Date: 20071123

Docket: T-535-06

Citation: 2007 FC 1227

BETWEEN:

JOHN HENRY POWELL III

Applicant

and

TD CANADA TRUST

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 29th 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 TD Canada Trust (the "Respondent"). As is the norm with decisions such as this that come before this Court, the decision here 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 investigation has not found evidence to support the allegation of adverse differential treatment based on race and colour.*

The decision under review is dated the 21st of February, 2006.

BACKGROUND

[2] The Applicant is an African American male residing in Canada. He is a young Black man, 6 ft. 7 inches tall, who, during one of the occasions giving rise to his complaint was wearing a hat and sunglasses. He was regularly employed. The bank account or accounts that he maintained with the Respondent was or were in a Scarborough branch.

[3] On the 4th of November, 2003, the Applicant sought to make a deposit to his account with the Respondent at a Whitby branch of the Respondent. He was unknown at that branch and, more particularly, he was unknown to the bank representative who served him. Pursuant to the Respondent's Know Your Customer policy (the "KYC" policy), the bank representative questioned him or, from the Applicant's point of view, "interrogated" him as to his identity. A second bank representative was consulted when the exchange between the Applicant and the first representative became somewhat heated. The Applicant's deposit was eventually accepted.

[4] On the 1st of December, 2003, the same scenario was repeated at a branch of the Respondent in Hamilton, Ontario. Once again, the Applicant's deposit was eventually accepted. The Applicant was of the view that, in both cases, he was subjected to excessive questioning and treatment which he believed was linked to his race, age, gender, colour and related grounds.

THE COMPLAINT

[5] Following the incidents described above, the Applicant filed a complaint with the Commission in February of 2004. The alleged grounds of discrimination cited in his complaint were race and colour. At a later date, on his behalf, counsel requested that the complaint be amended to include grounds of gender, age and country of origin. At that time the Applicant had been in Canada for many years. His country of origin was not identified in a careful review of the material before the Court.

THE PROCESS FOLLOWING THE FILING OF THE APPLICANT'S COMPLAINT

[6] On the 15th of June, 2004, an attempt was made to mediate the Applicant's complaint. It was unsuccessful. In the result, the complaint was referred to the investigation branch of the Commission. An investigation followed. The Applicant and his counsel, as well as certain individuals identified by the Applicant as witnesses in support of his complaint were interviewed. Representatives of the Respondent, including those who dealt directly with the Applicant during the incidents at issue were also interviewed. The Respondent's response to the complaint was shared with the Applicant and his counsel. The Applicant found the Investigator by whom he was interviewed to be substantially less than sensitive to his situation. He alleged that the Investigator engaged in inappropriate questioning, demonstrated manner and demeanour that left the Applicant embarrassed and humiliated, and injected into the interview personal experiences and areas of questioning that led the Applicant to believe that the Investigator was not only less than sensitive to the entire situation, but was also biased against the Applicant.

[7] The Applicant complained to the Commission about his concerns with regard to the assigned Investigator. An investigation was conducted by the Commission into the conduct of the investigation. The investigation was not recommenced. Rather, conduct of the investigation was re-assigned and the investigation was carried forward. The Commission found no bias was demonstrated and it was determined that the Applicant did not dispute the accuracy and comprehensiveness of the original Investigator's interview notes. The Applicant was not re-interviewed.

[8] A summary of the Respondent's response to the complaint was shared with the Applicant and his counsel. The Applicant was provided an opportunity to reply. He availed himself of the opportunity.

[9] An Investigator's Report issued and was shared with the Applicant. Once again, the Applicant was given an opportunity to reply and availed himself of that opportunity. The Investigator's Report was authored by the employee of the Commission who had been assigned to investigate the Applicant's complaint against the original Investigator and staff of the Commission with whom he had worked.

THE INVESTIGATOR'S REPORT

[10] The Investigator's Report (the "Report") is dated the 1st of December, 2005. It is reasonably extensive extending in substance to some nine (9) pages. Under the heading "Summary of Complaint and Respondent's Defence", the Report states:

> 1. The Complainant [here the Applicant] alleges that he was treated in an adverse differential manner in the provision of banking services because of his race and colour (Black).

It is worthy of note that "race and colour" were the Applicant's original grounds of complaint. His request that the grounds be extended to include "gender, age and country of origin" appears to have been ignored.

[11] Under the same heading, the Report provides:

> 3. The respondent denies that it discriminated against the complainant. It contends that, during the two incidents outlined in the Complaint Form, Bank staff were only following important Bank policies. The respondent states that it would have applied these policies to any customer, regardless of race or colour.

[12] The Report then goes on to describe at some length the background to the complaint, the allegations of discrimination and the Respondent's response to those allegations, the Respondent's KYC policy, and provides some summaries of interviews conducted with the Respondent's employees. The Applicant's rebuttal to the Respondent's response is also summarized. In the course of the background description, mention is made of the Applicant's allegation that he had been "racially profiled", in each case with the expression in italics, and in each case in a description of the Applicant's rebuttal to positions taken by the Respondent. The concept of racial profiling is nowhere else mentioned in the Investigator's Report. In particular, in the Report, the Applicant's allegation of racial profiling is nowhere mentioned in the analysis and conclusion. Rather, under the heading "Analysis", the following appears: "The issue in this case is whether the Complainant was subjected to differential treatment regarding banking services because he is Black".

[13] The Investigator's Report concludes with the following "Overall Analysis" and "Recommendation":

> Based on the evidence, it appears the following is what happened during both incidents. The complainant sought to make large deposits at branches where he was unknown. Following the KYC policy, service representatives sought to verify the complainant's identity. This was complicated by the fact he spells his name in different ways, that he has multiple bank accounts, that he appeared to have multiple addresses, and there was confusion about the identity of his employer. In both incidents, bank employees also perceived the complainant's behaviour to be intimidating and uncooperative.
>
> 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 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.
> …
> It is recommended, pursuant to paragraph 44(3)(b) of the Canadian Human Rights Act, that the Commission dismiss the complaint because:
> - the investigation has not found evidence to support the allegation of adverse differential treatment based on race and colour.

THE LEGISLATIVE SCHEME

[14] Subsection 3(1) of the *Canadian Human Rights Act*[1] (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*.

[15] 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.

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

[16] 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 summarized above.

[17] 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 the complaint is warranted, and	(i) d'une part, que, compte tenu des circonstances relatives à la plainte, 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 would appear to be subparagraph 44(3)(b)(i) on which the Commission relied in reaching the decision here under review.

THE ISSUES

[18] Counsel for the Applicant, in the Applicant's Memorandum of Fact and Law, described three (3) issues before the Court, as follows: first, did the Commission breach the duty of fairness owed by it to the Applicant in responding to his complaint? Counsel questions the thoroughness of the investigation conducted and of the Report prepared following the investigation, whether or not the Applicant was provided an adequate opportunity to meet the case put forward by the Respondent in response to the complaint and whether the manner of conduct of the investigation and the response to the Applicant's expressed concerns regarding the investigation should give rise to a reasonable apprehension of bias on the part of the Commission; secondly, whether the Commission erred in applying the incorrect test for "discrimination", either generally, or in the "racial profiling context"; and thirdly, whether the Commission erred in law in making findings arising out of the investigation that were simply not reasonably supported by the evidence or which ignored and misapprehended relevant evidence, or in failing to take into account the totality of the evidence.

[19] Counsel for the Respondent more concisely identified the same issues and added the issue of standard of review.

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)*[2] 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*[3]. 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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[2] 2007 FC 1076, October 19, 2007 (not cited before the Court).
[3] *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)*[4], 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]

[4] [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[5]. 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[6]. 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 investigation, the Commission took into account, much less seriously examined, the issue of racial

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[5] 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.
[6] See Tab 4Q, paragraphs 2, 25, 30 and 44.

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*[7], 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.

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

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[7] 64 O.R. (3d) 161 (Ont. C.A.).

> 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*[8], 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 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

[8] [2006] O.J. No. 4457 (Ont. C.A.).

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)*[9] 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.

[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

[9] [1989] 2 F.C.R. 879.

[41] In *Zundel v. Canada (Attorney General)*[10], 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.

[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

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[10] 175 D.L.R. (4th) 512.

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*[11]. 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)*[12], 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:
>
> > 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.

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[11] 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.
[12] [2005] O.J. No. 377, February 8, 2005.

[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.*[13]:

> …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.

[13] [2004] 1 F.C. 679.

[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 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.

CONCLUSION

[52] Based upon the foregoing analysis, this application for judicial review will be allowed.

[53] In the Applicant's Memorandum of Fact and Law, the Applicant seeks relief in the following terms:

> The Applicant requests an order setting aside the decision of the Commission dismissing the Applicant's Human Rights Complaint pursuant to section 44(3)(b) and:
>
> - an order substituting a finding that the complaint be referred to Tribunal or alternatively,
> - an order that the matter be referred back to the Commission for a fresh investigation by an investigator who has had no involvement in this matter under the supervision of staff who have had no involvement in this matter.

[54] During the course of the hearing of this application, counsel for the Applicant quite properly withdrew the Applicant's request for an Order referring the matter to a Tribunal.

[55] Neither the Applicant nor the Respondent sought costs. There will be no Order as to costs.

[56] An Order will go setting aside the decision under review and referring the Applicant's complaint back to the Commission for reinvestigation by an Investigator who had no involvement in the investigation giving rise to the decision under review that has been set aside. To the extent possible, the further investigation should be supervised by Commission staff who had no

involvement in the first investigation, in the supervision of that investigation or in the investigation of the conduct of the original Investigator.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
November 23, 2007

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-535-06
STYLE OF CAUSE:	JOHN HENRY POWELL III and TD CANADA TRUST
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 29, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	November 23, 2007

APPEARANCES:

Richard Miller	FOR THE APPLICANT
D. Barry Prentice	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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