

**Date: 20081103**

**Docket: A-534-07**

**Citation: 2008 FCA 341**

**CORAM: DÉCARY J.A.  
SEXTON J.A.  
SHARLOW J.A.**

**BETWEEN:**

**PAUL RICHARDS**

**Appellant**

**and**

**MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Respondent**

Heard at Toronto, Ontario, on September 29, 2008.

Judgment delivered at Ottawa, Ontario, on November 3, 2008.

**REASONS FOR JUDGMENT BY:**

**SHARLOW J.A.**

**CONCURRED IN BY:**

**DÉCARY J.A.  
SEXTON J.A.**

**Date: 20081103**

**Docket: A-534-07**

**Citation: 2008 FCA 341**

**CORAM: DÉCARY J.A.  
SEXTON J.A.  
SHARLOW J.A.**

**BETWEEN:**

**PAUL RICHARDS**

**Appellant**

**and**

**MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] This is an appeal of the judgment of Justice Teitelbaum (2007 FC 1100) dismissing the application of Mr. Paul Richards for judicial review of a decision of the Canadian Human Rights Commission dismissing his complaint against the Canadian Border Services Agency. The issue in this appeal is whether the decision of the Commission adopting the recommendation of an investigator should have been quashed on the basis of a statement in the investigator's report indicating that he may have misapprehended a principle of human rights law. In my view, given the particular circumstances of this case, the answer is no.

Statutory framework

[2] This appeal involves a complaint of a discriminatory practice, defined as follows in section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public  
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or  
(b) to differentiate adversely in relation to any individual,  
on a prohibited ground of discrimination.

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :  
a) d'en priver un individu;  
b) de le défavoriser à l'occasion de leur fourniture.

[3] The prohibited grounds of discrimination are set out in subsection 3(1) of the Act, which reads as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

[4] The Canadian Human Rights Commission is established by section 26 of the Act. It has a number of duties and functions, one of which is to receive complaints of discrimination submitted under section 40 of the Act. The Act contains some provisions that permit a complaint to be dismissed summarily, but none of those provisions apply in this case. The complaint was referred to an investigator pursuant to section 43.

[5] The investigator conducts an investigation and prepares a report to the Commission that summarizes the result of the investigation and recommends whether the Commission should dismiss

the complaint or refer it to the Canadian Human Rights Tribunal for an inquiry. Generally, the investigator's report is provided to the complainant and the party against whom the complaint is made. They are entitled to make submissions, and those submissions are considered by the Commission with the investigator's report.

[6] Based on the investigator's report and any submissions made by the parties, the Commission decides whether to dismiss the complaint or refer it to the Tribunal for an inquiry. That decision is made pursuant to subsection 44(3) of the Act, which reads in relevant part as follows:

44. (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, [...] or  
 (b) shall dismiss the complaint to which the report relates if it is satisfied  
 (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted [...].

44. (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 [...] b) rejette la plainte, si elle est convaincue :  
 (i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié [...].

[7] In making a decision pursuant to subsection 44(3) of the Act, the function of the Commission is analogous to that of a judge at a preliminary inquiry in the sense that the Commission does not adjudicate a complaint, but determines on the basis of the investigator's report, and any submissions by the complainant and other parties, whether there is a reasonable basis in the evidence for proceeding to an inquiry (*Cooper v. Canada (Human Rights Commission)*),

[1996] 3 S.C.R. 854, at paragraph 53; *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at page 899).

[8] The work of the investigator is treated as part of the work of the Commission. If the Commission accepts the recommendation of an investigator without giving separate reasons, as in this case, it is presumed to have adopted the reasons of the investigator (*Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paragraph 37; *Syndicat des employés de production du Québec et de l'Acadie*, cited above, at pages 902 and 903).

[9] Generally, the Commission is entitled to deference in relation to the scope and depth of the investigation upon which it relies in deciding whether a complaint should be dismissed or referred to the Tribunal for an inquiry. However, as a matter of procedural fairness, a decision of the Commission may be quashed if it is based on an investigation that is not neutral or not thorough. (*Slattery v. Canada (Human Rights Commission) (T.D.)*, [1994] 2 F.C. 574 at paragraph 56, affirmed (1996), 205 N.R. 383 (F.C.A.)).

[10] There is very little jurisprudence dealing with the neutrality of an investigation. However, the cases have established that an investigation is neutral if it is undertaken by an investigator with an open mind and no preconceptions as to the merits of the complaint or any potential defence to the complaint (see *Canadian Broadcasting Corporation (CBC) v. Canada (Canadian Human Rights Commission)* (1993), 71 F.T.R. 214 (T.D.) at paragraphs 45 to 47).

