

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

Decision

File No.: T1342/7208

Member: Robert Malo

Date: December 9, 2014

Citation: 2014 CHRT 34

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I. Background

[1] The Complainant, Ms. Fallan Davis, in a complaint dated November 24, 2006, to the Canadian Human Rights Commission (Commission), is asking that certain actions on the part of the representatives of the Respondent, namely, the Canada Border Services Agency (Respondent), be declared discriminatory on the basis of her race, age and sex, in violation of section 5 of the *Canadian Human Rights Act (Act)*.

[2] In that regard, certain incidents are alleged to have occurred on November 18, 2005, at the time the Complainant was questioned by officers of the Respondent upon returning from the United States by way of the Respondent's border crossing at Cornwall Island, Ontario.

[3] The Complainant indicates in her complaint that she was allegedly stopped without warning and forced to stand outside her vehicle, without a coat, in the cold for a period of forty-five minutes.

[4] She further mentions in her complaint that the officers on duty that day, who were part of the special unit known as Vehicle And Cargo Inspection System (VACIS), purportedly behaved in a racist and inappropriate manner with her.

[5] In particular, she states that her Onkwehonwe Aboriginal identity was violated by the actions of the Respondent's officers.

[6] In its response, the Respondent claims that the entire operation was part of a special operation that was being carried out at that time at the Respondent's border crossing on Cornwall Island, Ontario, in order to proceed with the verification of vehicles such as the one driven by the Complainant. The purpose of this operation was to check whether these vehicles contained secret compartments that could be used to move drugs, weapons or other contraband goods.

[7] The operation conducted by the Respondent's officers on November 18, 2005, was apparently ordered by one of the Respondent's "Intelligence" officers working on Cornwall

Island and required the presence of the VACIS team in order to proceed with the inspection of vehicles by scanner. This operation included inspections of vehicles such as SUVs, mini-vans, truck-trailers and other non-commercial vehicles.

[8] According to the evidence heard before the Tribunal, it is therefore necessary to examine the behaviour of both the Complainant and the Respondent's representatives and verify whether the actions of the Respondent's representatives towards the Complainant provide a basis for the Complainant's complaint, as described above.

[9] As this decision shall set out, it is my intention to uphold the Complainant's complaint.

II. Facts

A. Complainant's Evidence

[10] On November 18, 2005, at approximately 10:30 in the morning, when the Complainant was going through the border crossing at Cornwall Island, Ontario, upon returning from the United States, she was instructed to pull over by officers of the Respondent in order to carry out an examination of her vehicle by scanner.

[11] The Complainant told the Tribunal that, at the entrance to the border crossing, she normally uses the lane that is specifically reserved for Aboriginal residents of Cornwall Island. Before reaching her lane, she was summoned by the Respondent's officers to pull over to the lane normally used by commercial transport vehicles.

[12] She further indicated to the Tribunal that she used the Cornwall Island border crossing daily, sometimes as often as ten times a day.

[13] In addition, she told the Tribunal that November 18, 2005 had been a sunny day, but that it had been cold, about minus 6 degrees Celsius.

[14] At the time she was pulled over, the Complainant indicated to the Tribunal that she recognized the first officer, namely, Officer Derek O'Brien. He asked her whether she had any contraband cigarettes, alcohol, firearms or other goods, to which she responded in the negative to all of the questions. She then provided her driver's licence to Officer O'Brien.

[15] Following the instructions of Officer O'Brien, she then drove her vehicle towards the lane normally reserved for commercial vehicles located behind the commercial building, where the VACIS unit was located, in order for her vehicle to be examined by scanner.

[16] As the Complainant had never been behind this commercial building before, she was fearful in this unusual situation that she had not experienced before. She pointed out to the Tribunal that she was only 23 years old at the time.

[17] Once she was at the back of the commercial building, she was then questioned by a second officer of the Respondent. She indicated to the Tribunal that she decided to call her grandmother in order to inform her of the situation, which was becoming worrisome to her.

[18] According to the instructions of this second officer, she was apparently told to drive towards a truck and exit her vehicle. It was at that moment that she noticed a large white truck, outside of which was an arm-like appendage. She also noticed stop signs with disproportionately large lettering, on one of which was written "danger radiation".

[19] At the time of the facts in this case, the Complainant was driving a black DENALI GMC with Ontario licence plates.

[20] Following the instructions of this second officer, the Complainant moved her vehicle towards the white truck in question and exited her vehicle in order to stand in the area in which she had been instructed to remain.

[21] When she exited her vehicle, a third officer of the Respondent approached her and instructed her to remain in a specifically designated secure area.

[22] She indicated to the Tribunal that this was when she began to curse at this third officer while jumping up and down to try and warm herself up a bit. She then told the Tribunal that she asked this third officer to give her back her identification documents, to which he reportedly replied that he would return her identification documents to her once the scanning operations had been completed.

[23] The Complainant indicated that she asked for permission to wait inside the Respondent's border crossing facility to warm herself up while her vehicle was being scanned.

[24] Such permission was denied to her by this third officer, who allegedly told her to remain where she was.

[25] Still in contact with her grandmother on her cell phone, the Complainant indicated that her grandmother called a man named John Boots, who was one of the elders of the Akwesasne Aboriginal community. Her grandmother told her that this John Boots would be bringing her a blanket so that she could warm up.

[26] During this sequence of events, the Complainant indicated that she began to cry and that she asked the officers who were present what was happening and what they were looking for in her vehicle. They allegedly responded "everything and nothing", and told her that in their view she seemed definitely guilty of something.

