CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

IDRIS ORUGHU

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA BORDER SERVICES AGENCY

Respondent

RULING ON THE EXPERT'S REPORT TENDERED BY THE COMMISSION

MEMBER: Dr. Paul Groarke

2004 CHRT 35
2004/11/25

[1] The Commission has advised the Tribunal that it wishes to tender an expert's report. The Respondent has raised a number of objections to the report. I have received oral and written submissions from both sides.

I. DELAY

[2] The first objection relates to the tardiness of the report. The Complainant and the Commission were originally given until May 17th to provide its disclosure in the present case. This included any expert reports. The hearing was scheduled for September 13th. The period for disclosure was extended to June 4th, at the request of the Complainant. It was then extended to June 28th.

[3] There was no expert's report. On September 3rd, the parties requested a conference call. The call was held on September 8th. The Commission applied for an adjournment of the hearing. I refused the request.

[4] There was another frantic conference call on September 10th, the day on which the report was finally disclosed. The Respondent was naturally upset at the late disclosure of the report. All of the parties requested for an adjournment of the hearing. Since I was advised by counsel that the expert's report was central to the case, I agreed to adjourn the first week of the hearing until September 20th. This would allow the parties to deal with the expert's report at a subsequent sitting.

[5] The Respondent has submitted that the late delivery of the report was "tantamount to trial by ambush". It was impossible for the Respondent to review and respond to the report within the time set for the original hearing. The resulting delay has resulted in inconvenience and presumably some additional expense for the Respondent.

[6] Although I sympathize with the Respondent's position, the Respondent has now had the Commission's report for some time. The adjournment of the hearing is sufficient in my judgement for it to respond to the expert's report. The Complainant and Commission have a right to a full inquiry and a proper airing of the complaint, and should not be deprived of their opportunity to present the case for hearing.

[7] I agree with the Respondent that the Commission's conduct should be censured. There is to be no trial by ambush. I think there are other ways of dealing with the unfairness in the delivery of the report however. There may be a question of costs. It may also be possible to place limits on the Complainant's recovery, or deduct a set-off from the award. This was the course of action followed by the member in *Charlton v. International Longshoremen's Association, Local 269* 2004 CHRT 12.

[8] The Respondent is free to raise the issue at the close of the case.

II. WHETHER DR. WORTLEY CAN TESTIFY

[9] The Respondent also objects to the Commission's decision to call Dr. Wortley as an expert. This requires explanation.

[10] The Commission has advised me that the Respondent agreed, in settling another matter, to let the Commission investigate the racial aspects of the Respondent's inspection policies. This apparently requires information regarding "hit rates", a reference to the number of times that members of an identifiable group are subjected to inquiry. The Commission says that this data was never provided. As a result, the Commission is unable to determine whether a systemic complaint should be filed against the Respondent. It is accordingly seeking an order from the Tribunal, in the immediate case, that the information be provided. This is one of the remedies that it has requested.

[11] Mr. Underhill's submission in this regard deserves to be quoted in full:

The Commission concedes that this Tribunal could inquire into this complaint without reference to the Wortley Report and the phenomenon of racial profiling. However, such an approach would undermine the object and purpose of the Tribunal and its enabling legislation. The Commission is participating in this case because it is concerned that Mr. Orughu's experiences with the Respondent appear to be consistent with racial profiling (as that term is understood in the social science literature), and that there is preliminary evidence to suggest that Mr. Orughu's complaint may be but one example of a wider problem within the Canada Border Services Agency (the "Agency"). The Commission is not in a position to bring a "systemic" racial profiling complaint before this Tribunal and is therefore asking that the Tribunal inquire into Mr. Orughu's complaint as a single example of racial profiling, and pursuant to its fundamental statutory object of removing discriminatory practices, order a wider investigation into the matter.

There are a number of legal issues that arise out of these submissions. I cannot deal with these issues without full submissions from all of the parties.

[12] At this stage, I think it is enough to focus on the evidence. Dr. Wortley is being tendered as a witness who can testify with respect to "the larger problem of racial profiling within the Agency". This evidence is relevant to the complaint of Mr. Orughu, which may gain credence from the fact that the policies within Customs are in some

sense prejudicial. The law of human rights recognizes that the context in which a complaint occurs is relevant to an inquiry. This generally includes some evidence of the general policies and practices of a Respondent.

