

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Fallan Davis

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: Wallace G. Craig

Date: October 21, 2011

Citation: 2011 CHRT 18

I. Matters Considered On Jurisdiction

[1] On the morning of November 18, 2005, Teiohontathe Fallan Davis (Teiohontathe) was on her way home from the United States. She was alone, driving an old black Sport Utility Vehicle (SUV). Teiohontathe stopped at the Canada Border Services Agency (CBSA) port of entry on Cornwall Island in Cornwall, Ontario, where she was well known to CBSA officers as a resident of the Akwesasne reserve and a frequent traveller who crosses the border several times a day.

[2] CBSA is a corporate body established by the *Canada Border Services Agency Act (CBSA Act)*. Its mandate is set out in s. 5 of the *CBSA Act*:

The agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants that meet all requirements under the program legislation, by

(a) supporting the administration or enforcement, or both, as the case may be, of the program legislation: ...

[3] It is common knowledge that persons coming into Canada pass through a one or two-stage process when clearing customs and immigration. The first stage is a primary examination in which the traveller is asked preliminary questions by a CBSA officer, after which the traveller may be permitted to proceed. However, if the officer determines, from the perspective of customs or immigration requirements, that a more in-depth review is required, he or she refers the traveller to another officer for a secondary examination.

[4] Teiohontathe experienced a hasty primary examination followed by a lengthy secondary examination, during which she was required to stand outside in very cold weather while her SUV was scanned by a mobile Vehicle and Cargo Inspection System (VACIS) process, and while it was intensively searched by several officers afterward. At the conclusion of this primary/secondary examination process, Teiohontathe's SUV was returned to her and she was allowed to proceed into Canada.

[5] In its statement of particulars, the CBSA stated that Teiohontathe's SUV was "pulled over for a routine inspection" using the VACIS, and also that her SUV was the type of vehicle that had been targeted for inspection that day by a CBSA intelligence officer because a recent inspection of an SUV had revealed a secret compartment suitable for contraband.

[6] In a complaint subsequently filed with the Canadian Human Rights Commission (Commission), Teiohontathe claimed that CBSA officers engaged in racial profiling and infringed her rights under s. 5 of the *Canadian Human Rights Act (CHRA)* by selecting her for a secondary inspection using VACIS, and that by reason of her race, age and/or sex, she was subjected to heightened suspicion or aggression and subjected to insulting and demeaning racial comments.

[7] Member Réjean Bélanger of the Canadian Human Rights Tribunal (Tribunal) conducted an inquiry into Teiohontathe's complaint during the periods November 30 to December 4 and December 14 to 18, 2009, but did not complete the inquiry. Member Bélanger suspended the hearing as a result of CBSA's claim that he was demonstrably partial to the complainant and should recuse himself. A formal motion by CBSA was argued on October 13, 2010, and on March 28, 2011, Member Bélanger delivered a ruling dismissing the motion. He subsequently withdrew as adjudicator and, in due course, the Tribunal Chairperson directed me to continue with the inquiry.

[8] On August 24, 2011, counsel for CBSA presented written and oral argument in support of its motion for an order dismissing Teiohontathe's complaint against CBSA on the grounds that CBSA does not provide "services" under s. 5 of the *CHRA* when it enforces Canada's customs and excise legislation, and is therefore not subject to s. 5 of the *CHRA* and the Tribunal's jurisdiction.

[9] Counsel for CBSA framed the issue and CBSA's position concisely:

Did the duties and functions carried out by the CBSA officers in putting questions to the complainant upon her entering into Canada and in examining and scanning her vehicle constitute the 'provision of ... services' within the meaning of section 5 of the *Act*?

The CBSA submits that the duties and functions carried out by CBSA officers in enforcing the *Customs Act* that are complained of in this case do not constitute the 'provision of ... services' within the meaning of section 5 of the *CHRA*, and that the Tribunal is therefore without jurisdiction to conduct a hearing into the complainant's complaint.

