

IN THE MATTER OF: The Nova Scotia *Human Rights Act* (the "Act")

- and -

IN THE MATTER OF: Board File No. 51000-30-H10-1765

BETWEEN:

Dino Gilpin
(Complainant)

- and -

Halifax Alehouse Limited
(Respondent)

- and -

The Nova Scotia Human Rights Commission
(NSHRC)

Decision of the Board of Inquiry on Remedies

Facts

- [1] Dino Gilpin, at about 6:00 p.m. on Saturday, February 20th, 2010, entered the Halifax Alehouse ("Alehouse") alone to have a beer and some chicken wings. Mr. Gilpin, a Canadian who immigrated from Sierra Leone in 2003, is black. The Alehouse, relative to later in the evening, was quiet with its normal complement of early evening guests. Mr. Gilpin was then 32 years old. One must be at least 19 to drink in a licensed premises in Nova Scotia. The server, Stephanie Lent, asked him for proof of age. He produced various pieces of identification, most of which stated his birth date, but some of which had lapsed. Ms. Lent refused to serve him and asked him to leave. Mr. Gilpin lingered. Ms. Lent spoke to the bar manager, Shawn Murgatroyd. Mr. Murgatroyd told him to leave the Alehouse and then threatened to call the police to remove him. Mr. Gilpin remained. Mr. Murgatroyd called the police. A few minutes later, the police arrived, and escorted Mr. Gilpin from the Alehouse. Once he was outside, the police

arrested him under the *Liquor Control Act* for being intoxicated in a public place. They took him to the lockup and held him overnight. In July, the court dismissed the public intoxication charge. Mr. Gilpin filed a complaint under the Nova Scotia *Human Rights of Act* that he had been discriminated against by reason of his colour.

The Issue

- [2] There were, in my view, two separate and distinct acts which may be regarded as being discriminatory:
1. the Alehouse discriminated against him because of his race by refusing him service; and
 2. the Alehouse discriminated against him because of his race by calling the police.

Invoking the force of the state to forcibly remove someone from a private premises is not the same as simply refusing a patron service.

Opinion on the Facts

- [3] In my opinion of June 13, 2013, I found that while it was clear beyond doubt that Mr. Gilpin was at least 19 years of age, the Alehouse policies so bound staff that they were not discriminating against him in rejecting his identification and refusing to serve him. I also found, however, that in calling the police to eject him, there was an element of discrimination. Mr. Gilpin, I found, was quietly lingering over his water. He was sober. He was quiet. He was over 19 in fact, but any violation of liquor regulations if he were not, would simply have involved his being present in a premises licensed as a cabaret without a parent or guardian. He had not been served. He was drinking water.
- [4] I concluded that the Alehouse publicly humiliated Mr. Gilpin. The Alehouse, in their social relations with Mr. Gilpin, failed to accord Mr. Gilpin the respect due him as a guest in their premises. As Maya Angelou has said:

I have learned that people will forget what you said,
people will forget what you did, but people will never

forget how you made them feel.

- [5] Mr. Gilpin wept as he told his story. He will never forget how he was made to feel by the Alehouse.

Remedies

- [6] On April 27, 2014, counsel for the Alehouse, Mr. Gilpin and the Commission convened for submissions on remedies. Counsel had filed briefs in support. I reserved my opinion. Counsel, to their credit, raised issues beyond a monetary award adding that what I said might have some significance. I will do my best, although I hasten to acknowledge that my own life may not have provided me with the best insight into what happens to many others and I, myself, have learned through this process. I hope my opinion here reflects a due humility. I can only say in the end, one tries to learn. That, in a nutshell, is what I ask of those serving the public in Nova Scotia. To insist that all is well and that perceptions of discrimination are illusions or ill motivated is, in my view, wrong. It is not enough to allow a seat at the lunch counter, one also has to serve the customer with respect and courtesy. That we have to inwardly digest and apply everyday of our lives.
- [7] I have, in formulating this opinion, been guided by the opinion of Prof. Philip Girard in *Johnson and Nova Scotia Human Rights Commission v. Michael Sanford and Halifax Regional Police*, (2003), 48 C.H.R.R. D/307, and by the May, 2013 *Report on Consumer Racial Profiling in Nova Scotia* entitled *Working Together to Better Serve All Nova Scotians*. I shall refer to the report simply as *Working Together*.

Johnson and a Monetary Award

- [8] The facts in *Johnson* are, in my view, analogous to the facts in *Gilpin*. Prof. Girard summarized them this way:

On April 12 1998 (Easter Sunday) Earl Fraser and Kirk Johnson were pursued on Highway 11 by Constable Sanford and stopped at a shopping plaza just off Main Street in Dartmouth. Mr. Fraser was driving Mr. Johnson's Texas-registered 1991 black Ford Mustang. The constable asked for proof of insurance and vehicle

registration and was not satisfied with the documents offered. He then ticketed the driver and ordered the car towed. In fact, Mr. Johnson's documentation was valid under Texas law. The next day, an unidentified police official determined that the seizure had been erroneous and ordered the car released. Both Mr. Fraser and Mr. Johnson are black.

[9] Mr. Gilpin, like Mr. Johnson and Mr. Fraser, was behaving properly. Documents were demanded of both Mr. Gilpin and Mr. Johnson. Both had their valid documents stubbornly rejected. As an added insult, Mr. Johnson had his car towed. As an added insult, the police were called on Mr. Gilpin and he was escorted from the pub premises by them. Both incidents were brief and involved no physical contact.

[10] Prof. Girard said:

[93] I find that the evens of 12 April were very humiliating, stressful and painful for Mr. Johnson, and that this injury continued long after the night in question. Dr. Bernard testified as to the sense of violation that members of minorities experience when subjected to acts of racism: she analogized it to an assault. We understand that a person who has been physically assaulted will continue experience after-effects for some period of time line after any physical injury has healed. A similar reaction can occur after a direct encounter with racism. When the act occurs at the hands of the police, contact with whom one has no control over, it is bound to create an ongoing sense of vulnerability.

[11] Mr. Johnson is and was a man celebrated particularly within the Nova Scotia black community. He was and, one hopes, still is a man who preaches cooperation with the police and that one should not "blame racism for any problems he might have." [par. 94] Prof. Girard considered the disillusion Mr. Johnson suffered as a result of the police ticketing him and seizing his car in his award.

[12] Mr. Gilpin, by contrast, is an immigrant from Sierra Leone, a country with recent history of violence and arbitrary action. He was vulnerable because of this experience. I might add parenthetically that one never knows what

the history of anyone might be. The person one treats discourteously might be, for example, a veteran of Afghanistan, suffering from PTSD, and thus particularly vulnerable. Thus, it seems to me, that one should be careful to treat everyone courteously.

- [13] Prof. Girard awarded Mr. Johnson \$10,000.00, believing it to be on the high end of the precedents of other awards, together with interest at 2.5%.
- [14] I take into consideration that the Ale House participated in the restorative justice process and did so constructively. The Alehouse did not acknowledge liability and indeed, as was their right, firmly contested the allegations. The point is, however, that they enabled a process which, although it has now stretched over time, was efficient and, in my view, effective. I am satisfied that \$6,250.00 is the appropriate amount for the award in this case. I allow interest in the amount of \$625.00 for a total award of \$6,875.00.

Other Remedies

- [15] Money is the easy part. Prescribing other remedies applicable to the Alehouse is more challenging. I am mindful that as Prof. Girard says, "Anti-racism education, or as it is sometimes called, diversity training, requires a substantial commitment in terms of money, time and energy by the organization undertaking it." I am also mindful that here we are largely speaking of educating front line staff in a service small business. Many employees may be casual or short-term and turnover may be high.
- [16] That having been said, it seems to me that the root of the problem in Mr. Gilpin's case was a certain "macho", hard-nosed attitude which, in the end, amounted to a lack of courtesy, an indifference to Mr. Gilpin, and I daresay others, who did not know the minutiae of Nova Scotia liquor regulation. There was no grey; either you had the identification that we accept or you do not and then if you do not, then you have to get out immediately. Woe betide you if you don't.
- [17] Associated with this attitude was, I found, a certain defensiveness, a certain complacency that as a business they would never be the place of any racism, and a tone of indignation at the very suggestion of it.
- [18] To me, however, this confirmed too a lack of thinking, a lack of education, a lack of understanding by the Alehouse of the position of minorities in our society. At a stage in the hearing, after representatives of the Human

Rights Commission had made a presentation on the *Working Together*, I asked a member of the Alehouse staff whether he recognized that blacks, as an example of the racial profiling the Commission had been speaking of, might be subject to arbitrary stops while driving their cars - "Driving while black." He reacted with what I can only describe as an air of incomprehension and in the end, denied the phenomenon.

[19] This leads me to a consideration of what might be called the legal context of racial profiling and then to the *Study*. I find much of what is said in both is reflected in Mr. Gilpin's experience and the Alehouse's reaction to it.

[20] Again, I quote Prof. Girard, who in turn is referring to *R. v. Brown* [2003] O.J. No. 1251:

[9] A recent decision by the Ontario Court of Appeal which raised the issue of racial profiling by the police has made it clear that discriminatory acts by the police (**or anyone**) can arise from a process of subconscious stereotyping as well as from conscious decisions. Thus I must be alert at all stages of the inquiry for evidence from which such stereotyping might be inferred... The Court of Appeal agreed with the definition of racial profiling advanced by counsel for the police: "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." The Court added that "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." *Brown* deals with the criminal law but these comments about racial stereotyping are equally applicable in proceedings before human rights tribunals such as this one.

[21] As Prof. Girard says it is not just police, it is anyone as I have emphasized above. Prof. Girard concluded in the case of Mr. Johnson:

I infer that the tragic lack of communication which caused Constable Sanford to fall into error was the result of the police officer's use of a racial stereotype of black male criminality.
Par. 63

[22] *Working Together* acknowledges that further research needs to be done on

the experience of racial profiling, but as I have said, I have found much of Mr. Gilpin's experience at the Ale House reflected in it:

2.3 Consumer racial profiling is defined as any type of differential treatment based on a perception of the consumer's race or ethnicity that constitutes the denial or degradation of the product or services offered to the consumer (Williams et al., 2001). This practice may or may not be intentional. Through the literature, consumer racial profiling has been shown to affect members of the racialized groups including those who identify as Black, African, Hispanic, Asian and First Nations. Since September 11, 2001, there has been heightened interest and concerns about consumer racial profiling of those perceived by others as Middle Eastern or Muslim.

Consumer racial profiling can take many different forms, including avoidance (ignoring); rejection (refusing service); discouragement (providing slow service); verbal actions (using degrading racial epithets); and physical actions (subjecting to detentions, interrogations or arrests). Anecdotal information and research evidence indicate that the practice does not occur only in retail settings. Harris (2003) suggests that this type of marketplace discrimination frequently occurs in hotels, restaurants, gas stations, grocery stores, clothing stores, department stores, home improvement stores, and office equipment stores. However, the nature of these experiences, the relationships between these experiences, and their results has not been well defined through research.

Victims of consumer racial profiling often feel humiliated and abused. Many racialized consumers suffer insults, often in the presence of their children and other customers, with no place to obtain justice (Gabbidon et al., 2008; Gabbidon & Higgins, 2007). Victims live with the humiliation of not knowing what to do about the unfair treatment they have experienced or how to deal with the insulting burden they are forced to carry.

3.3... This project measured the prevalence and frequency of certain consumer incidents that the literature indicates have been linked with consumer racial profiling. Specific incidents that consumers experienced at the hand of staff or security personnel were measured. These incidents included

- being ignored
- receiving slow service
- being refused service
- being followed in a store
- being questioned about one's ability to afford a product or service
- being the target of offence language
- having one's belongings or person searched
- being physically removed from a store
- being wrongfully detained

[23] *Working Together* concluded:

The results from the survey show that race or ethnicity is the most significant factor in the experience of consumer incidents when compared to other demographics, such as age, gender, and level of education. Overall, racialized respondents reported experiencing significantly higher prevalence and frequency rates of both subjective and explicit consumer incidents than did White respondents.

[24] *Working Together* combined a survey with focus groups. Many of the comments coming out of the focus groups are reflected in Mr. Gilpin's experience. The summary of the comments of those in the focus groups speak of:

'How someone makes you feel stays with you a lot longer than just words' (p. 75)

individual actions are 'often unintentional and unrecognized as such by the individual' (p. 76)

Participants spoke to their need to constantly prove discrimination and experiences of racism, noting that, 'So

many times we are pushed to say prove it.' Participants described this frustration as another main reason for participating in the survey. (p. 81)

A central theme in the experience of racial profiling is that unless you have lived it, you cannot fully understand the experience and its impact. A familiar sentiment in each focus group was, 'You don't know racism if you are not in my shoes.' (p. 81)

Participants stressed that they felt it was important to remain calm when experiencing discrimination as a consumer... A Black male participant noted, 'When you call someone on it, it is a 'security issue'. Essentially, in speaking up for their right as citizens to be treated with fairness, respect and dignity, they are deemed a threat. (p. 81)

Several participants spoke about experiences where they stood up for themselves in the moment. In all three focus groups, there was a real sense of fear in participants around punishment, police and jail from standing up for themselves. One participant said, 'When you call someone on it, it is a 'security issue', and you can end up spending the night in jail'. Another participant commented, 'If I said something else, I'd end up in jail.' (p.82)

People experiencing discriminatory treatment as consumers 'describe tremendous stress, emotion, and impact on their lives and well-being'.
(p.93)

[25] Mr. Gilpin's experience then, to repeat, is by no means unique. Indeed, it is typical of what often happens to black people in Nova Scotia. The experience of the Ale House is by no means unique either; discrimination "unintentional and unrecognized as such."

[26] The Ale House is asking itself, since we believe we have not proceeded in a discriminatory manner and since it is acknowledged that although there was finding of a discriminatory act, it is not being said that the act was intentionally so, then what are we to do?

[27] I turn again to Prof. Girard at par. 66:

I also wish to address an understandable concern of officers reading this decision. If we are to be held liable for violating the *Human Rights Act* on the basis of unconscious stereotypes, some might say how can we ever be sure we are acting correctly? How can we guard against something that is not conscious? Isn't it unfair to hold us to such a high standard? I think the answer to this question was given by Constable Christopher Regan at the inquiry. In response to a question about how to deal with racial stereotypes, he replied that we have to work at it. That simple answer is the essence of it. Recognizing the problem and developing techniques to deal with it, both at the personal and institutional level, are the key...

- [28] "The problem" is not a new one. Prof. Girard refers to July, 1991 events centred on downtown Halifax bars. The police service he says was:

...forced to deal with race relations issues in the context of a crisis; in this case, the events of July 1991 which resulted in a so-called "race riot" in Halifax. The crisis arose out of allegations that the police overreacted to a spontaneous protest by black people over difficulties in access to some downtown bars in Halifax.

- [29] As Prof. Girard says, we all, at an individual, and at an institutional level have to "work at it". We have to work at it; we have to work to recognize the problem. The management of the Ale House, and indeed all of us serving the public, must understand that the kind of discrimination described in "*Working Together*", discrimination of which Mr. Gilpin's experience is, in my opinion, an example, does exist. *Working Together* has prescriptions generally, one of which is the raising of the public awareness of this form of discrimination. Mr. Gilpin's courage in carrying a complaint through this long process, one hopes, has indeed raised awareness.

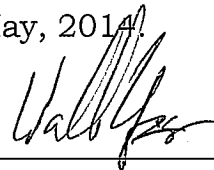
- [30] Then we have to work at techniques to minimize, if not eliminate, this discrimination. Leadership comes from the top. I appreciate that the Alehouse owners are themselves immigrants and hire minorities. Just the same, they and their senior managers, together with others engaged in public service businesses, must come to a realization that courtesy and consideration towards everyone everyday. What is also to be demanded is an open mindedness to and a sympathy for the experience and the perception of others.

Conclusion

[31] I look to the management of the Ale House to lead the way in educating their staff. To assist them in that effort, I direct that the managers, supervisors, and any staff who have been working for the Ale House or its associated bars and facilities located at or near the corners of Brunswick and Prince Streets for more than three years be trained, with particular reference to *Working Together*, in cultural competency in human rights as assessed and directed by the Nova Scotia Human Rights Commission. I will retain jurisdiction in the event there is any difficulty, until December 15, 2014.

[32] The Ale House shall also pay Mr. Gilpin \$6,875.00.

Dated at Halifax, Nova Scotia the 29th day of May, 2014.



J. Walter Thompson, Q.C.
Board Chair