[27] The third of the Respondent's officers reportedly asked her if she was moving contraband cigarettes, while concluding that, in his opinion, the inspection of the Complainant's vehicle, by the scanner, would probably detect the presence of contraband cigarettes.

[28] The Complainant told the Tribunal that at that point she repeated to this officer that she worked at a shop in the United States. The officer in question allegedly laughed at the Complainant and mocked her.

[29] Faced with the attitude of this third officer, she asked him to identify himself, at which point he allegedly pointed to his badge, telling her: “You see this badge, do you know what this badge represents?”

[30] The Complainant replied that she did not know and that, at any rate, she did not care. She then apparently told the officer that he was on her land, stating “this is my land,” to which the officer responded “do you know what our society thinks of you?” in reference to the Aboriginal community in which she lived.

[31] A few minutes later John Boots arrived on the scene. She told the Tribunal that this third officer was very rude to Mr. Boots and asked him to stand aside.

[32] In this sequence of events, a fourth officer appeared on the scene bearing receipts for various items found in the Complainant’s vehicle. This fourth officer reportedly asked her to go inside the main building of the border crossing in order to pay the taxes on the items she had purchased in the United States. The Complainant indicated to the Tribunal that she had never paid taxes on anything, given her Aboriginal status.

[33] The Complainant told the Tribunal that during the search, her entire vehicle was inspected, and indicated that the officers who conducted the search tried to rip the seats out of her vehicle.

[34] Inside the main building of the Respondent’s border crossing, the Complainant met with the superintendent of the border crossing and confirmed that she had not declared any of the items that had been found in her vehicle, namely, toys and jeans, indicating that she had not had a chance to do so.

[35] She further stated that once she was inside this building she began to hyperventilate, and started to cry again while feeling outraged at the situation she had just experienced.

[36] In the same part of her testimony, she indicated that she did not recall having mentioned that she was going to call the Mohawk Warriors Society, even though in her mind it did not strike her as a bad idea. She considered people from the Mohawk Warriors Society as peacekeepers.

[37] In short, the Complainant indicated that she had been the object of ridicule on the part of the Respondent's officers who had conducted the inspection of her vehicle.

[38] She found the entire situation to have been confrontational and frightening for her. She was of the view that the third officer who had spoken to her when she was outside her vehicle failed to act appropriately or in a manner that was consistent with the code of conduct to which he was subject and that he did nothing to calm the situation.

[39] She reiterated that she felt isolated and alone, before all of these identically-dressed men, especially with the indication that there was a danger of radiation on the premises. She told the Tribunal that she was pregnant at the time and confirmed that none of the officers who were present had asked her if she was in fact pregnant before scanning her vehicle.

[40] In her testimony, the Complainant returned to the altercation with the third of the Respondent's officers, who she claims was the most confrontational with her. She once again acknowledged having told the officer that he was on her land and that this land did not belong to the Respondent. She further indicated to him that she did not live far from the Respondent's border crossing on Cornwall Island and once informed of this fact, this third officer allegedly asked her, in a defiant manner, whether she was going to run for it.

[41] Specifying what had occurred on November 18, 2005, the Complainant confirmed that the area where the scanning operation took place was marked off with orange pylons. It was within this area cordoned off by these pylons that the scanning operation was conducted.

[42] She further confirmed that during the time she was outside, she was exposed to the cold for a period of approximately forty minutes. She confirmed that the search of her vehicle had taken about ten to fifteen minutes.

[43] Faced with the entire operation that took place on November 18, 2005, the Complainant likened the situation to that of a rape. She described the Respondent's officers as attackers who caused her much fear, and this fear would always remain with her still. Since then, she felt like a pariah when using the Respondent's border crossing.

[44] In her testimony, the Complainant identified the third officer with whom she had a confrontation as being the one wearing badge number 11275, namely, Officer Denis Demers.

[45] Lastly, she informed the Tribunal that following these incidents, she decided to file a complaint against the officers in question, but that the complaint against them was not deemed to be valid. She further stated that she went to the band council of her Aboriginal community in order to speak to the community's Chief and tell him what had happened. He purportedly recommended that she file a complaint with the Commission.

B. Respondent's cross-examination

[46] On cross-examination by the Commission's counsel, the Complainant also reiterated the words allegedly used by Officer Demers, who had reportedly asked her, in the following terms: "Do you know what our society thinks of you?"

[47] She found the words used by Officer Demers as well as his conduct in general to be discriminatory, especially in light of the fact that she was pregnant. In her view, the Respondent's officers on that day abused their authority.

[48] In addition, the Complainant indicated to the Tribunal that following the incidents that occurred on November 18, 2005, she searched the Internet in order to find out the potential effects of the radiation to which she may have been exposed and especially the potential effects

on her unborn child. She told the Tribunal that it was after this research that she decided to have an abortion. In that regard, the Complainant decided to have the abortion on December 2, 2005, some 19 days after the incidents of November 18, 2005.

[49] Moreover, on cross-examination, she acknowledged that she had made no mention of the fact that she was pregnant, and that the first time this had been mentioned was in an initial document dated July 13, 2007, a document entitled 'Rebuttal of Fallan Davis' addressed to the Commission (see Exhibit R-5, pages 4, 26 and 27).

[50] Accordingly, she confirmed that there had been no mention of her being pregnant in her affidavit of November 21, 2005, the affidavit that recounted all of the facts in relation to the incidents of November 18, 2005.