[11] The cases dealing with the thoroughness of an investigation have established that an investigation is not thorough if the investigator fails to investigate obviously crucial evidence or to address crucial submissions by one of the parties (see, for example, *Sketchley* (cited above), *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, and *Public Service Alliance of Canada v. Canada (Treasury Board)* (F.C.), [2006] 3 F.C.R. 283, at paragraph 42). It is an open question whether there are any other grounds upon which the thoroughness of an investigation may be challenged.

#### Facts

[12] Mr. Richards, an employee of the Ontario Human Rights Commission, is an African Canadian man, Jamaican born, who wears his hair in dreadlocks. On July 8, 2003, Mr. Richards was returning from a vacation in Jamaica. He flew into Lester B. Pearson International Airport. His complaint to the Commission was based on the treatment he received at the airport from three inspectors employed by the Canadian Border Services Agency (CBSA). He submitted his complaint on December 9, 2003, approximately five months after the event.

[13] The CBSA is responsible for national security and public safety at border crossings and international airports, including Lester B. Pearson International Airport. All passengers arriving at that airport are required to be cleared under the *Customs Act*, R.S.C. 1985, c. 1 (2<sup>nd</sup> Supp.) and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. It is undisputed that officers engaged in the clearance procedure are expected, among other things, to be aware of indications of unlawful activity, including drug smuggling.

[14] The clearing process consists of a primary examination and, in a minority of cases, a secondary examination. At the primary examination stage, all travellers are questioned by a customs inspector, known as the “primary inspector”. During this examination, the traveller’s self-completed Customs Declaration Card is reviewed for customs, agriculture and health reasons. After the primary examination, most travellers are directed to pick up their baggage and exit. Some travellers are directed for “secondary examination”, usually for further consideration of questions relating to immigration or customs, for the payment of duty and taxes, or for luggage inspection.

[15] In addition to primary and secondary examinations, travellers may be questioned at any time by a “roving” customs officer. This questioning may be the result of a random choice by the roving officer, or on the basis that the officer has noticed an “indicator”. An indicator is something that indicates that further scrutiny is warranted. The record does not contain a comprehensive explanation of what those indicators are for travellers directed for secondary examination or chosen for questioning by a roving inspector, but I assume that it would include such things as nervous behaviour or evasive answers to routine questions.

[16] The incidents that are the subject of Mr. Richards’ complaint all involve interactions with officers of the CBSA during the clearance process. It is not alleged that any of the officers did or said anything that was not permitted by their governing statute. The allegation, as I understand it, is that Mr. Richards was subject to greater scrutiny and a more intensive examination than other travellers, for no reason except that he is a black man of Jamaican origin, with dreadlocks.

[17] Before considering the facts, it is worth noting that there is no reason to doubt that on July 9, 2003, Mr. Richards was referred for secondary inspection and also was questioned by a roving inspector. However, there is no evidence as to why Mr. Richards was referred for secondary inspection, or why he was chosen for questioning by a secondary inspector. In fact, no CBSA inspector recalled dealing with Mr. Richards on July 9, 2003. There are a number of possible reasons for their lack of recall. One is that CBSA inspectors deal with a very large number of people. The other is that five months passed before Mr. Richards submitted his complaint. There is evidence that on July 8, 2003, 930 travellers cleared through customs at Lester B. Pearson International Airport at approximately the same time as Mr. Richards.

[18] I now turn to the summary of facts. This summary is based on the facts as stated by Mr. Richards, supplemented by information that the investigator received from the CBSA.

[19] When Mr. Richards arrived at the airport, he gave his completed Customs Declaration Card to a primary inspector. He had declared one bottle of rum. The primary inspector asked to see the bottle of rum, and Mr. Richards showed it to him. The primary inspector marked Mr. Richards' Customs Declaration Card and referred him for secondary inspection. The primary inspector was never identified. There is no evidence as to why the primary inspector referred Mr. Richards for secondary inspection.

[20] While Mr. Richards was waiting for his luggage, a roving inspector summoned him by saying "over here". Mr. Richards showed him his flight and citizenship documents. According to



Mr. Richards, the roving officer turned all the pages of the flight documents even though all the information was on the front page, and kept looking at his citizenship documents. The roving officer also asked Mr. Richards many questions about why he went to Jamaica and where he stayed. Mr. Richards answered all of those questions. Mr. Richards alleges that the roving officer also asked him whether he was “gainfully employed”, a question that Mr. Richards found offensive because it implied that he could not afford the trip unless he was engaged in illegal activity. The officer then asked Mr. Richards what he did for a living. Mr. Richards answered that he was a human rights officer with the Ontario Human Rights Commission. The officer stopped questioning Mr. Richards, gave him back his documents, and pointed him to the luggage search area (I take that to mean the secondary inspection area, to which Mr. Richards had already been referred by the primary inspection officer).

