place of origin and ethnic origin, on the 16th of September, 2005, by a customer service representative at a Mississauga branch of the Respondent. He further attests that he opened a British pounds foreign currency account at the same branch in June of 2004 and that, since that date, he had visited the same branch on "numerous occasions", apparently fifteen (15) in number, or on average about once every two months, to transact business, and that he had done so without problems until the 16th of September, 2005.

[3] The Applicant attests to the incident at issue at some length and further elaborates in his Factum. I summarize:

- On the 16th of September, 2005, the Applicant attended at the branch of the Respondent bank where he had a foreign currency account. There were several other customers at the branch and the Applicant joined the line. When it was his turn, he handed the customer service representative his passbook and requested $2,500 in cash from his British pounds funds on deposit, to be converted into Canadian currency.
- Apparently the Respondent's global computer system was not functioning, but the Applicant was not immediately advised of this. He had in fact been aware that this

was the situation the previous day. The Applicant was asked by a customer service representative, who he did not recognize and who apparently did not recognize him, to produce two (2) pieces of photo identification. He noted that no other customer appeared to be being treated in the same manner and that he was the only black customer then in the branch. A possible explanation for his differential treatment may have been that he had only a foreign currency account at the branch, and therefore he did not have a relevant bank card.

- The Applicant produced the requested photo identification. It was examined by the customer service representative who then left her station and consulted with another bank employee.
- The customer service representative returned to her station and requested that the Applicant sign the withdrawal transaction document that she had completed. The customer service representative advised the Applicant that his signature on the withdrawal transaction document was different from the signature on one of the pieces of photo identification material that he had produced which, he suggested to her, was not surprising since the identification document dated from 1970. The Applicant was requested to sign again. He again complied. In total, he was "forced" to sign three (3) times.
- The Applicant attested: "By this time I was the subject of attention of all the other customers. I was at this time humiliated and embarrassed, I felt like a common criminal and someone who was in the process of committing a bank forgery."
- The Applicant was requested to sign a fourth time. He refused.

The Applicant's requested withdrawal was apparently eventually successfully completed.

THE COMPLAINT

[4] Following the incident described above, on the next banking day, the Applicant closed his bank account to express his dissatisfaction with the treatment he had received. The Applicant filed a complaint with the Commission on the 27th of September, 2005. In the body of the complaint, under the heading "ALLEGATION", the Applicant wrote:

> …I have reason to believe that I was targeted, stereotyped, made to feel like a common criminal and differentially treated because of my race, colour, place of origin and ethnic origin, in regards to the service I received from [the customer service representative], a teller at the HSBC branch on September 16, 2005. I further have reason to believe that the differential service I received is in violation of Section 5 of the Canadian Humans Right Act.

THE PROCESS FOLLOWING THE FILING OF THE APPLICANT'S COMPLAINT

[5] The Applicant and the Respondent declined to participate in mediation.

[6] The Commission appointed an Investigator to enquire into the circumstances giving rise to the Applicant's complaint. Presumably at the request of the Investigator, the Respondent provided the Commission with a reasonably extensive response to the complaint, supported by a number of attachments. The response to the complaint, minus a number of the attachments, was provided to the Applicant for his consideration and comments. In responding, the Applicant once again reiterated his allegation that he had reason to believe that he was targeted, stereotyped, profiled, differentially treated and made to feel like a common criminal while receiving services at a branch of the Respondent, because of his race, colour, place of origin and ethnic origin.

[7] In his general comments, the Applicant notes:

> …it was evident that these events did not unfold in the same way when the white or non-black bank customers were being served. That demonstrates a clear and convincing case of different treatment. One of the most fundamental needs of every human being is the need for human dignity. Human dignity means being treated with respect and having a sense of self-esteem and self-worth. Perhaps nothing inflicts greater psychological and emotional damage on a person than to compromise his or her sense of dignity.
>
> **Racial profiling and targeting is defined as action undertaken for reasons of safety, security or public protection that single out an individual for greater scrutiny or differential treatment because of the stereotypes about race, colour, ethnicity, ancestry or place of origin. A variety of studies show that the perspectives of those who experience everyday racism are very different than that of White persons who have not themselves experienced these daily slights.**
>
> Racial profiling violates human dignity by sending a message to the victim that he or she is less worthy of consideration and respect as a human being. That has been my experience with HSBC Bank and that is why I closed my account and all my relatives in England and their friends will be doing the same as soon as I disclosed [sic] the Bank's unresponsive rationalization for my differential treatment to them.
>
> [emphasis in original]

The Applicant continued with a detailed paragraph by paragraph response to the Respondent's submissions. The response would appear to be the first time that the Applicant introduced the expression "racial profiling" into his claim which, I am satisfied, had previously been identified within the broader and less negatively loaded concepts of "targeted" and "stereotyped".