[51] Furthermore, the Complainant confirmed to the Tribunal that she had made no mention of having been pregnant during the investigation that had been launched by the Respondent, through its representative, Lucinda Reading, whom the Respondent had tasked with conducting an investigation of the incidents of November 18, 2005. In this regard, the Complainant stated that Ms. Reading had not asked her specific questions as to whether she was pregnant.

[52] Similarly, the Complainant also admitted to the Tribunal that she had made no mention of her pregnancy when she filed her complaint with the Commission on November 23, 2006 (Exhibit R-2, Tab 96).

[53] In response to another question from the Respondent's counsel with regard to whether she was pregnant, the Complainant indicated that one of her other children, born in 2007, namely, Georgia Jacob, who was born on February 27, 2007, may also have been affected by the radiation following the scanning operations conducted on November 18, 2005. In that regard, counsel for the Respondent referred the Complainant to one of her affidavits, dated October 28, 2008, in which it is noted that her child Georgia had Bell's palsy, which is a very rare medical condition. The Complainant submitted that Georgia may have been affected by the radiation from the VACIS.

[54] Once again, the Complainant acknowledged to the Tribunal having never undergone medical tests to assess the level of radiation she may have been exposed to during the scanning operations conducted on November 18, 2005.

[55] During her cross-examination, the Complainant told the Tribunal that she remains fearful when using the Respondent's border crossing, now located near the city of Cornwall.

[56] Indeed, the Complainant indicated to the Tribunal that the border crossing located on Cornwall Island was closed on May 31, 2009, and relocated to the north shore, where the city of Cornwall is located.

[57] She stated that she was still fearful when using the said border crossing at Cornwall Island, as were other members of her Aboriginal community who had also reportedly had problems with the Respondent's officers in the past.

[58] Responding to another question from the Respondent's counsel, the Complainant acknowledged that another incident had occurred on August 6, 2005, when the vehicle in which the Complainant was travelling was searched by the Respondent's officers. At the time, the Complainant was accompanied by her sister-in-law, Méliissa Papineau. During this secondary inspection of her vehicle, the Complainant apparently stated that she would like to blow up the Cornwall Island border crossing. However, the Complainant told the Tribunal that it was not a serious threat in her view and that she had not uttered the threat inside the Respondent's border crossing.

[59] Questioned about her obligation to declare the items in her possession when crossing the border, the Complainant told the tribunal that under normal circumstances, and if she had used her usual lane to cross the border, she believed that she would have declared the items and that she would certainly have remembered to do so.

[60] In her testimony, the Complainant questioned why the border crossing was located on Cornwall Island, indicating that she failed to understand why the border crossing had been

placed there. She further indicated to the Tribunal that she truly did not know what the territorial limits of Canada were with regard to the geographic location of the premises.

[61] Questioned about the conduct of the officers she encountered on November 18, 2005, she further confirmed that the first officer she had encountered had not yelled at her, but that he had raised his voice.

[62] In response to another question from the Respondent's counsel regarding her declaration of the goods she had in her possession and had acquired in the United States, she confirmed to the Tribunal that she would not have made such a declaration despite having been asked to do so by the first officer who had dealt with her at the border crossing.

[63] With regard to her encounter with the second officer when she was transferred to the back of the commercial building in order for her vehicle to be scanned, the Complainant also acknowledged that this second officer was not aggressive towards her and had acted in a professional manner.

[64] However, this officer did not inform her of the potential effects of the radiation on her vehicle, and more specifically with regard to her unborn child.

[65] Questioned about her interaction with the third officer, namely, Officer Demers, she confirmed that the officer was dressed in the same manner as the other officers, that he was wearing a tuque and sunglasses and that he was easily recognizable due to "his teeth being in her face."

[66] According to her, Officer Demers addressed her in a loud voice, and she acknowledged having yelled at Officer Demers to return her driver's licence to her.

[67] Lastly, with respect to her demand that her driver's licence be returned to her, and after Officer Demers' response telling her that she would have her driver's licence returned to her once the process was finished, she admitted having told the officer to "fuck off".

[68] Still under cross-examination by the Respondent's counsel, and with regard to her interaction with Officer Demers, she confirmed having called Officer Demers a "homo." In addition, she allegedly called Officer Demers an "asshole." She acknowledged to the Tribunal that the language she used with Officer Demers was disrespectful.

[69] In reference to a document shown to her by the Respondent's counsel and that consisted of a summary of the response she had presented to the Commission, dated July 13, 2007, (Exhibit R-5, page 26), the Complainant, who had indicated in the document that she had not used the words "fuck off", acknowledged at the hearing that she had in fact used those words. The Complainant thus admitted that the statement that had been made in the document in question was a lie.

[70] Similarly, the Respondent's counsel succeeded in getting the Complainant to admit that other information contained in the documentation she had provided was untrue or, at the very least, that she could no longer remember having heard the words Officer Demers had addressed to her.

[71] In her cross-examination, the Complainant confirmed that during her conversation with the superintendent of the Cornwall Island Border Crossing, with regard to the goods she had purchased outside the country, that she was not required to pay taxes, on account of her Aboriginal status and also pursuant to the Akwesasne Residents Remission Order (SOR/91-412) (Order), this Order having been issued with regard to the customs tariff and the exemption applicable to the Akwesasne Aboriginal community.

[72] In that regard, once this formality was completed with the superintendent of the border crossing, the Complainant then left the premises and apparently took some photographs. She believed that she had been the subject of ridicule on the part of the VACIS officers who were present, as they had allegedly laughed at her.