[21] The roving officer was eventually identified, but he did not recall dealing with Mr. Richards. He confirmed that if he chose to question a traveler, he would normally ask questions such as those recalled by Mr. Richards. He also agreed that a person with dreadlocks would “stand out”. He explained that when he concluded that a person’s luggage should be searched, he would highlight their Customs Declaration Card. He said that since Mr. Richards’ card was not highlighted, he must have believed Mr. Richards’ answers and not referred him for a luggage inspection.

[22] The secondary inspection officer asked Mr. Richards to unlock his two pieces of luggage. Before searching the luggage, the officer asked Mr. Richards if he had anything to declare. Mr. Richards answered that he had just one bottle of rum. The officer asked to see it, and

Mr. Richards gave it to him. The officer held the bottle up, tilting it back and forth. The officer asked Mr. Richards if he was gainfully employed, and Mr. Richards said that he was. The officer asked where he worked, and Mr. Richards said that he worked for the Human Rights Commission. The officer quickly looked through one of Mr. Richards' bags, declined to examine the other one, and told Mr. Richards he could go.

[23] The secondary officer was also identified but, like the roving officer, he did not recall dealing with Mr. Richards. However, he explained that he routinely holds up alcohol bottles in the manner described by Mr. Richards in order to determine if the bottle contains liquid cocaine, a substance that may be hidden in bottles of other liquids. He also confirmed that he often asks travellers what they do for a living, in order to look for indicators of a legitimate purpose for travelling, or for indicators of drug smuggling. He denied that he would have treated Mr. Richards unfairly or discriminated against him because of his race, colour or place of origin, and stated that he treats all travelers the same.

[24] The computer system that normally records information about primary inspections was not functioning on July 8, 2003. As a result the only documentary record of Mr. Richards' inspection is his Customs Declaration Card. It indicates that Mr. Richards declared that he was importing one bottle of rum. The markings on the Card also disclose that the primary inspector referred him for secondary inspection to have his customs declaration verified, and that no inspector required Mr. Richards' luggage to be examined for drugs.

[25] In the complaint submitted by Mr. Richards on December 9, 2003, he alleges that he was subjected to discriminatory treatment on the basis of his race, colour and place of origin. He argued at that time that the officers assumed that he would be more likely to be smuggling drugs because he is black and of Jamaican origin, and was coming from Jamaica.

[26] Mr. Richards' complaint was assigned to an investigator. By letter dated June 18, 2004, Mr. Richards was informed that the CBSA has provided a defence to the complaint. Mr. Richards was asked for his comments on the defence. Mr. Richards provided those comments in a letter sent to the investigator on July 19, 2004. In that letter, Mr. Richards elaborated on his complaint, saying, "The country of Jamaica has been targeted as a 'source' country that grows marijuana and certain persons who look a certain way as part of their customs consume marijuana" (emphasis in original). Referring to some of the questions the inspectors asked, he argued that they were "all based on the assumptions that I practice a certain lifestyle (religion) and therefore drugs are apart (*sic*) of that lifestyle. Taking [*sic*] together, all the action [*sic*] and comments made by the officers involved, which led to my negative experience were unquestionably based on the fact of my race, my gender and my perceived religious belief." In a subsequent telephone conversation with the investigator, Mr. Richards explained that his reference to "perceived religious belief" was a reference to Rastafarianism.

[27] The inspector did not speak to Mr. Richards again, but he records in his report some information he obtained about Rastafarianism from a website. Counsel for Mr. Richards argues that

this summary is inaccurate and misleading, but as it appears to have played some part in the investigator's reasoning, it is useful to quote it in full (emphasis in original):