[8] The Investigator, according to his report, interviewed only four (4) individuals, all of whom were representatives of the Respondent.

[9] The Investigator prepared an investigation report dated the 14th of August, 2006. He concluded that the evidence before him did not support a finding that the Applicant was subjected to differential treatment when requesting banking services from the Respondent. Further, he

concluded that the evidence did not support a link between the Applicant's allegations and the prohibited grounds of discrimination identified in the *Canadian Human Rights Act*[1] (the "*Act*"). Finally, the Investigator found that the evidence did not support a conclusion that the treatment that the Applicant allegedly received during the incident at issue resulted in adverse consequences to the Applicant.

[10] The Investigator's Report concludes with the following recommendation:

> It is recommended, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint because:
> → the evidence does not support the complainant's [the Applicant's] allegations that the respondent discriminated against him;
> → the evidence does not support a link between the alleged incidents and grounds of discrimination.

[11] The Applicant was invited to respond to the Investigator's Report. He availed himself of the opportunity and, by letter dated the 5th of September, 2006, he responded at some length. Under the heading "**Analysis of the investigation**", he wrote:

> I submit that the Commission breached the rules of procedural fairness in its investigation of my complaint. I was of the view that a human rights investigator must conduct a fair, objective and unbiased human rights investigation. I submit that the full extent of this investigation is that, this investigator simply reiterated my allegations, accepted the complete 100 percent of the respondent [sic] arguments. Acknowledged [sic] their stated operating policies as rational without functional analysis and treated as evidence numerous contradictions of the respondent's previous positions, including obvious pretext without proper inquiries.
>
> Contrary to the investigator's conclusions that the evidence does not support my allegations, I maintain that I was targeted, stereotyped, profiled, differentially treated and made to feel like a common criminal in the eyes of non-black customers of the HSBC Bank on September 16th 2005, because of my race, colour and national and ethnic origin, contrary to the Canadian Human Rights Act.

[1] R.S., 1985, c. H-6.

[12] The decision of the Commission that is under review followed.

THE LEGISLATIVE SCHEME

[13] Subsection 3(1) of the *Act* provides that race, national or ethic origin, colour, age and sex are among the prohibited grounds of discrimination for all purposes of the *Act*.

[14] Section 5 of the *Act* provides that it is a discriminatory practice in the provision of, among other things, services customarily available to the general public, to deny, or to deny access to, any such service on a prohibited ground of discrimination.

[15] Section 26 provides for the establishment of the Canadian Human Rights Commission. Part III provides for the filing of complaints regarding discriminatory practices and the investigation of those complaints. It also provides for reports following investigations such as the Report herein at issue.

[16] Subsection 44(3) provides for the disposition of Reports by the Commission that are filed with it. That subsection reads as follows:

44.(3) On receipt of a report referred to in subsection (1), the Commission	44.(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la 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	*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) that, having regard to all the circumstances of the complaint, an inquiry into	(i) d'une part, que, compte tenu des circonstances relatives à la plainte,

the complaint is warranted, and	l'examen de celle-ci est justifié,
(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*).

It is sub-paragraph 44(3)(b)(i) on which the Commission would appear to have primarily relied in reaching the decision here under review.

THE ISSUES

[17] The Applicant, who represented himself on this application for judicial review, provided no succinct statement of the issues in his written materials. That being said, it is clear from those materials, and was clear from his oral presentation at hearing, that he is concerned that the Commission breached the duty of fairness owed by it to him in responding to his complaint. He questioned both the thoroughness and neutrality of the investigation. He further urged, albeit somewhat obliquely, that the Commission erred in applying the incorrect test for "discrimination",

either generally or in the "racial profiling context", and finally he urged that the Commission erred in its findings of fact, although the line between that issue and the issue regarding thoroughness of the investigation was somewhat blurred.

[18] Counsel for the Respondent provided the following statement of points in issue:

> Has the Applicant submitted material which is not properly before the Court on an application for judicial review?
>
> What is the appropriate standard of review of the Canadian Human Rights Commission's decision?
>
> Did the Canadian Human Rights Commission's decision fail to meet the standard of reasonableness in ruling that the Applicant's Complaint should be dismissed?
>
> Did the Canadian Human Rights Commission fail to observe the principles of natural justice or procedural fairness with respect to its investigation of the Applicant's Complaint?

The issue of material not properly before the Court was in no sense central to the judicial review.

ANALYSIS

[19] The day before the hearing of this application for judicial review, that is to say on the 29th of October, 2007, I heard a very similar application for judicial review of a decision of the Commission. In particular, the decision related to incidents in a different bank, two (2) in number, involving another individual, of somewhat similar profile, the differences in profile being age and stature. In the other matter[2], the Applicant was somewhat younger and, with great respect to the Applicant herein, was of substantially more imposing profile. I was able to discern these differences since the Applicant in the other matter, John Henry Powell III, appeared as an observer

[2] Court File T-535-06, 2007 FC 1227, November 23, 2007.

in the courtroom during the hearing of his application and the Applicant herein, appeared in the courtroom the next day to represent himself.

[20] The issues raised on the two applications were substantially the same although the factual backgrounds differed.

[21] I allowed the John Henry Powell III application. The analysis leading to my decision therein is set out in paragraphs [20] to [51] of my reasons. Those paragraphs are annexed hereto as a Schedule to these reasons.

[22] I reach a different conclusion in this matter based upon the following factual differences in the two (2) matters:

> 1. The complaint to the Commission in this matter is based on a single incident not on two incidents in the short space of time underlying the complaint in the Powell matter.
> 2. The incident here at issue was, I am satisfied, driven to a large extent by a computer failure affecting the Respondent's world-wide banking system which, I am satisfied, quite reasonably in the circumstances justified a heightened degree of surveillance to ensure that the Respondent's Know Your Client ("KYC") policy was observed. No similar, relatively unusual I would assume, event dominated the Powell incidents.
> 3. In this matter, the Applicant was dealing with his "home" branch where the Applicant could be presumed to be relatively well known whereas in the Powell matter, the Applicant was dealing with branches where it was safe to assume that the Applicant was unknown. That difference is mitigated by the fact that, here, although the Applicant had maintained an account at the branch of the Respondent where the incident occurred for approximately twenty-eight (28) months, the Applicant acknowledged that he had only conducted some fifteen (15) transactions in the branch, working out to approximately one transaction every two (2) months on

> average in a branch that serviced many customers. It was, therefore, not unreasonable to assume that he would not be particularly well known at that branch.
> 4. In this matter, the Applicant operated a British pounds account, a type of account that it would be fair to assume was not common. In the Powell matter, by contrast, the Applicant operated one or more accounts with no indication that they were anything other than Canadian dollar accounts.
> 5. Finally, while in both matters, the recommendations to the Commission in the Investigator's Report were based on a conclusion that the investigations had not found evidence to support allegations of adverse differential treatment based on prohibited grounds of discrimination, the recommendation in this matter goes further to suggest that the evidence did not support any link between the alleged incident and prohibited grounds of discrimination.

[23] As strange as it might seem that the Respondent found itself substantially inhibited in its operations by reason of a computer failure, I am satisfied that it was open to the Investigator to reach such a conclusion on the totality of the information before him. The Applicant operated an unusual form of account. By reason of that fact, he had no bank card. He was, I am satisfied, not a common attender at the branch of the Respondent where he operated that account. It should not, therefore, have come as a surprise to him that he was asked to provide photo identification to support that he was in fact the individual who operated the account in question. He responded to the request for photo identification with two (2) pieces of identification, one of which dated back to 1970. Not surprisingly, his signature on that particular piece of photo identification did not entirely conform to his signature at the time of the incident. In the result, I am satisfied that it was open to the Respondent's representative who dealt with the Applicant to proceed very cautiously. I am satisfied that this course of action would have been open to that representative of the Respondent no matter what the profile of the individual who presented the photo identification might have been. Equally, I am further satisfied that it was open to the Investigator to conclude, on all of the evidence

that was before her, that there was no link between the incident at issue and a prohibited ground of discrimination when the incident unfolded as it did.

[24] I am satisfied that the investigation into the Applicant's complaint was both thorough and fair. Further, based on the foregoing brief analysis, I conclude, as earlier indicated, that the recommendation provided by the Investigator in her Report was open to her. Finally, I am equally satisfied, that it was open to the Commission to accept the Investigator's recommendation. This matter simply never got so far as to open the question of whether the incident at issue gave rise to stereotyping or racial profiling. In the face of a conclusion that the evidence did not support a link between the incident at issue and a prohibited ground of discrimination, stereotyping or racial profiling simply cannot arise.

CONCLUSION

[25] For the foregoing reasons, this application for judicial review will be dismissed.

[26] Counsel for the Respondent did not seek costs. There will be no Order as to costs.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario.
November 23, 2007

SCHEDULE
(see paragraphs 19 to 21)

…
ANALYSIS

a) Standard of Review

[20] On the issue of standard of review, I can do no better than to quote the reasons of my colleague Justice Mosley in *Besner v. Attorney General of Canada (Correctional Service of Canada)*[3] where he wrote at paragraphs 23 to 25:

> The Federal Court of Appeal applied a pragmatic and functional analysis to determine the appropriate standards of review of a decision of the Canadian Human Rights Commission to dismiss an analogous complaint in *Sketchley v. Canada (A.G.)*…. The Court noted at paragraph 111, that this analytical approach does not apply to the question of whether an investigation has been sufficiently thorough. That issue is one of procedural fairness, for which no curial deference is due. The failure to accord procedural fairness has long been seen to be a grave failure on the part of any tribunal, such that the courts should provide the legal answer to any such question: … .
>
> The issue of whether an employer must make specific and reasonable medical inquiries about an employee's alleged limitations is a question of law, which attracts a standard of correctness:… .
>
> Absent a breach of procedural fairness or an error of law, a reviewing court should only intervene where it is shown that the decision of the Commission is unreasonable:… . Flaws in an investigator's Report will not vitiate a Commission's decision, so long as such flaws are not so fundamental that they cannot be remedied by the responding submissions of the parties. For the purposes of judicial review, when a Commission has not elaborated upon its reasons, as here, the Investigator's report may be considered to be the Commission's reasons for decision:… .
>
> [citations omitted]

[21] The complaint here before the Court is not "analogous" to that which was before the Court of Appeal in *Sketchley*[4]. That being said, I am satisfied that my colleague's brief comments on standard of review apply here. The first issue raised by the Applicant is one of procedural fairness,

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[3] 2007 FC 1076, October 19, 2007 (not cited before the Court).
[4] *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, December 9, 2005.

for which no curial deference is due. The second issue here before the Court, that of applying the incorrect test for discrimination, is, as with the issue to which the second quoted paragraph above is directed, a question of law and attracts a standard of correctness. The third issue raised on behalf of the Applicant is neither an issue of breach of procedural fairness or error of law. The third quoted paragraph above applies. On that issue, this Court should only intervene where it is shown that the decision of the Commission is unreasonable. Equally, on the facts before me, the Investigator's Report should be considered to be the Commission's reasons for decision.

b) Duty of Fairness

i) Thoroughness of the Investigation

[22] In *Sanderson v. Canada (Attorney General)*[5], my colleague Justice Mactavish wrote at paragraphs 45 and 46 of her reasons:

> …in fulfilling its statutory responsibility to investigate complaints of discrimination, investigations carried out by the Commission must be both neutral and thorough. Insofar as the requirement of thoroughness is concerned, the Court in *Slattery* stated that:
>
> > Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example *where an investigator failed to investigate obviously crucial evidence*, that judicial review is warranted. [emphasis added]
>
> Cases decided after *Slattery* have established that a decision to dismiss a complaint made by the Commission in reliance upon a deficient investigation will itself be deficient as "[i]f the reports were defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion": …
>
> [citations omitted, the references to "*Slattery*" are to *Slattery v. Canada (Human Rights Commission)*, [1994] 2 FC 574]

[5] [2006] F.C.J. No. 557, 2006 FC 447, April 6, 2006.

[23] As previously noted at paragraph [5] of these reasons, the Applicant filed his complaint with the Commission in February, of 2004. The alleged grounds of discrimination cited in his complaint were race and colour. In a letter dated the 4th of May, 2004, counsel for the Applicant advised the Commission that "…in addition to discrimination on the grounds of race, we would like to amend Mr. Powell's complaint to add the following grounds: colour, gender, age and country of origin." The proposal to add "colour" was, of course, duplicative. Also as previously noted, "country of origin" would appear not to be documented. The extended grounds were sought to be added well in advance of an appointment of an investigator by the Commission. I am satisfied that the ground of "ethnicity", later referred to, is included in the ground of "race", as broadly defined.

[24] Similarly, the Applicant gave extensive notice to the Commission of his concern, almost to the point of pre-occupation, that the discrimination he alleged involved racial profiling. In replying to the Respondent's defence to the allegation of discrimination, at paragraphs 44 and 47 of the response, the Applicant wrote:

> The Respondent's actions on November 4 and December 1, 2003 are indicative of racial profiling.
> …
> The Complainant submits that he was racially profiled because of his colour, gender, race, ethnicity, and age by both of the TD Canada Trust branches in the complaint. He believes he was profiled as a criminal, a fraudster and physically violent because he is African American.

[25] In paragraph 5 of his affidavit filed in this matter, commenting on an interview by the Commission's investigator, the Applicant attests:

> …I was concerned about the way the investigator seemed not to understand racial profiling as a form of racial discrimination.

On that ground among others, the Applicant complained to the Commission about the course of the investigation and, more particularly, about the conduct and attitude of the Investigator. Following an investigation by the Commission, the Investigator in question was removed from the file although the investigation was not recommenced.

[26] In responding to the Commission's "finding and recommendation" in the Investigator's Report, the Applicant, once again and extensively, raised the issue of racial profiling[6]. Of particular note, at paragraph 65, the Applicant wrote:

> The investigation failed to properly apply the law to the facts because the Investigator failed to be conscious of the Court's direction that it is often necessary to prove allegations of racial profiling by inference. It is submitted the only inference that can be drawn from the all [sic] of the surrounding circumstances is that the Complainant was racially profiled as more likely to commit fraud on the basis of his colour, gender, race, ethnicity and age.

[27] The Applicant also expressed his concern that the Commission had failed to conduct a thorough investigation[7]. In particular, the Applicant wrote at paragraph 30:

> With regard to the second requirement, the Complainant submits that the Investigator has not conducted a thorough investigation. This is evidenced by the Investigator's failure to address a number of discrepancies that, given the surrounding circumstances in the complaint, provide a reasonable basis to conclude that the Complainant was racially profiled and discriminated against on the basis of his colour, gender, race, ethnicity and age. …

[28] Despite all of the foregoing, there is no evidence before the Court that, in the course of its

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[6] See tab 4Q of the Applicant's Application Record, Vol. 1, paragraphs 1, 25, 27, 30, 38, 39, 40, 41, 42, 43, 44, 54, 55, 60, 65 and 66.
[7] See Tab 4Q, paragraphs 2, 25, 30 and 44.

investigation, the Commission took into account, much less seriously examined, the issue of racial profiling and took into account the expanded grounds of discrimination put forward by the Applicant.

[29] Evidence of racial profiling is illusive, particularly since intention to racially profile is not required. In the result, a person engaging in racial profiling may not even be aware that he or she is doing so.

[30] In *R. v. Brown*[8], Justice Morden, wrote for the Court:

> [7] There is no dispute about what racial profiling means. In its factum, the appellant defines it compendiously: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group" and then quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case, *R. v. Richards*… as set forth in the reasons of Rosenberg J.A….:
>
> > Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.
>
> [8] The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.[citations omitted]

On the facts of this matter, of course, no police officer is involved. That being said, I am satisfied that precisely the same might be said in respect of the Respondent's representatives who confronted the Applicant in an effort to ensure that fraud was not perpetrated against the Respondent.

[8] 64 O.R. (3d) 161 (Ont. C.A.).

[31] Justice Morden continued at paragraph [44] of his reasons:

> A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.

[32] In *Peart v. Peel Regional Police Services Board*[9], Justice Doherty wrote at paragraphs 89 and 90 of his reasons:

> In *R. v. Richards*…, Rosenberg J.A., after quoting the second definition of racial profiling cited above, wrote at paragraphs 90 and 91 of his reasons:
>
> > A police officer who uses race (consciously or subconsciously) as an indicator of potential unlawful conduct based not on any personalized suspicion, but on negative stereotyping that attributes propensity for unlawful conduct to individuals because of race is engaged in racial profiling…
> >
> > Racial profiling is wrong. It is wrong regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race….
> >
> > [citation omitted]

[33] Once again, I am satisfied that the foregoing should not be restricted to the conduct of police officers but should extend to the conduct of any person, such as the bank representatives who here confronted the Applicant who are concerned with prevention of unlawful conduct.

[34] I reiterate from paragraph [28] of these reasons that there is no evidence before the Court

[9] [2006] O.J. No. 4457 (Ont. C.A.).

that, in the course of its investigation, the Commission took into account, much less seriously examined, the issue of racial profiling. Further, while the Applicant's concern about racial profiling is superficially acknowledged on the face of the Investigator's Report, it is nowhere acknowledged in the "Overall Analysis" comprised in that Report, nor is it acknowledged in the "Recommendation" that concludes the Report. Further, it is nowhere acknowledged in the additional material that was before the Commission when it reached the decision under review except in the Applicant's Complaint Form and in the Applicant's response to the Investigator's Report.

[35] On the basis of the foregoing analysis, I am satisfied that the Commission's investigation of the Applicant's complaint, and thus the Investigator's Report that was put before the Commission, was less than thorough. As such, the lack of thoroughness tainted the Recommendation to the Commission and, in turn, tainted the Commission's decision that is under review. On this ground alone, by reason of a breach of the duty of fairness owed by the Commission to the Applicant, the decision under review must be set aside.

[36] The foregoing conclusion is dispositive of this application for judicial review. Nonetheless, in the interest of completeness, I will briefly turn to the remaining issues before the Court on this matter.

ii) Adequate opportunity to the Applicant to meet the case put forward by the Respondent in response to the complaint

[37] Counsel for the Applicant noted that the Respondent's KYC policy on which the Respondent's representatives relied in closely examining the Applicant during the two (2) incidents at issue was not made known to the Applicant in a manner that provided the Applicant with a reasonable opportunity to respond. Neither the Respondent's defence to the complaint, to which the Applicant was given an opportunity to respond, or the Investigator's Report, to which the Applicant was also given an opportunity to respond, contained the actual language of the KYC policy. By the time the Applicant became aware of the precise terminology of the policy, no opportunity to respond remained.

[38] Counsel for the Respondent notes that the "relevant portions" of the policy were referenced in the Respondent's response, were addressed on behalf of the Applicant in his response thereto and were considered in the Investigator's interview with the Applicant. Counsel notes that no request was ever made by the Applicant for production of the actual policy statement.

[39] Counsel for the Respondent relies on the following extract from *Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*[10] where the Supreme Court of Canada adopted the following reasoning of Lord Denning, M.R., in defining the duty to act fairly:

> The investigating body is, however, the master of its own procedure…It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give substance only.

[10] [1989] 2 F.C.R. 879.

[40] Against the foregoing, I am satisfied that the Commission did not deny the Applicant fairness in this regard.

iii) Bias, neutrality or open-mindedness

[41] In *Zundel v. Canada (Attorney General)*[11], Justice Evans, then of the predecessor to this Court, wrote at paragraph 21 of his reasons:

> …it has been held with respect to both the provincial human rights commission…and the Canadian Human Rights Commission…that the closed mind test of bias is applicable to investigators and the Commission. As Noël J. (as he then was) said in *Canadian Broadcasting Corporation v. Canada (Human Rights Commission)*…when considering the test of bias applicable to the Commission:
>
> > The test, therefore, is not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[42] As noted above, the Applicant was deeply concerned about the open-mindedness of the Investigator originally assigned to investigate his complaint. He complained to the Commission through his counsel. An internal investigation was conducted within the Commission. The original Investigator was removed from further investigation of the Applicant's complaint. A new Investigator was assigned, but that Investigator was among those who had been involved in the internal investigation. Although the original Investigator was removed from the matter, the investigation was not recommenced. Rather, the new Investigator simply picked up where the original Investigator had left off.

[11] 175 D.L.R. (4th) 512.

[43] That being said, the Applicant, according to the record before the Court, never disputed the accuracy and comprehensiveness of the original Investigator's interview notes.

[44] While the process followed by the Commission in investigating the Applicant's complaint was certainly less than satisfactory to the Applicant, and the conduct of the original Investigator and his questioning might have been substantially less than entirely sensitive, I am not satisfied that the evidence before the Court establishes that the issue here before the Commission was predetermined. In the circumstances, the Applicant would not succeed on this ground.

c) Error of Law - Did the Commission apply the incorrect test for "discrimination", either generally, or in the "racial profiling context"?

[45] The Applicant submits that the Investigator assigned to investigate his complaint, and thus the Commission, utilized the test for discrimination applicable to claims under section 15 of the *Canadian Charter of Rights and Freedoms*[12]. In so doing, the Applicant alleges, the Investigators and thus, the Commission, looked for intent and motivation in their analysis of the conduct of the Respondent's representatives involved in the two (2) incidents at issue and thus erred in a reviewable manner. In *Smith v. Ontario (Human Rights Commission)*[13], the Court wrote at paragraph 11:

> It has been held consistently that intent or motive to discriminate is not a necessary element of discrimination. In *Ontario (Human Rights Commission) and O'Malley v. Simpson-Sears Ltd.*, …the Court said:

[12] Part I of the *Constitution Act, 1982* (R.S.C. 1985, Appendix II, No. 44), being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
[13] [2005] O.J. No. 377, February 8, 2005.

> The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.
>
> [citation omitted]

[46] Further, the Applicant urged, the Investigator, and thus the Commission, fell into reviewable error in adopting a "comparator" test.

[47] The relevant paragraph of the Investigator's Report is brief and is repeated here, with emphasis, for ease of reference:

> The investigation has not found evidence to support that the actions of the respondent and its employees were motivated by the complainant's race and colour. There are no relevant known White comparators to test whether a White person, in the identical circumstances to those of the complainant, was treated better or differently than the complainant. Based on the totality of the evidence, a White person, in the identical circumstances, probably would be treated the same under the respondent's KYC policy to establish that person's identity to the satisfaction of branch staff.
>
> [emphasis added]

[48] The Investigator clearly relied heavily on the issue of motivation and, as indicated earlier, given the brief decision of the Commission that is at issue, I must assume that the Commission adopted that reliance. In doing so, I am satisfied that the decision under review was made in reviewable error, against the appropriate standard of review, assuming that that standard is correctness.

[49] With regard to the reliance in the Investigator's Report on a "comparator" test, my colleague Justice O'Reilly wrote at paragraph 22 of his reasons in *Canada (Human Rights Commission) v. M.N.R.*[14]:

> …the Commission argued that the Tribunal's discussion of a "comparator group", which derives from jurisprudence under subsection 15(1) of the *Charter*, was inappropriate and affected the Tribunal's conclusion. In my view, this discussion was completely innocuous. A court or Tribunal cannot decide whether a person has been discriminated against without making comparisons to the treatment of other persons. Comparisons are inevitable.

[50] On the facts of this matter, the brief discussion of a "comparator" group was not innocuous. Rather, it was central to the very brief analysis leading to the recommendation to the Commission. That being said, I share the view of my colleague Justice O'Reilly that "Comparisons are inevitable." I cannot conclude that the Commission fell into reviewable error in impliedly adopting the reasoning of the Investigator's Report in this regard.

c) Findings not reasonably supported by the evidence, ignoring of evidence and misapprehending relevant evidence

[51] The Applicant did not rely heavily on this ground in written submissions, if the relative length of submissions is to be used as a guide and, equally, counsel for the Applicant devoted little argument to the issue. I am satisfied that the evidence as to identity relied on by the Applicant during the two (2) incidents, combined with the evidence from the Respondent's records that was available to the representatives of the Respondent involved in the same incidents was somewhat confusing. The reality is that the Applicant chose to present himself at two different branches of the Respondent bank, neither of which was a branch in which he had an account. In doing so, it was

[14] [2004] 1 F.C. 679.

not unreasonable that the Respondent's representatives placed an onus on him to clearly identify himself. Such is not to say that the Applicant was not discriminated against in the incidents. It is only to say that I find no reviewable error, against a standard of review of reasonableness *simpliciter*, in the Commission's treatment of the evidence in the Investigator's Report which was before the Commission itself.

...

[For technical reasons, footnote numbers in this Schedule do not confirm with footnote numbers in the original.]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2219-06
STYLE OF CAUSE:	MR. GLEN MORRISON and HSBC BANK OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 30, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	November 23, 2007

APPEARANCES:

Self represented	FOR THE APPLICANT
Vincent P. Johnston	FOR THE RESPONDENT

SOLICITORS OF RECORD:

	FOR THE APPLICANT
Harris & Company, Vancouver, B.C.	FOR THE RESPONDENT