[10] Teiohontathe attended the hearing of the motion in person, and while she was not represented by counsel, submissions were made on her behalf by Ms. Dana Thompson (Kakwerais) - who summarized the history of the Akwesasne nation and Teiohontathe's community, Kanion'ke:haka. The Akwesasne nation straddles the Canada/United States border, placing it within several jurisdictions, Ontario and Quebec in Canada, and New York State in the United States, necessitating frequent border crossings by the Akwesasne people. Teiohontathe would cross the border regularly, sometimes as often as 10 times a day, taking her daughter to school, visiting family members, attending to personal matters and conducting her business.

[11] In its statement of particulars, CBSA acknowledges that "the Cornwall Island port of entry is located on the Mohawk Reserve of Akwesasne. Approximately 80% of travellers who cross the border at this location are residents of the Akwesasne reserve. At the request of the Mohawk community, one of the traffic lanes located at the Cornwall Island port of entry (Primary Inspection Lane 4, or P4) is reserved for the exclusive use of residents of the Akwesasne reserve and is open during peak traffic times."

[12] The Commission was represented by counsel at the hearing of the motion, and took the position that the CBSA's interaction with Teiohontathe at the Cornwall port of entry on November 18, 2005 constituted "services" within the meaning of s. 5 of the *CHRA*, and the

Tribunal therefore had jurisdiction to hear her complaint. Teiohontathe adopted the Commission's argument on the jurisdiction issue.

[13] S. 5 of the *CHRA* provides:

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.

[14] Section 3 of the *CHRA* sets out the prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, disability and conviction for which a pardon has been granted.

[15] CBSA maintained that "services" contemplates something of benefit being held out as services and offered to the public, and that enforcement actions such as those undertaken by CBSA officer with Teiohontathe do not constitute services because they are not held out or offered to the public and they are not the result of a process which takes place in the context of a public relationship.

[16] CBSA cites *Canada (Attorney General) v. Watkin, 2008 FCA 170* as decisive authority in support of its position, and makes specific reference to paragraphs 31, 33 and 34:

[31] Addressing this question, I agree that because government actions are generally taken for the benefit of the public, the "customarily available to the general public" requirement in section 5 will usually be present in cases involving discrimination arising from government actions (see for example *Rosin*, supra at para.11, and *Saskatchewan Human Rights Commission v. Saskatchewan (Department of Social Services)* (1988), 52 D.L.R. (4th) 253 at 266-268).

However, the first step to be performed in applying section 5 is to determine whether the actions complained of are “services” (see *Gould, supra*, per La Forest J., para. 60). In this respect, “services” within the meaning of section 5 contemplate something of benefit being “held out” as services and “offered” to the public (*Gould, supra*, per La Forest J., para 55). Enforcement actions are not “held out” or “offered” to the public in any sense and are not the result of a process which takes place “in the context of a public relationship” (*Idem*, per Iacobucci J., para. 16). I therefore conclude that the enforcement actions in issue in this case are not “services” within the meaning of section 5.

[33] Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are “services” (*Gould, supra*, per Iacobucci J., para 16 per La Forest J., para 60), and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one. Unless they are “services,” government actions do not come within the ambit of Section 5. As in the present case, the enforcement actions which form the object of the complaint are not “services” under any of the meanings that can be given to this word, the Commission is without jurisdiction to hear the complaint.

[34] In reaching this conclusion, I have had in mind throughout that the Act, being dedicated to the advancement and protection of human rights, should be given a broad, liberal and purposive interpretation in order to maximize its reach. However this is not a matter of giving the word services a generous meaning in order to achieve that goal; this is a matter of not giving that word a meaning that it cannot bear (*Gould, supra*, per La Forest J., para 50 and per Iacobucci J., para.13).

[17] I conclude that paragraphs 31, 33 and 34 must be considered in context with paragraph 22:

[22] In my view, Health Canada, when enforcing the *Food and Drugs Act* in the manner complained of, is not providing ‘services ... customarily available to the general public’ within the meaning of section 5. **The actions in question are coercive measures intended to ensure compliance.** The fact that these measures are undertaken in the public interest does not make them ‘services.’ (emphasis added)

[18] Counsel for the Commission argued that *Watkin* is not binding. The following is a summary of his argument:

- *Watkin* leaves open the possibility that enforcement actions in other cases could constitute “services” within the meaning of s. 5 of the *CHRA*. *Watkin* para. 31: “I therefore conclude that the enforcement actions at issue **in this case** are not ‘services’ within the meaning of section 5.” (emphasis added)
- The Federal Court of Appeal did not cite or refer to the *Customs and Excise Human Rights Investigation Regulations (CEHRI Regulations)* in its general discussion of enforcement activities, and this critical difference renders the outcome in *Watkin* of limited application.
- The relationship between Teiohontathe and the CBSA is qualitatively different than that of the parties in *Watkin*. Teiohontathe alleges in this case that she is routinely required to cross the border in order to carry out the normal activities of everyday living, and as such, she has an ongoing “public relationship” with the CBSA, having regular face-to-face interactions with its officers, as often as 10 times per day. Relationships of this kind are ones that properly fall within the scope of reviewable “services”.
- In *Watkin*, the Federal Court of Appeal began its decision with a preliminary comment: “...I note that it is difficult to detect any genuine human rights concern in this complaint brought by the appellant as it appears to be driven by purely commercial motives. ...” In contrast, Teiohontathe’s case is exactly the kind of case for which human rights protections were created, and if the CBSA’s motion is granted and Teiohontathe’s complaint is dismissed for lack of jurisdiction, the result will be that persons who are subjected to racial slurs or other forms of discrimination at border crossings will no longer have human rights recourse, a very serious result that

should only be imposed if Parliament amends the *CHRA* or *CBSA Act* to provide clear wording that compels such a conclusion.

[19] I am satisfied that the characterization of Health Canada's enforcement actions as "...coercive measures intended to ensure compliance" limits *Watkin* to its facts. While *Watkin* may be persuasive, it is not determinative of the issue in this case.

[20] Bearing in mind that the Federal Court of Appeal in *Watkin* did not define the meaning of "enforcement," I must consider whether CBSA officers conducting primary and secondary inspections of travellers and their vehicles are providing "services" within their mandate of "integrated border services".

[21] In doing so, I am mindful that the CBSA is mandated to administer and/or enforce the "program legislation", principally the *Customs Act*, which inevitably involves recovering appropriate taxes on goods from law-abiding citizens and businesses. The *Customs Act* establishes a dynamic relationship between the public and CBSA officers in a comprehensive process. In the initial stage of primary and secondary examination, CBSA officers are to facilitate entry into Canada of law-abiding travellers and any goods they are importing. In carrying out this function CBSA officers have a concomitant duty to deal appropriately with tax/duty evaders which may include seizure, forfeiture, and monetary penalties.

[22] However, if this routine process presents circumstances that establish a suspicion, on reasonable grounds, that a traveller is in possession of illicit goods or substances, then the officer must act in accordance with the provisions of Part VI of the *Customs Act*. Part VI is titled "Enforcement, Powers of Officers", and it stipulates the process which must be followed in conducting a search of a traveller.

[23] In the case of travellers found to be engaged in smuggling of prohibited goods and unlawful substances, CBSA officers must abide by the procedures in the *Criminal Code of Canada* and the *Charter of Rights and Freedoms*.

[24] Overarching the foregoing is a basic public interest in CBSA activities. Canadians depend on CBSA officers to facilitate entry to Canada of all legitimate travellers while at the same time screening out undesirables. CBSA is perceived to be, and is expected to conduct itself, as an adjunct service to police services. Both services are involved in maintaining peace and order in Canada. There is a significant degree of similarity in their function.

[25] Counsel for the Commission outlined a statutory regulatory regime which synchronizes *CHRA* review of CBSA activities with the Recourse Directorate, Admissibility Branch of the CBSA.

[26] S. 43 (4) of the *CHRA* provides:

The Governor in Council may make regulations

- (a) prescribing procedures to be followed by investigators;
- (b) authorizing the manner in which complaints are to be investigated pursuant to this part; ...

[27] On February 25, 1983, the Governor General in Council, on the recommendation of the Minister of Justice, enacted the *CEHRI Regulations*.

[28] *CEHRI Regulations* 3 and 9 are pertinent to the issues raised in the CBSA motion:

3. Where a complaint is received by the Commission arising from the actions of an officer engaged in the administration **or enforcement** of a law relating to

customs and excise, the Commission shall serve on the Deputy Minister a copy of the complaint;

- (a) notice of the name of the investigator designated pursuant to subsection 35(1) of the Act to investigate the complaint;
- (b) an investigation plan that
 - (i) identifies those relevant documents believed to be under the control of the Department that the investigator may request to examine, and
 - (ii) identifies those officers whom the investigator may request to examine.

9. At the completion of an investigation of a complaint, the investigator shall inform the appropriate Regional Collector of Customs or Regional Director of Excise, as the case may be, of his findings and the recommendations that he intends to make to the Commission. (emphasis added)

[29] The Commission argues that the *CEHRI Regulations* give rise to a necessary implication that CBSA officers are providing a “service” within the meaning of s. 5 of the *CHRA*, and establish a public right to file *CHRA* complaints relating to the manner in which CBSA officers deal with travellers in administering or enforcing federal customs and excise law.

[30] In support of its argument the Commission tendered a copy of an affidavit of Lucinda Reading, Senior Program Advisor for the Recourse Directorate, Admissibility Branch, CBSA, dated March 4, 2009. In this affidavit, Ms. Reading describes her duties:

I am responsible for dealing with the Canadian Human Rights Commission (“Commission”) and coordinating the management of service-related discrimination complaints, including the monitoring of settlements and other matters that may arise with respect to complaints made by members of the public against the CBSA

[31] In paragraph 4 of her affidavit, Ms. Reading describes the formal relationship between the Commission and the CBSA:

The CBSA and the Commission entered into a general Memorandum of Understanding with the Commission (sic) dated December 7, 2005. A copy of this MOU is attached hereto as Exhibit "A." The CBSA and the Commission entered into a subsequent operational memorandum of understanding (dated March 31, 2006) defining the procedures, roles, responsibilities and timelines intended to guide the review and processing of complaints made against the CBSA to the Commission. A copy of the operational MOU is attached hereto as Exhibit "B." The CBSA expects that the Commission will conduct its investigations into complaints against the CBSA in accordance with the MOU and the operational MOU.

[32] The "Introduction" to the December 7, 2005, MOU states the purpose of collaboration between CBSA and the Commission:

The Canada Border Services Agency (the Agency) and the Canadian Human Rights Commission (the Commission), hereinafter referred to as the "Participants," signed a Memorandum of Understanding (MOU) on December 7, 2005, in which they agreed to collaborate to prevent discrimination in the workplace **and in the provision of services to the general public**, as well as to take steps to deal efficiently with any complaints of discrimination that may arise either within the Agency **or from the general public**. This MOU sets out procedures to guide the Participants in support of these objectives. (emphasis added)

[33] Commission counsel argued that by enactment of the *CHRA*, a law prohibiting discrimination with respect to "services", and the subsequent creation of the CBSA, an agency whose title describes it as a provider of "services", Parliament must have intended that the prohibition on discrimination would apply to the activities of the CBSA.

[34] I conclude that the *CEHRI Regulations* and the Memorandums of Understanding establish that this was in fact the intention of Parliament.