Originating in Jamaica around 1930, Rastafarianism has grown to an estimated 1,000,000 adherents worldwide. Most members are male, wear their hair in dreadlocks, and use marijuana as part of their religious practice. Former Ethiopian Emperor Haile Selassie I was revered as a messiah figure by Rastafarians, who believed his coronation in 1930 was a fulfillment of a prophetic writing of Marcus Mosiah Garvey, a Black freedom fighter prominent in the "return to Africa" movement of the early 1900's. In the 1970's, reggae musician Bob Marley "*came to symbolize Rasta values and beliefs,*" and "*played a catalytic role in the Rastafarian movement worldwide.*" After the death of Haile Selassie in 1975, "*the Rastafarian movement has become increasingly secular. Many of the movement's symbols have lost their religious and ideological significance. ... The Rasta colours (red, green, and gold), in which all Rastafarian banners and artifacts are painted, have been largely stripped of their ideological meaning and are now worn by all. Further, dreadlocks are now sported as a trendy hairstyle by both blacks and whites in Jamaica and abroad.*"

[28] The investigator's report includes an analysis in which the investigator identifies and discusses three issues relating to Mr. Richards' complaint. The first issue is factual ("whether or not the complainant received unusual scrutiny by the Customs officers he encountered"), the second involves a judgment of the nature of the scrutiny ("whether or not the scrutiny was unreasonable and unfair"), and the third involves an assessment of whether the scrutiny was motivated by discrimination on a prohibited ground ("whether or not that unusual, unfair scrutiny was because of his race, colour, national ethnic origin, or perceived religion"). Logically, a negative answer to any of these questions could result in a recommendation to dismiss the complaint.

[29] The investigator reached a negative conclusion on the first question on the basis that, although Mr. Richards considered that the questions he was asked were intrusive and unwarranted, the evidence was that they were not unusual.

[30] The investigator also reached a negative conclusion on the second question, based on the following reasoning:

The complainant noted in his rebuttal that he “fits a certain stereotype” in how he looks, i.e., that of a Rastafarian. Based on his look, the officers involved asked him about the goods he was importing, and examined his goods to satisfy themselves that no contravention of any Act of Parliament occurred. It would seem reasonable that a Customs officer would have to satisfy himself that a person who appears to be an adherent of a religion that has as one of its practices the use of an illegal substance is not, in fact, bringing that illegal substance with him. Contrary to the complainant’s statement that the questions they asked were about his “character”, the complainant’s own information indicates that the questions related to his travel itinerary and occupation, not his innate characteristics. The information gathered does not support that it was unreasonable for the complainant to be asked questions and be required to show the contents of his bag by the officers in the performance of their duties.

[31] The investigator declined to deal with the third question because he did not consider it necessary. He recommended that the complaint be dismissed on the basis that “the information gathered does not support the allegation”. The Commission accepted the recommendation and dismissed Mr. Richards’ complaint for the reasons he gave. Mr. Richards’ application for judicial review of the decision of the Commission was dismissed.

Discussion

[32] Mr. Richards' appeal is aimed principally at the investigator's analysis of the second issue. The appellant argues that the investigator's analysis of the second issue casts doubt on whether the investigator correctly understood and applied the principles of human rights law. In my view, this argument warrants some consideration.

[33] Contrary to what the investigator wrote, it is doubtful that a CBSA inspector should assume that a person who is black, of Jamaican origin, and wears his hair in dreadlocks may be a Rastafarian, and for that reason may use marijuana, and for that reason may be importing an illegal substance. It follows that a person who meets that description, and who is selected for unusual scrutiny because he meets that description, may well feel that a complaint is warranted.

[34] However, this reference by the investigator was unnecessary to his decision. The essential finding of the investigator was factual. The investigator concluded that Mr. Richards's complaint did not warrant an enquiry because the evidence did not establish that, in fact, Mr. Richards was subject to unusual treatment. That conclusion is not challenged, and by itself justifies the Commission's decision to accept the recommendation of the investigator to dismiss the complaint. In my view, that is a sufficient basis for concluding that Justice Teitelbaum made no error in dismissing Mr. Richards' application for judicial review.

Conclusion

[35] I would dismiss the appeal with costs.

“K. Sharlow”

---

J.A.

“I agree.

Robert Décary J.A.”

“I agree.

J. Edgar Sexton J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-534-07

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE  
TEITELBAUM DATED OCTOBER 25, 2007, DOCKET NUMBER T-190-05.)**

**STYLE OF CAUSE:** Paul Richards v. Minister of Public  
Safety and Emergency Preparedness

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 29, 2008

**REASONS FOR JUDGMENT BY:** SHARLOW J.A.

**CONCURRED IN BY:** DÉCARY J.A.  
SEXTON J.A.

**DATED:** November 3, 2008

**APPEARANCES:**

Marie Chen FOR THE APPELLANT

Gillian Patterson FOR THE RESPONDENT  
Julie Jai

**SOLICITORS OF RECORD:**

African Canadian Legal Clinic FOR THE APPELLANT  
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada