

THE CHARTER CHALLENGE LE DÉFI DE LA CHARTE

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CASE SCENARIO SPRING 2010

HER MAJESTY THE QUEEN (In Right of Canada)
The ATTORNEY GENERAL OF CANADA
The MINISTER OF PUBLIC SAFETY and
The MINISTER OF TRANSPORT

-v.-

MANFRED AND MARIA RICHTOFEN

SUPERIOR COURT OF ONTARIO

B E T W E E N:

**HER MAJESTY THE QUEEN (In Right of Canada)
The ATTORNEY GENERAL OF CANADA
The MINISTER OF PUBLIC SAFETY and
The MINISTER OF TRANSPORT
(Respondents)**

- and -

**MANFRED AND MARIA RICHTOFEN
(Applicants)**

REASONS FOR JUDGEMENT

ROY-BROWN, J.

William Bishop, Q.C.

Counsel for the Applicants

Georgia Frederick Beurling, Q.C.

Counsel for the Respondents

1. In this application, once again, a Court is being called upon to determine the delicate balance between the rights of individuals and the need for public safety. This is not an enviable task. The basic facts of the case are straightforward, but the issues engaged have great importance for all Canadians.

2. The Government of Canada and the governments of the United States and Mexico reached a consensus on air travel safety measures which is known as the North American Air Safety Agreement (NAASA). This document requires the three governments to subject air travel into the United States to special security arrangements that do not apply to other countries. The Agreement has many features, such as requiring Canadian and Mexican travellers to have valid passports and visas if travelling by air, advance screening for business travellers and special exemptions for certain categories of people (mostly those who live on one side of a border and work on the other). Air travellers are also subject to special security screening measures when leaving Canada or Mexico to travel to the United States. One of these is that a traveller may be required to step into a full body scanner.

3. The use of scanners has been controversial. Some have called this process a “virtual strip search” while others have stated it is a necessary step to ensure public safety. The scanners will see through the clothing of a person being examined and produce an image of the contours of the body. According to the evidence I have heard, the examiner is not on scene with the actual passenger but at another, central location in the airport where the image obtained from the scanner is sent to be examined. If the examiner determines that there is anything suspicious about the person being examined, they will be required to undergo further, direct examination, such as a pat down search by a member of the same sex or a wand with a metal detector. It is possible that a passenger could be subject to a further search, if they fail these types of searches and wish to continue to travel by air.

Once a passenger is cleared by the scanner, their image is deleted. The level of detail shown in the scanned image can be adjusted from general (or fuzzy, lacking in detail) to precise.

4. The Applicants are Canadian citizens, resident in London, Ontario and members of the Seventh Congregation of the Reformed Church of the Black Forest. This Church was created as a result of several schisms with the Christian faith. The original schism relevant for this case was that following the posting of The Ninety-five Theses by Martin Luther in Wittenberg, Germany in 1517. The Lutheran Church was eventually created as a result. Several other sects arose in response to doctrinal issues, such as the Anabaptists. Further schisms arose. It is not necessary to trace all the history which led to the creation of the Reformed Church of the Black Forest. It is sufficient to hold that this is a recognised religion.

5. The Applicants are members of the Seventh Congregation, which simply refers to a group within a geographical area, which may or may not correspond to modern political boundaries. Their faith requires them to live what they have described as a “pure” life. They eschew great wealth, instead distributing monies to all members of the faith in a somewhat egalitarian fashion. They believe all life is sacred, so will not eat animals or even kill vermin. They believe in the transmigration of souls. They have a moral code which states that after puberty, a person shall not appear unclothed before any other person except his or her lawfully wedded spouse (wedded within their church, not

according to civil law). The exceptions to this are only for the most dire medical needs and even then, medical doctors are to be the same sex as the person being treated. This religion believes technology is for the good of all, and embrace it to the extent it does not harm others, according to their religious views. The bona fides of this faith as a religion are not in question.

6. It was the Applicants' intention to attend a gathering of members of their faith in the Black Forest region of Germany. They would travel by air to New York, where congregants were meeting for several days of prayer and discussion of issues affecting their religion. From there, they would travel to Frankfurt and then to the Black Forest. Because of the travel to New York, the Applicants would be required to pass through full body scanners. They objected to this on the ground that it would violate their religious principles, and sought another way to comply with the need for flight security while not being subject to a full body scan. The Canada Border Services Agency, which operates the scanners, refused any accommodation after consultation with the United States' Department of Homeland Security. The Applicants sought relief from the Courts, seeking a declaration that their rights had been infringed and an order that they be exempted from the use of full body scanners. Due to the pressing nature of this issue and the timing of their religious retreat, the application was treated as a matter of priority. I am indebted to all counsel for the highly professional way they have acted.
7. The Applicants claim that to pass through the scanners would violate their rights under

the *Canadian Charter of Rights and Freedoms*, specifically: freedom of religion under s. 2(a); mobility rights under s. 6 and does so in a manner contrary to the principles of fundamental justice, set out in section 7.

Section 2(a):

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion.

Section 6(1):

Every citizen of Canada has the right to enter, remain in and leave Canada.

Section 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Crown counters that none of these rights have been violated and in any event, the use of airport security scanners fall within section 1 of the *Charter*, being a reasonable limit on freedoms.

Section 1:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Application of the *Charter*

8. The Crown has made an initial objection to the case being heard at all, claiming the *Charter* does not apply to this situation, as it is a matter of foreign affairs and international relations, which are not within the normal purview of the courts. I utterly

reject this argument. While an international agreement led to the creation of this security apparatus, there is no question that the devices are being operated on Canadian soil, by a Canadian agency. The *Charter* binds Canadian state actors. Further, this is a matter related to aviation, which is without doubt a federal responsibility under the Constitution. Merely because there is an international aspect to actions undertaken by the servants of the Canadian state does not make all action a matter of international affairs. I see no merit in this argument.

9. I now turn to the points made by the applicants. In so doing, I must examine all constitutional rights in context. These rights are to be applied in a way that both fulfills the individual to the greatest possible extent and recognizes the competing demands of society. In this situation, I must also recognize that we are all living in a post - 9/11 world, where the United States in particular has been the target of terrorist attacks and that airplanes have been used to devastating effect in these acts. I stress that there is no suggestion that the Richtofens are in any way affiliated with a violent group.

Freedom of Religion

10. First in dealing with freedom of religion, I was initially attracted to this argument. However, it must fail. This is not a situation where the state is attempting to tell the Applicants that they must follow a particular faith or that they have to do anything with a specific religious purpose. The Respondents do not forbid the Applicants from acting upon their beliefs, proselytizing or indeed travelling to meet with like minded

congregants. The Respondents only require that if the Applicants choose a particular means of transport, to a particular destination, they must abide by a plan designed to promote public safety. It is the Applicants who are choosing to go to New York. If they went directly to Germany, by air, they would not have to pass through a full body scanner. Indeed, if they went to the United States by train or car, they would not face this type of scrutiny. It is their own choice of destination and method of transportation that has created the so-called interference with their religious beliefs. The state is not responsible for this. If there is any effect on the Applicant's religion, it is trivial and does not fall within the scope of *Charter* protection.

11. I would state further that the freedom to practice religion does not mean the freedom to evade the requirements of the law. A person cannot reasonably claim that their religion forbids them to, for example, pay income taxes. Nor can a person claim exemptions from legislative acts of general application, such as laws designed to control dangerous drugs, on the basis of freedom of religion. I find no infringement of the Applicants' rights in this regard.

Mobility Rights

12. The second right that the Applicants claim has been violated is their freedom of mobility under section 6 of the Charter. I disagree. They are Canadian citizens and have the right to enter or leave Canada as they wish. No one is stopping them so doing. They can leave Canada, it is simply required that in so doing, they submit to a specific safety procedure.

The conflict, if any exists, between the right to leave the country and their mobility is due totally to the destination they have chosen and the means they have chosen to go there. This situation has been created by their own desire to travel to another country by air. Alternate methods of transport are available. Neither this section of the *Charter*, nor section 2 (a) requires that all facilities, programs or other government accommodations be equally available to everyone despite an individual characteristic. If there are reasonable alternatives available to the claimant, then a *Charter* right has not been infringed.

13. I would note as well, that every country has the right to admit persons as they see fit. Travellers cannot simply attend at the border of another state and demand entry. They are subject to the immigration or other admissibility laws of that state. The NAASA was created by three countries for travellers bound to one of them. The United States could determine that if a person was not prepared to undergo body scanning, then they could not enter that country. This would be open to them to do. While body scanning takes place on Canadian soil, this actually can be seen as being of assistance to travel and facilitating international mobility. I find no violation of this right.

Right to Life, Liberty and Security of the Person

14. The final point raised by the Applicants is that their security of the person has been violated in a manner not in accord with the principles of fundamental justice, contrary to section 7. This argument is based on the variables which apply in the administration of

the body scanner scheme. The scanners were placed in airports due to the NAASA and are operated by the Canada Border Service Agency, but there is no specific legislation enacted nor regulation proclaimed which governs them. They are simply another piece of machinery, like metal detecting wands, according to the Respondents. Operators are trained in their use according to the manufacturer's standards. Operators will decide the level of detail needed in any scan. According to the Respondents, a detailed scan would only be employed if a basic scan revealed any need for concern. The right of the Applicant's to shield their bodies from intrusive inspection, they argue, engages their security of the person or, in other words, the right to privacy.

15. The lack of specific legislation or regulation may, on its surface, cause concern. Upon closer examination, this argument must also be rejected. I agree that the Applicants have the right to be free from intrusive inspection of their bodies, in general. A police officer could not search them on the street without proper cause and authority, be it statutory or founded in the common law. It must be recognized, however, that the ability to act in furtherance of security, or indeed any law enforcement, entails an element of discretion. The Applicants have not alleged that members or their religion, or of any specific, identifiable group, have been targeted for greater scrutiny than anyone else. In the absence of such a provable claim, I see no deprivation of security of the person. The Applicants are simply being treated like any other person in the same situation. Further, I must assume in the absence of any contrary evidence that officers of the Canada Border Service Agency will execute their duties in the high traditions of the office, without

improper motives or actions. They have a sworn duty to uphold the law. The fact that they must exercise some discretion in exactly how to do this does not render their actions improper or arbitrary. This argument must also fail.

Section 1

16. If I am wrong in my analysis of the issues in this case, I must consider the application of section 1 of the *Charter*. If I had agreed with the applicants that their Charter rights had been violated, which I don't, I would still find that their breaches would be saved by section 1). In analyzing this case, I must note the unique features of air travel and the danger posed by threats to it. For example, a bomb aboard an airplane is much more likely to cause lethal damage than a similar device aboard an ocean liner. While a plane is a large vehicle, it is also very vulnerable. The cabin must be pressurized for passengers as they cannot survive at cruising altitudes which are tens of thousands of feet in the air. A serious breach of the hull of the craft will result in loss of pressure, causing items within the plane to be expelled into the atmosphere. A small explosive device may cause such depressurization, or may cause fires which can destroy the navigational system of the aircraft. No one could survive such a disaster, as the history of aircraft attacks has shown. This alone justifies much greater security measures than may be taken with respect to trains, ships or automobiles.
17. The law applicable to this situation is the common law. While there may be specific provisions of various Acts of Parliament, I will deal with the common law as it has the

- broadest application. Security forces, including police departments and similar organizations, have a common law duty to prevent crime. This will involve detecting potential crimes before they are committed. The goal of protecting air transport is a pressing and substantial one, especially in a post 9/11 world, as noted. Free societies everywhere have taken steps to guarantee the safety of air travel. Secondly, these measures are carefully crafted to deal with the pressing need, and only apply to travel to a country which is a particular target of terrorist attack. The impairment of the rights of the individuals concerned, if there are any (contrary to my above finding) are affected as little as possible due to the very short time that a person is under scrutiny and the destruction of any image created. A detailed image will only be needed if a general image reveals concerns for security purposes. The respondents argue that the body scan image is a serious breach of their privacy, and is not proportionate to the goal of protecting air transport. I disagree. There is a strong proportionality between the means chosen to protect air travel and the methods chosen which may limit the right or freedom. Thus, I find that any violation is amply justified in a free and democratic society.
18. In closing, I wish to note that the Applicants are honest, religious and good people. A system of security cannot, however, be designed to exempt those who may be honourable from its rigours. It must apply to everyone and if the person who has nothing to do with illegal or threatening activity is caught up in the net of security in this modern world, that is a small price to pay for security. The Application is dismissed.

Roy-Brown, J.