[73] At this stage of the Complainant's testimony, she left the court, on the ground that she was physically and mentally unable to continue the cross-examination conducted by the

Respondent's counsel. In that regard, the Complainant's representative informed the Tribunal that the Complainant was under observation by a psychiatrist and was no longer able to continue the cross-examination.

C. Other witnesses who have evidence on behalf of the Complainant

John Boots

[74] As regards for the conduct of the two officers present with the Complainant while she watched the search of her vehicle, witness John Boots, who was called by the Complainant's representative to testify, indicated that the two officers who were present yelled at the Complainant. Mr. Boots told the Tribunal that he could not remember the exact words that were said at the time, on account of the weather conditions. However, he indicated that the body language of the parties who were present, and in particular that of the two officers, was indicative of the situation in which the Complainant found herself.

[75] Mr. Boots confirmed to the Tribunal that the Complainant was crying when he arrived and that she had her arms wrapped around herself in an attempt to keep warm, given the cold weather conditions on November 18, 2005.

[76] He confirmed before the Tribunal that the tone that had been used between Officer Demers and the Complainant was loud and aggressive. Shortly after he arrived at the border crossing facility, Officer Demers asked him to leave the premises, given that his presence was not required.

[77] In his view, the Complainant had been verbally assaulted by the officers present.

[78] However, he did not recall what words had been used or the nature of what was said during the exchanges between the Complainant and the officers who were present.

Sergeant William Lafrance

[79] In addition, the Complainant called as a witness Sergeant William Lafrance, who has been an officer with the Akwesasne Mohawk Police for 25 years.

[80] In his testimony, Officer Lafrance told the tribunal that he had not been present during the incidents that had taken place on November 18, 2005, between the Complainant and the other officers of the VACIS team.

[81] However, he had been informed that an altercation to that effect had occurred.

[82] More specifically, he had received a call from the Complainant during which she stated that she wanted to file a complaint against the officers of the VACIS team, which he refused to do, given that, in his view, there were no reasonable grounds to support a criminal complaint against the officers of the VACIS team.

[83] In his testimony, Officer Lafrance indicated that no one should be forced to stand outside in the kind of weather conditions to which the Complainant had been exposed on November 18, 2005.

[84] He further confirmed to the Tribunal that he was aware that many complaints had been made by residents of the Aboriginal community with regard to the attitudes and conduct of the Respondent's officers at the Cornwall border crossing.

Lucinda Reading

[85] The Complainant also called as a witness Lucinda Reading, who has been an employee of the Respondent for 37 years. At the time she gave her evidence, Ms. Reading was a Senior Advisor for the Respondent. She had been tasked by her superiors to conduct a factual analysis of the events that occurred on November 18, 2005, involving the Complainant as well as the VACIS team.

William Philips

[86] Called upon by the Complainant to give evidence, William Philips was District Chief to the Mohawk Council of Akwesasne in November 2005.

[87] He was in charge of the Department of Justice portfolio with the Respondent at the time and also worked with the police department.

[88] With regard to the incidents involving the Complainant, Mr. Philips had been made aware of these incidents through the complaint filed by Ms. Davis; he also had conversations with Rod Hart, who was Chief of Operations at the Cornwall border crossing.

[89] In his testimony, Mr. Philips confirmed that he had also met with Ms. Reading, with the Complainant as well as with her mother, discussing the development of good relations between the Aboriginal community and the officers of the border crossing.

[90] However, he confirmed to the Tribunal that the Complainant was a “big mouth” indicating that the Complainant spoke from the heart.

[91] He further confirmed to the Tribunal that a number of incidents had occurred both prior to and after the incidents of November 18, 2005.

[92] In a similar vein, he told the Tribunal that the Complainant was not a calm person considering her mother’s own history.

D. The closing of the border crossing

[93] In her evidence, the Complainant’s representative also called as a witness Officer Scott Anderson, who began his shift at the border crossing at noon on November 18, 2005.

[94] In his testimony, Officer Anderson stated that when he arrived the Complainant had already left the premises of the border crossing and had returned to her vehicle. However, he noted an atmosphere of panic at the border crossing.

[95] Informed of the altercation that had taken place between the Complainant and some of the officers deploying the VACIS equipment, Officer Anderson reportedly called the Chief of Operations of the Cornwall border crossing, Rod Hart, and provided him with a detailed account of what had happened.

[96] Officer Anderson made reference to a journalist and a number of area residents having approached the border crossing and having taken photographs of the officers in charge of the VACIS machine operation.

[97] Worried about this, he then contacted Mr. Hart, his superior officer. Mr. Hart ordered that the premises be secured and that the VACIS operation that was underway be stopped.

[98] In light of the gathering of persons who were taking photos in the vicinity of the border crossing, and in the face of mounting concern, Officer Anderson then proceeded to close the commercial area in which the VACIS team was located in addition to calling for the assistance of the Akwesasne police to bolster security.

[99] Officer Anderson further confirmed to the Tribunal that this decision was made after other officers at the port of entry had made it clear of their intention to initiate a work stoppage and refuse to work for the remainder of the day, as they feared their safety might be in jeopardy.

[100] Consequently, all of the officers and staff on duty headed to a secure location within the main building at the Cornwall Island border crossing.

[101] In that same time period, police officers from the Akwesasne police force arrived and escorted the VACIS team to Highway 401 so that they could return to their original posting at the Lansdowne border crossing.

[102] Given the concerns expressed by the other officers who were present, Officer Anderson told the Tribunal that he decided to close the entire border crossing.

[103] Towards the end of his cross-examination by the Respondent's counsel, Officer Anderson confirmed that the Complainant had in the past been unpleasant to deal with because she expressed her displeasure at having to identify herself each time she used the border crossing.

[104] Lastly, he confirmed to the Tribunal that he had never feared for his safety during the incidents of November 18, 2005. He confirmed that he had agreed to work in the Aboriginal community on various jobs.

[105] The evidence showed that an investigation conducted under the *Canada Labour Code*, Part II, by a Health and Safety officer, confirmed the lack of danger (see Exhibit C-22).

E. Respondent's evidence

[106] In its evidence, the Respondent called 14 witnesses, all of them officers working for the Respondent. Without repeating the entire testimony of all of the witnesses called by the Respondent, the tribunal will limit itself to evidence given by officers who were in direct contact with the Complainant and about whom she made the complaint of discrimination.

Officer Derek O'Brien

[107] Thus, as the first witness to have become directly involved with the Complainant, the Respondent called Officer Derek O'Brien, who had been tasked with selecting which vehicles were to be subject to the VACIS operation on November 18, 2005.

[108] Therefore, Officer O'Brien was to proceed with what was commonly referred to as "primary inspections," before vehicles arrived directly in front of the gates of the border crossing.

[109] According to Officer O'Brien, a specific operation involving the inspection of SUV-type vehicles and pick-up trucks was scheduled for that day.

[110] Thus, around 10:30 on the morning of November 18, 2005, he spotted the Complainant's vehicle heading towards lane 4, the one that was reserved for vehicles driven by Aboriginal residents.

[111] At that time, he noticed that Ms. Davis was driving a large black SUV.

[112] Noting that the Complainant's vehicle corresponded to type of vehicle that was to be inspected in the VACIS operation, he instructed the Complainant to stop in order for him to proceed with a cursory inspection of the Complainant's vehicle.

[113] Given that the Complainant's vehicle had tinted windows, Officer O'Brien told the Tribunal that he was unaware of who was driving the vehicle in question when he stopped it.

[114] Once the driver lowered the window, he recognized the Complainant as being a resident of the Akwesasne Aboriginal community, but could not remember her exact name.

[115] When questioned in regard to the primary inspection, he indicated to the Tribunal that he had never had any issues with the Complainant before and that she had always been polite and answered his questions every time.

[116] During the stop on November 18, 2005, he asked her whether she had anything to declare, to which she responded in the negative.

[117] Similarly, the Complainant also responded in the negative to the following questions: whether she had any alcohol or tobacco, firearms, or was carrying goods whose value was in excess of \$10,000.

[118] Once the Complainant had answered all of these questions in the negative, he then filled out an E-67 form, which is a form used to authorize a secondary inspection of the Complainant's vehicle.

[119] This was when he noticed that the Complainant was not happy about the situation.

[120] The E-67 form was blown away by the wind. Officer O'Brien then proceeded to fill out a second E-67 form, which he handed to the Complainant after indicating to her that she should move to the commercial buildings of the Cornwall border crossing. He took note that the Complainant was angered by this situation. He then immediately relayed this information to the rest of the VACIS team that was to conduct the secondary inspection of the Complainant's vehicle.

[121] For his part, he had no further interaction with the Complainant and his dealings with her ended at that time.

Officer Todd Smart

[122] Once the Complainant was directed towards the VACIS team, at the time located in the commercial compound of the Cornwall border crossing, the Complainant then came into contact with a second officer, namely, Officer Todd Smart.

[123] In his testimony, Officer Smart told the Tribunal he was what was commonly referred to as a "point officer", on November 18, 2005. He was the first officer to interact with drivers who had been referred after their primary inspection.

[124] Officer Smart told the Tribunal that at the time of his first contact with the Complainant, he was unaware that she was Aboriginal person. When the Complainant arrived before him, he noted that she was aggressive and upset. In addition, he noted that the Complainant was on her cell phone. He immediately asked her to stop using her cell phone, but she did not hang up right

away. The Complainant then reportedly asked him why she had been directed to this part of the Cornwall Island border crossing and why she could not use “her lane.”

[125] Officer Smart subsequently informed her that he did not know why she had been sent to have her vehicle scanned, and indicated to her that everyone was subject to inspection when crossing the border and that, for his part, he was simply doing his job.

[126] A little later on, he was explaining the scanning procedure to her, but she cut him off and indicated to him that she was worried about radiation.

[127] Officer Smart replied that if she would let him finish explaining, he would explain the scanning procedure to her and that in the end she would have no reason to be worried. He then finished explaining the scanning procedure.

[128] Throughout his discussion with the Complainant, she never gave him any indication to the effect that she was pregnant and in that regard, Officer Smart indicated that the Complainant made no mention to him of her concerns about the impact of radiation on her unborn child.

[129] A short time later, the Complainant’s vehicle was then moved in the direction of the VACIS vehicle itself. It was at this point that he informed the other officers of the VACIS team of the Complainant’s state of mind by indicating to them that she was angry.

[130] Once her vehicle was in the immediate vicinity of the VACIS machine, the Complainant exited her vehicle and headed to a secure area so as to allow for her vehicle to be scanned.

Officer Denis Demers

[131] She subsequently came into contact with a third officer, namely, Officer Denis Demers, whose conduct was specifically identified in the Complainant’s complaint.

[132] On November 18, 2005, Officer Demers was part of the VACIS team as a base officer.

[133] Among his duties, Officer Demers indicated that he assisted in creating a secure zone using orange pylons, a sign warning of radiation as well as a stop sign. He indicated to the Tribunal that he conducted tests for radiation in four places near the VACIS machine itself, in order to ensure the area was safe.

[134] As was indicated by the procedure that existed at the time, once a vehicle approached the area of the VACIS machine, drivers must not remain in their vehicle during the scanning process.

[135] When the Complainant's vehicle arrived on the premises, he was informed by Officer Todd Smart of the Complainant's state of mind.

[136] Upon approaching the Complainant, she became rude, cursing at him and saying things such as "go fuck yourself." In addition, the Complainant used inappropriate and vulgar language towards him, such as: "fag, asshole, a big man with a big penis".

[137] Officer Demers told the tribunal that he had never been subjected to such behaviour before, throughout his entire employment.

[138] In addition, Officer Demers indicated that at no time did the Complainant mention anything about being pregnant. Moreover, the Complainant never expressed any of her concerns about the effects of radiation on her.

[139] In the course of the heated discussion that ensued, the Complainant indicated that she was an Aboriginal person, and that she had never been subject to a search because of her status as an Aboriginal woman.

[140] During the conversation, she allegedly asked him to return her driver's licence to her twice, to which he replied that he would return her driver's licence to her once the operation was finished. Faced with the Complainant's attitude, Officer Demers reportedly told her to stop cursing at him, but he apparently noted that she told him that she was an Aboriginal person, and

that the land she was on was “her land” and that he had no right to search either her or her vehicle.

[141] Prior to that, Officer Demers had not noticed that the Complainant was an Aboriginal person at all and only did so when the Complainant told him of this fact.

[142] Throughout the course of the heated discussion he had with the Complainant, she never mentioned anything to him about being pregnant or about being concerned about being exposed to radiation.

[143] During this sequence of events, Officer Demers indicated that he remembered having identified himself by pointing to his badge.

[144] In reference to the Complainant’s affidavit (Exhibit R-1, Tab 16), Officer Demers told the Tribunal that he had tried to calm the situation, while maintaining control.

[145] It was for that reason that he had pointed to his badge in order to reassert his authority. In response to a question from the Respondent’s counsel, Officer Demers had originally indicated that he had not uttered the following words “you’re definitely guilty of something” (see examination of January 29, 2014, Volume 46, page 164).

[146] Because of her aggressiveness, he reportedly told the Complainant that her behaviour was telling and that based on his experience, she was acting like someone who had done something wrong. He indicated to the Tribunal that he found the Complainant’s behaviour odd.

[147] Still in reference to the Complainant’s affidavit, counsel for the Respondent then drew the witness’s attention to the passage in which the Complainant allegedly told him that they were using her land without permission and that, in this regard, she also told the officers of the VACIS team that they should go back to where they came from. During the same sequence of events, she reportedly mentioned to him that he was on the land of the Akwesasnoron. He allegedly

responded by stating “you know what we think of your society,” to which she reportedly replied that she didn’t need to know and that she didn’t care.

[148] Officer Demers told the Tribunal that he could not remember the exact words he used but that he remembered having said something to the effect that he was on Canada Customs’ property. However, he did not remember the Complainant having mentioned to him that it was the land of the Akwesasnoron. Similarly, Officer Demers denied having used the words “do you know what our society thinks of you?” in reference to the Mohawk people.

[149] Furthermore, in his testimony, Officer Demers indicated that the Complainant had never asked him if she could go inside to warm up. In addition, he denied using aggressive language when he spoke to Mr. Boots, one of the elders of the Akwesasne Aboriginal community.

[150] He denied the fact that the Complainant was reportedly in tears in his presence or that she began hyperventilating. He also did not recall the Complainant having allegedly jumped up and down to warm herself up, as she claimed. He did not raise his voice, and did not remember having done so. In any event, he asserted that he asked the Complainant why she was speaking to him that way, as if she was trying to intimidate him.

[151] On cross-examination by the Complainant’s representative, who questioned him about the Complainant’s affidavit, Officer Demers admitted having asked the Complainant whether she worked, without providing any specific reasons for asking her such a question; (see examination of Officer Demers, Vol. 47, 30 January 2014, page 272, as well as his incident report, filed as Exhibit R-2, Tab 99).

[152] On cross-examination by the counsel for the Commission with regard to the Code of Ethics and Conduct normally applicable to the Respondent’s officers (Exhibit HR-2), Officer Demers indicated that the Complainant’s conduct as expressed by her provocative attitude did not constitute a violation of the law.

[153] In one of his answers with respect to what he referred to as the use of “force continuum”, which is a guide for determining the level of interaction to be employed with specific travellers, he decided to raise his voice, contrary to what he had declared in his earlier testimony. In addition, in response to the Complainant questioning his right to be on her land, he apparently pointed to his badge, telling her that the land was Canada Customs property. In his view, that manner of acting was a way of identifying himself as being part of Canada Customs.

[154] In response to another question from the Commission’s counsel, namely, whether it may have crossed his mind that acting in such a way could be perceived as a provocation to a Mohawk resident of Akwesasne, the witness stated that he did not recall anything in particular having crossed his mind.

[155] In short, Officer Demers felt that he had been polite to the Complainant, that he had not used foul language when speaking to her, that he did not retort in any way, and that his conduct in general had not been subject to any sanctions or reprimands from his superiors.

Officer Kevin Sills

[156] In the sequence of events that ensued while the Complainant was outside her vehicle waiting with Officer Demers, another officer appeared and became involved in that same sequence of events.

[157] As the inspection of the Complainant’s vehicle was drawing to a close, Officer Kevin Sills joined the discussion between Officer Demers and the Complainant.

[158] Given that Officer Sills had just inspected the Complainant’s vehicle, he approached her and asked her whether any of the goods that had been found in her vehicle had been declared, considering that she had said nothing about this during the process that resulted in the E-67 Form being issued. She then confirmed to Officer Sills that she had not declared the goods, in light of the fact that she did not have to pay tax because she was an Aboriginal person.

[159] Officer Sills noted that her behaviour was hostile and that she was very angry.

[160] Faced with the Complainant's conduct, Officer Sills told the Tribunal that he had tried to reduce the tension by offering her the option of going inside to discuss the matter of the undeclared goods. Consequently, Officer Sills indicated that he decided to report the situation to his supervisor on duty at the time and leave the final decision to him.

[161] During the short interval in which he had contact with the Complainant, he noted that she was using her cell phone, but he could not understand what she was saying to her interlocutor. He further confirmed to the tribunal that the Complainant's vehicle had been thoroughly searched but that no damage had been caused to her vehicle.

[162] Similarly, he did not hear the Complainant ask him to go inside during the search.

[163] After having informed her of his decision to have her go inside to deal with the matter of the goods she had failed to declare, he further noted that the Complainant was very angry and that she asserted that she did not have to go inside, calling him an "asshole". Consequently, the tone used by the Complainant was loud, abrupt, and even hostile.

[164] In response to the Complainant's hostility, Officer Sills indicated that he tried to reduce the existing tension by not yelling at the Complainant, but by using a professional tone of voice.

[165] Once the Complainant had been provided with information in order to have her go inside the border crossing, he himself headed to the border crossing to find the officer in charge, namely, Superintendent Maurice Saucier, and apprise him of the situation. In that regard, he also handed Superintendent Saucier the receipts for the undeclared goods he had found in the Complainant's vehicle.

[166] In that same timeframe, the Complainant got into her vehicle and parked it in the border crossing's parking lot. He noted that no one had accompanied the Complainant in order to force her to go inside. Thus, she entered the border crossing of her own volition.

[167] On cross-examination, Officer Sills confirmed that the Complainant's vehicle was not a commercial vehicle and that it had been the first non-commercial vehicle to have been scanned by the VACIS team at the Cornwall Island border crossing that day. In addition, he confirmed to the Tribunal that the Complainant's vehicle was the only SUV-type vehicle that was scanned that day and that the Complainant had not been singled out personally for her vehicle to be scanned.

[168] Furthermore, in response to another question by the Respondent's counsel that was supplementary to his examination-in-chief, namely, why he had not contacted officers of the Mohawk security force who were present, he replied that everything was under control and that there was no need to call them.

Inside the border crossing

[169] Once inside the Cornwall border crossing, the Complainant was then brought before the officer in charge of the crossing, that is, Superintendent Maurice Saucier.

[170] In his testimony, Superintendent Saucier stated that he noticed that the Complainant was mad and crying, and found that she was really angry.

[171] In Superintendent Saucier's discussions with the Complainant, she told him that she had no taxes to pay and that she would call the Mohawk Warrior Society.

[172] In response to the Complainant, Superintendent Saucier told her about the existence of the Order.

[173] Superintendent Saucier told the Tribunal that, in the past, he had had other interactions with the Complainant that he knew her and knew her name, as she was a resident of Akwesasne. He also confirmed that the Complainant often used the border crossing for her travels.

[174] Because he had been a border crossing officer who had performed primary inspections on vehicles entering Canada, he had already met her. He had characterized her as being unpleasant and even arrogant.

[175] According to Superintendent Saucier, he had assumed that the Complainant knew the Order well, considering her many trips through the Cornwall Island border crossing in the past.

[176] In his testimony, Superintendent Saucier stated that he contacted his immediate supervisor, Rod Hart in Ottawa, and told him about the situation on November 18, 2005. Mr. Hart then authorized the Complainant to leave the premises without paying taxes, in accordance with the Order.

[177] Before the Complainant left the premises, he apparently reminded the Complainant of her obligation to declare goods purchased outside of Canada, in accordance with the Order.

[178] Cognizant of the situation, the Complainant then made a statement referring to the VACIS team as scary. Superintendent Saucier then noted that the Complainant stopped crying and seemed calmer. A few seconds later, when the Complainant was with another border crossing officer, that is, Officer H el ene Oakes, she composed herself and, finally, she left the border crossing.

[179] Also in his examination, Superintendent Saucier stated that he was not worried about the Complainant's threat that she would call the Mohawk Warrior Society.

[180] However, he confirmed to the Tribunal that he had indeed heard the Complainant's threat in that regard.

Officer Sylvie Beaudry-Giroux

[181] Another border crossing officer, Officer Sylvie Beaudry-Giroux, was present and she also heard the same threat from the Complainant that she would call the Mohawk Warrior Society.

[182] Similarly, Officer Beaudry-Giroux also heard the Complainant curse at Superintendent Saucier while informing him that she did not want to pay taxes. She heard the Complainant shout and cry when she was two or three feet away from her.

III. Analysis

[183] The Tribunal properly reviewed the evidence in the Complainant's record with respect to the arguments of the parties as well as the applicable legislation and case law in this case. After a lengthy analysis, I have concluded that the Complainant's complaint should be upheld in part, for the following reasons.

