Federal Court  Cour fédérale

Date: 20091028

Docket: T-157-09

Citation: 2009 FC 1104

Ottawa, Ontario, October 28, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

FALLAN DAVIS

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

REASONS FOR ORDER AND ORDER

[1] It was a cold day in November 2005 when matters got out of hand at the Canadian Border Crossing on Cornwall Island, Ontario. They got so out of hand that Border guards walked off the

job and the Seaway International Bridge to New York State was closed. They got so out of hand that Teiohontathe Fallan Davis, a young Mohawk woman who lives on the Akwesasne Reserve located on the island, complained to the Canadian Human Rights Commission that various officers of the Canadian Border Services Agency discriminated against her. The Commission appointed an investigator, endorsed his final report, and has referred the matter to the Canadian Human Rights Tribunal, which is scheduled to commence its hearing next month.

[2] The Attorney General, on behalf of the Canadian Border Services Agency (CBSA), has brought an application for judicial review of the Commission's decision to refer the complaint to the Tribunal. He submits that the underlying investigation was neither neutral, nor thorough, as the law requires. More particularly, it is said that the Commission completely ignored the CBSA's detailed criticisms of the investigator's report. Furthermore it subsequently came to light that in an earlier draft of his report, the investigator had recommended that Ms. Davis' complaint be dismissed.

[3] Although the Attorney General raises substantive issues, and although allegations that several of the CBSA officers on duty that day are racists may have grave repercussions and must be taken very seriously, I have come to the conclusion that the CBSA was shown adequate procedural fairness, that the investigation was thorough enough and that the decision of the Commission to refer the complaint to the Tribunal, having regard to all the circumstances, was not unreasonable.

THE FACTS

[4] The Mohawk community situated on Cornwall Island, Ontario, also extends to nearby islands and to the mainland along the south shore of the St. Lawrence River in Quebec and New York State. The community is somewhat disdainful of the Canada/United States border. Personal items bought in the United States and brought onto Cornwall Island by Akwesasne residents are to be reported to customs officers, but are not subject to duty.

November 18, 2005

[5] During the morning of November 18, 2005, Ms. Davis was returning from New York State in her old black SUV.

[6] To hear her tell it, as she veered towards the passenger lane reserved for Akwesasne residents, a Customs officer stood in her path and signalled her to drive into the commercial transport compound. Although asked why, he did not give any explanation. As she entered the compound she saw a transport truck under what looked like an x-ray machine festooned with a sign reading “danger radiation”. She was concerned as this was not where secondary detailed inspections of passenger vehicles normally take place. She was told to get out of the vehicle which was then x-rayed and after was dismantled to some extent. She used her cell phone to call her grandmother in panic. It was cold, she was not allowed to take shelter, and she was told to “shut up.” There were a number of officers present. One in particular made a number of remarks such as “you’re definitely guilty of something…are you moving contraband cigarettes?...” The situation deteriorated. Ms. Davis said he was trespassing on her territory to which he replied “it is Canadian Customs land” which she disputed. He said “you know what our society thinks about you people.”

[7] All told, after she was denied shelter and left out in the cold for 45 minutes notwithstanding that she was inadequately dressed, all that the officers found were a few items of clothing and toys for her children which had been purchased that morning at a mall in Massena, New York. When asked why she did not declare them, she said she had not been given an opportunity to declare anything.

[8] Thereafter a dispute arose as to whether she had to pay duty because she had failed to declare.

[9] The CBSA has a different version of events.

[10] It so happened that a mobile Vehicle and Cargo Inspection System (VACIS) was in operation at the border station that day. In addition to inspecting commercial vehicles which might be used to carry contraband, there had been a report of a secret compartment being built into a black SUV. That was why Ms. Davis' vehicle was selected for inspection, as was at least one other SUV. There was nothing sinister about directing her vehicle to the commercial trucking area. The VACIS unit is large and logically was placed there.

[11] Ms. Davis was rude and uncooperative to the officers who were all male. She used extremely profane language and called their sexual orientation and size of various body bits into

question. Although tempers naturally flared, she was always treated with respect, and no remarks were ever made of an adverse discriminatory nature.

[12] Because of her status Ms. Davis is not obliged to pay duty on personal items, but she is obliged to report them. They finally gave her the benefit of the doubt that in the circumstances she had not had the opportunity to make any declaration and so did not impose any duty.

[13] No matter who started what, all agree that Ms. Davis was extremely distraught. She came to the attention of another Customs officer, a woman, who gave her the badge numbers of the officers in question "should she be interested in filing a complaint," and later told the Commission's investigator that this behaviour was entirely consistent with racist remarks previously made by various CBSA officers staffing the Cornwall Island border crossing.

[14] As a result of a telephone call Ms. Davis made on her cell phone, a number of vehicles carrying members of the community began to gather around the Customs house. She also threatened to call in the Mohawk Warriors. Fearing for their safety, the officers left and closed the border.

CANADIAN HUMAN RIGHTS ACT

[15] The purpose of the *Canadian Human Rights Act* is to give effect, in the federal sphere, to the principle that all should be able to make for themselves the lives they are able to and wish to make, without being hindered or prevented by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex and other factors. More particularly section 5 states that it is

a discriminatory practice in the provision of services or facilities customarily available to the general public to differentiate adversely in relation to any individual on a prohibited ground of discrimination.

[16] On receipt of a complaint the Commission may do a number of things. In accordance with section 41 and following it may refuse to deal with the complaint if, for instance, it should be more appropriately dealt elsewhere, if it is beyond the Commission's jurisdiction (i.e. not a federal matter), if it is trivial, frivolous, vexatious or made in bad faith or if it is based on a situation occurring more than one year earlier.

[17] In this case the formal complaint was filed one year and one week after the incident. However the Commission has the power to extend time which it did as Ms. Davis had in a less formal way complained to it within the year. The CBSA does not take issue with that decision.

[18] There is no other commission to which to complain, as might be the case if the officials in question had been members of the RCMP or members of the Military Police carrying out policing duties.

[19] The Commission may propose mediation, which it did in this case. Unfortunately, and I say this deliberately, Ms. Davis refused. It is unclear whether the CBSA was given an opportunity to refuse. Certainly it did not advocate mediation.

[20] The Commission then appointed its own investigator. At the conclusion of the investigation, the Act provides that after considering the report the Commission may either refer the complaint to the Tribunal or dismiss it if "…satisfied that, having regard to all the circumstances of the complaint, an inquiry…is warranted…", or not warranted as the case may be.

STANDARD OF REVIEW

[21] A decision of the Commission either to dismiss a complaint or to refer it to the Tribunal is judicially reviewed on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). That means that the Court must show some deference to the Commission, even if it might have decided differently. However it is a condition precedent thereto that the Commission, and its investigator, observe the rules of natural justice; procedural fairness in this case. The investigation had to be thorough, meaning that the CBSA had to be given a reasonable opportunity to comment on the case it was facing and the Commission had to be neutral, in the sense of not being affected by bias. When it comes to procedural fairness, the Court owes no deference to the Commission. Indeed the Court would be shirking its duty if it did show deference. See for instance the decision of Mr. Justice Nadon, as he then was, in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574.

THE CBSA'S INTERNAL INVESTIGATION

[22] Upon receipt of Ms. Davis' formal complaint, the Commission sent a copy thereof to the CBSA and invited comment. The CBSA had already carried out its own investigation. It made

detailed comments on Ms. Davis' complaint and also provided the Commission's investigator with a copy of its own conclusions. I shall first deal with the CBSA's investigation.

[23] The CBSA's report states that the VACIS team is only present at the Cornwall Border Crossing from time to time. It was determined that trucks and SUVs would be selected for inspection. Automobiles were included because of a previous scan the VACIS team had performed on an SUV at the request of the RCMP that revealed a secret compartment.

[24] Ms. Davis' SUV was the first selected. Although the details of the other vehicle scanned are not stated in the report, and although there is some confusion amongst officers as to whether it bore Vermont or Virginia plates, the CBSA provided the Commission's investigator with the name of the driver of the other vehicle which bore Vermont plates.

[25] Ms. Davis crosses the border a number of times a day using the lane reserved for Akwesasne residents. The incident was described as follows:

> The scan and ensuing examination of Ms. Davis's vehicle and her interaction with the CBSA officers quickly escalated in that Ms. Davis was reportedly belligerent and disrespectful to staff and finally distraught. As a result of the examination $200.00 of undeclared goods were discovered. However, the shift superintendent in communication with the port chief allowed her the benefits of the Akwesasne Remission Order and allowed her forward without payment of duties and or taxes.
>
> VACIS team members and some Cornwall port staff became fearful when they perceived their personal safety was in jeopardy due to the continuing presence and actions of Ms. Davis, a reporter and Ms. Davis's grandmother. This resulted in the VACIS team's request for

> a police escort off the island as well as the port staff tendering a refusal to work notice.

[26] Thereafter reports were reviewed and statements from those officers involved as well as Ms. Davis were solicited. However there are some warning signs. "For the most part staff were cooperative and forthcoming…" (my emphasis). There was some regret that the VACIS team members had not received a formal briefing from Cornwall Port Management on local community relations or sensitivities and that the information they did receive from local Port Officers "…may be tainted by the Port Officer's personal beliefs." The report concluded that since it had been some time since cross-cultural awareness sessions have been provided, it would be appropriate to reinstitute these sessions in the hope of eliminating, or at least limiting, future incidents of this nature.

[27] However, the report found that "there is nothing to substantiate Ms. Davis' allegations of officer misconduct", although it was noted that none of the male officers did anything to diffuse the situation. That conclusion is factually incorrect. There was evidence to substantiate Ms. Davis' allegations. The evidence comes from her own mouth; allegations she immediately repeated to the female Customs Officer and within her community. On the other hand, there is also evidence that there was no misconduct on the part of the officers, that evidence coming from their mouths.

[28] This is a credibility issue.

The Commission Investigator's Report

[29] The report begins by pointing out that the relevant prohibited grounds of discrimination alleged were race, age and sex. It concludes with the recommendation pursuant to section 44(3) (a) of the Act that the Commission request the chairperson of the Tribunal to institute an inquiry into the complaint because having regard to all the circumstances thereof an inquiry is warranted. It was stated that the public interest is engaged by this complaint to the extent that travellers should not be subjected to discrimination due to their race by CBSA officers.

[30] The investigation only focused on race as Ms. Davis had not provided any specifics of discrimination based on age or sex.

[31] The investigator summarized the events at the secondary inspection as alleged both by Ms. Davis and the officers involved.

[32] He noted the CBSA's position that the crossing on Cornwall Island is challenging as many of the travellers are Akwesasne residents. Indeed it appears that some 80% of the crossings from New York State are by Mohawks. The CBSA had also asserted that the situation was exacerbated by the Mohawk security officer on duty who is supposed to lend a hand if security incidents arise, but who did nothing. One person interviewed had arrived at the scene as a result of one of Ms. Davis's phone calls. He is said to have told the investigator that he saw officers intimidating and yelling at Ms. Davis who was very upset and in tears. This witness was of the opinion that the

behaviour was unbelievable and unacceptable although he did not know if it arose because of Ms. Davis' race, age or gender.

[33] The report refers to an interview with the female Customs officer, who later left her employment with the CBSA because she says she was disgusted with the manner in which "indigenous people" were treated. In an email three days after the incident she mentioned to the CBSA that she had been told by Ms. Davis that an officer told her "you know what we think of your society; we will find something, we know you are guilty just by the way you are acting." She was of the opinion that the officer showed a complete lack of cooperation, respect, integrity and professionalism, and that Ms. Davis should have been told what was going on rather than being terrorized. She added that CBSA officers assume that "Indians" are guilty until proven innocent, and that treatment of Mohawks at the border was absolutely atrocious.