[13] The law also establishes that evidence with respect to systemic issues may be used to bolster the evidence of a personal complaint. In *Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra)*, [1998] F.C.J. No. 432 (QL), at para. 22, for example, the Federal Court ruled that the Tribunal had erred in not allowing the applicants to lead "general evidence of a systemic problem as circumstantial evidence to infer that discrimination probably occurred in this particular case as well." The court in *Chopra* was dealing with statistical evidence, which requires the intervention of an expert.

[14] I also agree that the Commission is entitled to ask the Tribunal to enquire into the broader allegation that Mr. Orughu's treatment raises concerns that there may be larger problems at the Agency. I agree with the Commission that an inquiry calls for some degree of exploration and is significantly broader than the trial process. It is also significant that the Tribunal is obliged, under section 50(1) of the *Canadian Human Rights Act*, to give all of the parties "full and ample opportunity" to "present evidence". The Respondent will have ample opportunity to address any legal issues that arise in the context of the remedy that the Commission is seeking at the close of the case.

[15] I think it is fair to characterize this aspect of the hearing as an inevitable and necessary adjunct of the inquiry into Mr. Orughu's complaint, which raises larger issues for the Commission. This is a matter of degree. The Commission has acknowledged that there is no "systemic" complaint before the Tribunal. The policies and practices of the Agency are not directly before the Tribunal. They have nevertheless been called into question by Mr. Orughu. I think it is probably impossible to divide these two aspects of the complaint in any definitive way. It is more a matter of keeping the evidence within its proper bounds.

[16] The only legal question at this stage of the process is whether the testimony of the expert is relevant and necessary, if the Commission is to present the complaint for hearing. I think it is. The law of human rights has long recognized that the analysis provided by standard research methods may be indispensable, in determining whether the effect of a Respondent's policies is discriminatory. If Dr. Wortley is of the view that the Commission is not in possession of the information that it needs, to determine what the practices of the Respondent may be, that is in itself a legitimate piece of opinion evidence.

[17] The matter goes beyond this, however, since Dr. Wortley is also being called as a witness on the facts. I say this because the Commission has submitted that he is familiar with the practices of the Agency and can speak about the protocols that are commonly used at inspection points. I realize that the Respondent disputes this. That can be dealt with when he is qualified however and cannot be decided at this point.

[18] Even if Dr. Wortley cannot comment on the protocols employed by the Respondent, he appears to have some knowledge of international standards in the area and the practices that have been followed in other jurisdictions. This has apparently been the subject of comment in the social science literature. There also appears to be a body of research into what has been described as "racial profiling". It is evident that this is a loaded term, with many pejorative associations, which should be used cautiously. The

research in the area may nevertheless be of assistance in determining whether Mr. Orughu was discriminated against.

[19] There are a number of points that could be made. At its simplest, however, the Commission is calling Dr. Wortley as an expert who can testify as to the use of racial identifiers, in customs or elsewhere. This goes to the substance of the complaint, which is that Mr. Orughu was treated differently at the border because of his race. As long as Dr. Wortley is properly qualified, I do not see why he should not testify.

III. THE SUBSTANCE OF THE REPORT

[20] I nevertheless agree with many of the Respondent's criticisms of the report. These can be dealt with under a variety of headings.

A. Necessity

[21] The first is necessity. The Respondent relied on *R. v. Beland*, [1982] 2 S.C.R. 24, at p. 42, which follows *Davie v. Magistrate of Edinburgh* [1953] S.C. 34, at p. 40, where Lord Cooper said that expert evidence should not be allowed if the question "falls within the knowledge and experience of the triers of fact". It is the Tribunal that must make the findings in the case and rule on legal issues. It would be a mistake for the Tribunal to receive instruction on the discharge of its duties in a particular case.

[22] Dr. Wortley's report does not respect this fundamental principle. It contains a theory of the case and even comments on the legal strategy of the Respondent. This goes well beyond the role of an expert witness. An expert is not in the business of investigating and determining the facts of the case. If an expert's opinion is based on certain factual assumptions, those assumptions should be clearly laid out, in a neutral fashion, as assumptions.

[23] Some of the reluctance to accept expert evidence comes from the fact that the weight of such evidence is easily overstated. Dr. Wortley suggests, for example, that Mr. Orughu's experiences are consistent with certain hypotheses in the social science literature. This may or may not be significant. The reality however is that a number of the observations made by Dr. Wortley simply clothe our common observations of life in the language of the social sciences, thereby giving them an air of scientific credibility that overstates their significance.