[35] The Commission also argued that the CBSA identifies itself as a service provider in the following publications:

- CBSA has published a “Commitment to Service Excellence”, the components of which are “respect and courtesy”, “fair application of the law”, “privacy and confidentiality”, “bilingual service”, “accurate information”, and “review of our actions and decisions”.
- The CBSA website states that, “Service excellence is a key priority of the CBSA ...”
- The CBSA Code of Conduct states that, among other things, “You are prohibited from engaging in any discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.” Sidebar reference is made to section 2 of the Canadian Human Rights Act.

[36] Finally, the Commission argued that applying *CHRA* s. 5 to the CBSA would be consistent with provincial human rights decisions involving police services, which the Commission submits are similarly applicable to the conduct of CBSA officers:

Both are engaged in the ground level, day-to-day administration and enforcement of legislation that is designed at least in part to support security and public safety priorities. Both have direct face-to-face interactions with the public. Both have powers to question and search members of the public in appropriate circumstances.

[37] During the course of oral argument on this motion, I expressed skepticism when counsel for the Commission argued the persuasive relevance of decisions of provincial human rights tribunals that police forces provide a service customarily available to the public. However, having carefully considered the cited cases, I conclude that there is general acceptance in the

case law across Canada that police officers provide “services” within the meaning of provincial human rights law, and that the similarity in the enforcement functions performed by police officers and CBSA officers ought not be disregarded since, as counsel for the Commission put it, “to do otherwise would fail to heed the Supreme Court of Canada’s direction that human rights statutes should be interpreted in a consistent and harmonious fashion, where possible”.

II. Decision

[38] The CBSA was created in 2003 to conduct integrated border services, ranging from facilitating the free flow of persons and goods to dealing with national security and public safety priorities. A core activity of the CBSA is administering and/or enforcing federal customs and excise law, largely a tax-collecting function. Enforcement is process-driven, such that when there is disagreement with a commercial enterprise or an individual traveller, the CBSA undertakes to engage in an impartial review of the enforcement action and to administer applicable laws in an objective and non-discriminatory manner.

[39] The CBSA has a direct public relationship with all Canadians returning to Canada. It is a public body providing border services for the public good. It declares, unequivocally, its commitment to “service excellence” in keeping Canada’s borders secure, and that “service excellence” is of vital importance in serving the trade community, Canadian citizens and visitors to Canada.

[40] By necessary implication and inference, the *CEHRI Regulations* establish that CBSA officers are providing a “service” within the meaning of s. 5 of the *CHRA* when they are carrying out the administration or enforcement of the *CBSA Act*. The *CEHRI Regulations* establish a public right to file *CHRA* complaints relating to the manner in which CBSA officers deal with travellers in administering or enforcing federal customs and excise law.

[41] In accordance with the *CEHRI Regulations*, and enabled by the Memorandums of Understanding dated December 7, 2005, and March 31, 2006, the Commission and the CBSA

have created a functional and synchronized process to prevent discrimination “in the provision of services to the general public, as well as to take steps to deal efficiently with any complaints of discrimination that may arise either within the Agency or from the general public”.

[42] In processing Teiohontathe and her vehicle through primary and secondary examinations, CBSA officers were providing “services” within the meaning of s. 5 of the *CHRA*. Teiohontathe’s claim that she was singled out and discriminated against by reason of gender and race must be dealt with by a Tribunal inquiry.

III. Orders

[43] The motion of the Canada Border Services Agency seeking dismissal of Teiohontathe’s complaint is dismissed.

[44] The Tribunal inquiry into Teiohontathe’s complaint shall continue.

Signed by

Wallace G. Craig
Tribunal Member

OTTAWA, Ontario
October 21, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1342/7208

Style of Cause: Fallan Davis v. Canada Border Services Agency

Ruling of the Tribunal Dated: October 21, 2011

Date and Place of Hearing: August 24, 2011

Cornwall, Ontario

Appearances:

Janet (Katenies) Davis and Kakweraias, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Sean Gaudet and Susan Keenan, for the Respondent