[34] The investigator used Ms. Davis' version of events, which had been immediately repeated to the female border officer, to say that "Evidence appears to indicate… that officers made racial comments, that they demonstrated a complete lack of core values towards the complainant because of her race".

[35] He was of the view that the evidence was not clear as to whether other SUVs were scanned, or, if they were, whether they were directed to the same area that Ms. Davis' was. He suggested that the vehicles targeted were selected from the lane reserved for Akwesasne residents. He added that

Ms. Davis may have behaved rudely and used foul language with the officers "…as a result of their yelling and rude manners."

The CBSA's Response

[36] The Commission sent its investigator's report to the CBSA and to Ms. Davis for comment, prior to making its decision. The report is some 12 pages in length and contains 109 paragraphs. A number of issues were raised in response. The CBSA complains that the investigator lent great credibility to the former CBSA employee who was not present during the initial incident and whose understanding of what was said or done was based on a subsequent conversation with Ms. Davis. There follows this cutting remark:

> In addition, it should be noted that CBSA has reason to believe that Ms. _____'s past history with the CBSA would clearly undermine the reliability of her testimony. However, in the context of the present complaint, the CBSA **cannot** disclose personal information regarding Ms. _____'s employment or medical history in accordance with the *Privacy Act*. As a result, we are faced with a situation where the CBSA cannot fully explain the reasons why Ms. _____'s testimony is unreliable.
>
> [My deletion.]

Talk about asking the Commission to reweigh evidence!

[37] It was also submitted that the investigator completely misunderstood the purpose of the CBSA's internal review. That complaint may well be correct, but is not particularly relevant.

[38] The CBSA also complained that the investigator failed to consider all the evidence submitted and often said “the evidence suggests…” without identifying the witness or why evidence form CBSA witnesses was discarded.

[39] The statement that the CBSA declined mediation was challenged. It says it was never given the opportunity to participate as Ms. Davis had declined mediation. Although the investigator’s report indicates newspaper clippings were reviewed, “CBSA is concerned that the articles may have been derived from Mohawk publications that are blatantly biased against CBSA.” The Commission was obliged under our *Federal Courts Rules* to produce its file. Indeed the newspaper clippings were from Mohawk publications.

[40] It was complained that Ms. Davis lacked credibility. No doubt this is a conclusion drawn from the fact that the CBSA believes its own.

[41] The litany of complaints went on.

[42] Ms. Davis also made detailed comments.

[43] In any event, following receipt of the commentaries, the Commission simply wrote a form letter stating that it had reviewed the investigator’s report and had decided to request the chair of the Tribunal to institute an inquiry pursuant to section 44(3)(a) of the Act because it was “satisfied that, having regard to all the circumstances, an inquiry is warranted.”

[44] The CBSA submits that natural justice required a response to its detailed objections to the investigator's report, as otherwise the investigation was not thorough. For instance, it is suggested that after the CBSA alleged that the investigator completely misunderstood the purpose of its internal report, the author thereof should have been interviewed.

[45] Rule 317 of the *Federal Courts Rules* requires a tribunal, in this case the Commission, if requested, which it was, to produce its record. The record produced indicated that there had been earlier drafts of the investigator's report, which were not produced. An order for production was sought. The Commission first took the position that the drafts were privileged, as a draft is reviewed by a team which includes a lawyer, but then voluntarily produced them without Court order. I am not called upon to say whether the drafts would have been privileged or not. If they were, privilege was waived by voluntary production. The pertinent draft bears the following notation "Draft for team x review". There are a number of handwritten comments being "John's comments Sept 23/08". "John" is not identified. The concluding recommendation was: "It is recommended, pursuant to para. 44(3) (b) of the *Canadian Human Rights Act* that the Commission dismiss the complaint because the evidence does not support the allegations of deferential treatment based on race." Just under that paragraph "John" wrote "Bonnie, I think this could go either way".

