

Racial Profiling—Identification or Discrimination?

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Cases Considered:

[*Coward v. Alberta \(Human Rights and Citizenship Commission, Chief Commissioner\) 2008 ABQB 455*](#)

This case was an application for judicial review of a decision of the Chief Commissioner of the Alberta Human Rights and Citizenship Commission ("Commission"). It addresses some very interesting issues, including the jurisdiction of the Commission to deal with the *Canadian Charter of Rights and Freedoms* ("Charter") issues, and which police behaviour will amount to racial discrimination.

There has been a heightened awareness in Canada that police and other law enforcement officials engage and have engaged in racial profiling. For example, various reports have indicated that there is racial profiling by police services in Ontario and at Canadian Ports of Entry. See, for example:

- [Bias-Free Policing: Kingston Data Collection Project \(2005\)](#);
- Ontario Human Rights Commission, [*Paying the Price: The Human Cost of Racial Profiling*](#).

These reports found that residents of African/Black communities receive harsher treatment than white residents and that persons of colour are overrepresented in police statistics of arrests and charges.

The issue in the *Coward* case is: When a person is approached and questioned by police because his race and some other factors match the description of a person of interest, and is subsequently arrested and searched, is that racial discrimination?

Mr. Coward, a Black man, was walking in downtown Calgary at 5:30 pm when a police car blocked his further movement. A police officer approached him, stating that Mr. Coward matched the description of a person seen waving a big knife in a public place. Mr. Coward stated that he did not have a knife. The police officer asked if he could search Coward, and Coward asked some questions about the alleged offender. Then, Coward refused to consent to a search of his person. The police officer detained, handcuffed and searched Mr. Coward in public. When no knife was found, Mr. Coward was released.

Mr. Coward complained to the Commission that the police had discriminated against him in the area of goods, services and accommodation on the ground of race contrary to s. 4 of the *Human Rights Citizenship and Multiculturalism Act* ("HRCMA"), R.S.A. 2000, c.H-14.

The complaint was investigated by one person and then dismissed by the Commission's Director. Mr. Coward asked the Chief Commissioner to review the Director's decision and the Chief Commissioner declined to send the complaint to a Human Rights Panel for adjudication. Mr. Coward then applied to the Court of Queen's Bench for judicial review of the Chief Commissioner's decision. The review application was heard by Justice Sheilah Martin.

The investigator's report indicated that a transit driver called the LRT train dispatch reporting that he/she had seen a Black man with a large bag of knives selling a knife to another Black man (there was no transcript available of this call). The LRT dispatch called 911 and a transcript of that call indicated a Black male dressed in all black with a red Calgary Flames hat near a mountain bike was holding out a big hunting knife in his hand and that he was intimidating people in the area (2008 ABQB 455 at para. 7).

Although there were discrepancies between what the transit driver told the LRT dispatch and what was relayed to the police in the 911 call, the investigator proceeded on the basis that the police could act on information they received. As a result of the 911 call, the Calgary Police Service was dispatched on both radio and computer with the following information: "male on the S/E corner of A/A, is waving around a really big knife, off is blk male, dressed all in blk with Flames hat, called in by train driver, looks like a hunting knife."

The arresting officer testified that he heard that the suspect was a Black man in dark clothing. He did not hear about a Flames hat or a bicycle.

As noted earlier, Mr. Coward refused to be searched and told the police constable that the description of the subject was vague and that he did not wish to be searched because of his colour. The constable claims at this point Mr. Coward stepped back and put his hands in his pockets, leading the constable to think that perhaps Coward did have a knife on him. Coward claims that he stepped back, but did not put his hands in his pockets. It was then that he was handcuffed and patted down.

In the investigator's report, the constable agreed that he stopped the complainant because he was a Black male, but not for the purpose of racial profiling. Coward was Black, was in the vicinity and wore a long 3/4 black jacket that covered most of his pants. The weapons suspect was a Black male wearing dark clothing and waving a knife.

Mr. Coward alleged that the actions of the police violated his *Charter* rights. However, Justice Martin ruled that any comments made by the Commission with regard to the legality of the police search were outside of the jurisdiction of the Commission, by virtue of the *Designation of Constitutional Decision Makers Regulation* (Alta. Reg. 69/2006), which indicates that the Commission is not a body authorized to decide *Charter* issues. Further, she declined to rule on

the matter, because Mr. Coward had initiated a separate civil action alleging various breaches of his *Charter* rights.

The Court determined that reasonableness was the appropriate standard of review to use in reviewing the Chief Commissioner's finding there was no discrimination. Justice Martin noted that the question is whether race was a factor in how Mr. Coward was treated and the threshold is low because there are ingrained patterns of discrimination against certain persons or groups in society (see: *Troy v. Kemir Enterprises Inc.*, 2003 BCSC 1947 ("*Troy*"). Justice Martin noted at para. 61 that the line of analysis in the Chief Commissioner's decision was that while race is a prohibited ground of discrimination, it may also operate as a relevant descriptor. She held that it was reasonable for the Chief Commissioner to determine that there was no generalized heightened suspicion of Mr. Coward on the grounds he was Black. Further, this was not a situation like that in the *Troy* case where a person interpreted and reported the equivocal acts of a particular Black person as suspicious and the Court held that the Commissioner ought to have probed whether her beliefs were shaped by unfounded racist assumptions.

The Court of Queen's Bench held that the Commissioner's decision was not unreasonable and the Court would not intervene.

In order for a complaint of racial discrimination to be successful, this case suggests that the police must be very intentional when approaching persons of colour for arrest. It would not be considered illegal racial discrimination if the person's colour is part of a description which includes other factors, as opposed to the circumstances where the police officer's beliefs and then behaviours (i.e., arrest) are based on unfounded racist assumptions. The latter, however, may be very difficult for a complainant to prove.