B. Credibility

[24] There is a more specific concern. The Respondent submits that the report comments on the credibility of the Complainant. Mr. Burnet referred me to *R. v. Marquard* [1993] 4 S.C.R. 223, at 248, which holds that a judge should rely on his own knowledge of the case in deciding such an issue. I would go further. It is the particular province of the Tribunal to assess the weight and significance of a witness' testimony, in accordance with the relevant legal rules.

[25] There are many reasons why an expert is not in a good position to judge the evidence that comes before the Tribunal. Some of these reasons are a matter of policy. The law is burdened with consequences, which brings in considerations that do not arise in the academic exercise. Some of these reasons are a matter of expertise. The assessment and interpretation of evidence cannot be delegated to experts, who do not have the training, sensibilities or adjudicative experience of the members of the Tribunal. Some are simply practical. An expert is not in the position of the trier of fact, who will inevitably have a more comprehensive view of the case and the legal context in which it arises. There may also be a question of independence or partiality.

[26] There is nothing to prevent counsel from canvassing the issues that arise in this context in his final submissions. I agree with the Respondent that paragraphs 19 and 20 of the report interpret the evidence and are offensive. The same is true of paragraph 39 and many other passages.

C. Legal commentary

[27] Dr. Wortley also indulges in legal commentary. The report shows little appreciation of the rationale behind some aspects of the law. It nevertheless wanders into legal terrain, and argues, for example, that the burden of proof should be on the Respondent. Dr. Wortley is not in a position to instruct the Tribunal in such matters.

[28] Paragraph 14 of the report is offensive.

D. Advocacy

[29] Then there is a question of advocacy. Mr. Burnet referred me to *Yewdale v. Insurance Corporation of B.C.* (1995), 3 B.C.L.R. (3d) 240 (S.C.), at para. 4, where Justice Newbury states that experts "must not become advocates." "Thus the expert should express his or her opinion in an objective and impartial manner, and must not present argument in the guise of expert evidence."

[30] The report frequently crosses this line and lapses into argument. Paragraph 37 of the report is offensive. The report also shows serious signs of bias. This is troubling. Although experts are called for the purpose of advancing a specific case, a Tribunal is within its rights to expect a certain neutrality from expert witnesses. These witnesses are allowed to provide opinion evidence because they possess the accumulated knowledge and insight of those who practice in their discipline. It is the fact that this knowledge has an objective component that makes it compelling.

E. Ultimate issue

[31] Then there is the rule regarding the ultimate issue before a legal body. An expert is allowed to give opinion evidence, in order to assist the Tribunal. It is not for the purpose of coaching or second-guessing the Tribunal in its deliberations. The Tribunal must reach its own conclusions in the case. I agree with the Respondent that paragraphs 16 and 17 of the report are offensive in this respect.

[32] The issue before the Tribunal is whether Mr. Orughu was a victim of discrimination. This is a legal matter. It is not for Dr. Wortley to tell the Tribunal what constitutes discrimination, or whether Mr. Orughu was the victim of discrimination. Unfortunately, this seems to be the goal of much of the report, which is heavy-handed and rather didactic. I think it fails to respect the role of the Tribunal as the decision maker in the process.

[33] The Commission tries to argue its way around this criticism by saying that Dr. Wortley has restricted himself to the observation that Mr. Orughu's treatment is consistent with racial profiling. That merely demonstrates the point. This is exactly what the Commission is trying to prove, in arguing that it needs the data from the Agency to investigate the systemic aspects of the case. It is for the Tribunal to draw its own conclusions on the evidence and determine whether the Commission's concerns are justified.

F. Sources

[34] There was a minor issue regarding Dr. Wortley's sources. Material such as newspaper articles may be helpful, in illustrating a point. They do not however provide a proper basis for expert evidence. This is not a matter that can be dealt with in the abstract

and is better saved for another time. All of the material on which the expert relies, within reason, should be provided to the other side. This does not extend to standard texts, reference works, or work which would be familiar to other experts.

IV. RULING

[35] The report is inadmissible in its present state. The Commission has suggested, in such a circumstance, that I should allow it into evidence and ignore the offending passages. I think this would be a mistake. The report is fundamentally flawed and needs extensive editing. In the circumstances, I think it is preferable to let the Commission tender a revised report, should it wish to do so.

[36] This does not necessarily dispose of the matter. The Respondent is within its rights to raise other issues when Dr. Wortley takes the witness stand.

"original signed by"

Dr. Paul Groarke

OTTAWA, Ontario

November 25, 2004

PARTIES OF RECORD

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Mark Underhill	For the Commission
Keitha Richardson Edward Burnet	For the Respondent