[46] Counsel for the CBSA engaged in a detailed comparison of the draft with the final report. During the hearing I expressed considerable concern with this approach, as earlier drafts of reasons I write, including these reasons, never see the light of day. Often substantial revisions are made. In

this case the female Border officer, who supports Ms. Davis, was only interviewed by the Commission's investigator after the draft report had been prepared. Some matters were dropped from the first draft as clearly not being relevant. However other matters were fudged and slanted differently. In the first draft, it is said that evidence suggested that the foul language began with Ms. Davis and that although the officers reacted they did not issue any racial epitaphs. In the final draft evidence indicates that it was their behaviour which may have caused Ms. Davis to use inappropriate language. In the final version the investigator believes evidence may suggest that there was racial profiling from the get-go by singling out Akwesasne residents who were on route to their reserved lane. These changes may have arisen from a re-reading of interview notes, or the interview with the former Customs officer may have put a different perspective on matters. This is not a case where the Commission published its decision and then changed its mind. In such a case, an explanation may well be owed. (*Canada (Attorney General) v. Grover*, 2004 FC 704, 252 F.T.R. 244).

MS. DAVIS' CASE

[47] Ms. Davis, who represented herself, and who is not a lawyer, did not have much to say at the hearing before me. Obviously she supports the decision of the Commission to refer the matter to the Tribunal. She had some difficulty focusing on the events on November 18, 2005, clearly resents highway 138 and the border station running through the Akwesasne Reserve and considers that the event may have been a pretext in the CBSA officers' campaign to be permitted to carry weapons. She referred to the closing of the bridge this past summer after the CBSA closed the border crossing on Cornwall Island until it set up a border station on the mainland in Cornwall. When returning

from New York she must now pass through Cornwall Island on to Cornwall on the mainland to report, and then return. Otherwise she would be severely fined.

THE COMMISSION'S POSITION

[48] The Commission sought leave to intervene to explain its process as Ms. Davis is self-represented. Prothonotary Aronovitch granted that motion. The CBSA moved to have certain paragraphs of the Commission's subsequent memorandum of fact and law struck from the record on the grounds that they did not explain the process, but rather were intended to justify its decision by referring the Court to various portions of the record. Whether or not there is any merit in the CBSA's position, its motion is pointless as I am expected, in any event, to consider the record as a whole. The motion is dismissed on the grounds of mootness.

THE LAW

[49] I begin with Mr. Justice LeDain's reasons on behalf of the Federal Court of Appeal in *Latif v. Canadian Human Rights Commission*, [1980] 1 F.C.R. 687 where he said at page 697:

> There can be little doubt that the Canadian Human Rights Act creates new rights of a substantive and procedural nature. In effect it creates the right to be dealt with free from discrimination of certain kinds in respect of certain matters within federal legislative jurisdiction, and it provides special machinery for obtaining relief from discriminatory practices. A decision not to deal with a complaint on a ground specified in section 33 is a decision which effectively denies the possibility of obtaining such relief. It is in a real sense determinative of rights.

[50] In *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, the Supreme Court plumbed Parliament's intention in the event there be insufficient evidence to warrant the referral of the complaint by the Commission to the Tribunal. Mr. Justice Sopinka said at page 899: "It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage." He adopted the following statement of Lord Denning in *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.) where he said at page 19:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion .... In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

[51] This quotation puts to rest the complaint that the Commission's investigator did not identify witnesses.

[52] It is well-established in the case law that when the Commission simply adopts its investigator's report, that report becomes its reasons: *Sketchley v. Canada (A.G.)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 37. It is also well-established that the investigator is part of the Commission, not a person independent from it (*Selvarajan*, above). There is nothing untoward about other Commission members reviewing the draft and making comments. These comments may have led to the interview of the female CBSA officer which caused the officer to see the evidence in a different light.

[53] As noted by Mr. Justice La Forest in *Bell v .Canada (Canadian Human Rights Commission); Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 53:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:
>
> > The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[54] The vetting duty of a judge at a preliminary inquiry in criminal law was summarized by the Supreme Court in *R. v. Arcuri,* [2001] 2 S.C.R. 828, 2001 SCC 54 at paras. 21-23. The question to be asked there is whether or not is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The judge must commit the accused to trial if there is admissible evidence which could, if it were believed, result in a conviction. Then there is the question of whether the evidence is direct or circumstantial; if the evidence is circumstantial, then some limited weighing is permitted. Applying these principles to this case, there is direct evidence from Ms. Davis which could, if believed, lead the Tribunal to a finding of discrimination on the part of CBSA.

[55] The CBSA accepted that it falls upon the Commission to refer either all of the complaint to the Tribunal, or none of it. Had the complaint been limited to gender and age, given the investigator's report, it is not likely that the matter would have been referred to the Tribunal. In like manner, even if it could be said that there is no evidence to support the proposition that the CBSA targeted the Akwesasne Residents' Lane, it does not follow that the Commission's decision is therefore unreasonable. The crucial issue is what was said or not said by the CBSA officers to Ms. Davis during the secondary inspection. I hasten to add that if the information the CBSA had was that contraband was coming onto Cornwall Island in vehicles belonging to Akwesasne residents, it would have been perfectly natural to focus scanning on vehicles using the Residents' Lane. Otherwise, the officers would be shirking the responsibilities conferred upon them by the Parliament of Canada.

[56] As to the submission by the Attorney General on behalf of the CBSA that procedural fairness demanded a response by the Commission to its detailed commentary, that situation is more likely to occur in cases in which the investigator has recommended that the complaint be dismissed (*Herbert v. Canada (Attorney General)*, 2008 FC 969, and *Sanderson v. Canada (Attorney General)* 2006 FC 447). This is because a dismissal brings an end to the matter. A referral to the Tribunal is in no way determinative of the truth of the allegation of discrimination. Procedural fairness is contextual (*Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817). In any event, most of the commentary was argumentative and urged the investigator to prefer one body of evidence over the other. It is not the function of the investigator, or the Commission, to make credibility determinations, but rather only to determine whether or not there is evidence which, if believed, would justify the complaint. In speaking of the Refugee Board in *Miranda v. Canada (M.E.I.*) (1993), 63 F.T.R. 81, Mr. Justice Joyal said:

> [4] […] Although one may isolate one comment from the Board's decision and find some error therein, the error must nevertheless be material to the decision reached. And this is where I fail to find any kind of error.
>
> [5] It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals. Yet we must always remind ourselves of what the Supreme Court of Canada said on a criminal appeal where the grounds for appeal were some 12 errors in the judge's charge to the jury. In rendering judgment, the Court stated that it had found 18 errors in the judge's charge, but that in the absence of any miscarriage of justice, the appeal could not succeed.

[57] The Attorney General urges me to isolate various aspects of the Commission's decision wherein his "artful pleader" sees errors. Yet as Mr. Justice Joyal emphasized, one must not lose track of the Commission's mandate.

[58] I have come to the conclusion that the Attorney General has not made a case on the balance of probabilities that the Commission's decision to refer the complaint to the Tribunal was tainted with bias, a lack of procedural fairness, based on an inadequate investigation, or was unreasonable.

[59] I hasten to point out that what is at issue are the events of November 18, 2005 at the border crossing on Cornwall Island, not the history of European settlement in North America.

[60] Ms. Davis did not seek costs, and none shall be awarded. The terms of reference of the Commission's intervention precludes it from seeking costs.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review of the decision of the Canadian Human Rights Commission to refer the complaint of Fallan Davis to the Canadian Human Rights Tribunal is dismissed.
2. The motion by the Attorney General to strike portions of the memorandum of argument of the intervener, Canadian Human Rights Commission, is dismissed on the ground of mootness.
3. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Canadian Human Rights Commission	FOR THE INTERVENER