A. General principles of discrimination

[184] For a better understanding of the applicable statutory provisions in this case, I will reproduce the provisions of the following sections of the *Act*:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

[185] Similarly, more specifically, the Complainant's complaint is founded with respect to section 5 of the *Act*, which reads as follows:

5. 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.

Specifically, the Complainant's complaint falls under paragraph 5(b) of the Act.

[186] As previously noted, the Complainant claims that she was discriminated against because of her race, age and sex.

[187] To understand the scope of the provisions of section 5 of the *Act*, the case law has developed certain criteria, which I will cite.

[188] In one of the Supreme Court of Canada's first decisions on discrimination with respect to education programs, the Supreme Court, in *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, stated the following principles regarding the interpretation of section 8 of the British Columbia *Human Rights Code*.

[189] The Honourable Justice Abella of the Supreme Court of Canada stated the following at paragraph 33 of the decision:

[33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[190] In another decision by the Supreme Court of Canada, that is, in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, the majority of the Supreme Court of Canada made the following finding at paragraph 129 of said decision:

129 Section 5(a) of the *Canadian Human Rights Act* states that “[i]t is a discriminatory practice in the provision of goods, services, facilities or

accommodation customarily available to the general public . . . to deny, or to deny access to, any such good, service, facility or accommodation”. Section 15(g) of the *Canadian Human Rights Act* provides, however, that it is not a discriminatory practice to deny access to a good, service, facility or accommodation customarily available to the general public if “there is *bona fide* justification for that denial or differentiation”. In *Central Alberta Dairy Pool*, at p. 518, this Court unanimously agreed that “[i]f a reasonable alternative exists to burdening members of a group with any given rule, that rule will not be *bona fide*.” *Grismer* further elaborated that establishing a *bona fide* justification for a *prima facie* violation of human rights legislation requires a respondent to show that “the employer or service provider has made every possible accommodation short of undue hardship” (para. 21). . . .

[191] Similarly, in paragraph 130 of the same decision, the Supreme Court of Canada defined undue hardship:

. . . can be established where a standard or barrier is “reasonably necessary” insofar as there is a “sufficient risk” that a legitimate objective like safety would be threatened enough to warrant the maintenance of the discriminatory standard (*Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202); where “such steps as may be reasonable to accommodate without undue interference in the operation of the employer’s business and without undue expense to the employer” have been taken (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 555); where no reasonable alternatives are available (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970); where only “reasonable limits” are imposed on the exercise of a right (*Eldridge*, at para. 79); and, more recently, where an employer or service provider shows “that it could not have done anything else reasonable or practical to avoid the negative impact on the individual” (*Meiorin*, at para. 38). The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain.

[192] Similarly, in another decision by the Canadian Human Rights Tribunal (Tribunal), that is, *P.S.A.C. and Murphy v. C.R.A.*, 2010 CHRT 9, the Tribunal stated the following at paragraph 39:

(39) It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the impugned decision or action (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para 7 (F.C.A.); *Canada (Attorney General) v. Uzoaba*, 1995 CanLII 3589 (FC) [1995] 2 F.C. 569 (T.D.)).

[193] Regarding the definition of service that appears in the first paragraph of section 5 of the *Act*, the Federal Court rendered a decision in a case involving the same parties as in the present case, that is, *Canada (Attorney General) v. Davis*, 2013 FC 40, where the Federal Court upheld the Tribunal's decision that the Respondent was indeed providing a service to the public when it interacted with Ms. Davis on November 18, 2005 (see paragraph 54 of the judgment).

[194] Regarding the degree of evidence required, another well-known discrimination decision by the Supreme Court of Canada, that is, *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (*O'Malley*), stated the following at page 558:

The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[195] In another decision by the Supreme Court of Canada, that is, *F.H. v. McDougall*, [2008] 3 S.C.R. 41, at page 60, the Supreme Court of Canada stated the following regarding the degree of evidence required in an allegation made in a civil case:

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[196] In discrimination cases, the evidence is not always direct and, in that respect, circumstantial evidence may lead tribunals to conclude that there was a form of discrimination. Thus, I would also like to refer to *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. 5029 (CHRT), where the Tribunal stated the following:

Discrimination on the grounds of race or colour are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises.

Quoting directly from *Kennedy v. Mohawk College* (1973) Ontario Board of Inquiry (Professor Borons).

[197] Moreover, it has even been decided by our courts that the attitude underlying racial profiling is one that may be consciously or unconsciously held. In that respect, a person's conduct may be based on subconscious racial stereotyping (*R. v. Brown*, 64 O.R. (3d) 161 (C.A.), at paragraph 8).

[198] Furthermore, in another decision of the Court of Appeal for Ontario, that is, *Peel Law Association v. Pieters*, [2013] O.J. No. 2695, in reference to *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302, as well as *Phipps v. Toronto Police Services Board*, 2009 HRTO 877 (CanLII), the Court confirmed that there is no need to establish an intention or motivation to discriminate. The focus of the enquiry is on the Respondent's actions towards the complainant (see paragraph 111 of *Peel Law Association v. Pieters*).

[199] In reference to *Radek* and *Phipps*, above, I reproduce the propositions in those decisions:

- 1) the prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;

- 2) there is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;
- 3) the prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;
- 4) there need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and
- 5) racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

[200] Also, it is useful to reproduce the following paragraphs from *Pieters*, in which the Court, after reproducing the five above-mentioned propositions, noted the following:

112] The first four of these are long established propositions of law. The Vice-Chair did not refer to Radek and Phipps as sources of authority for these propositions but because they provided a convenient summary of them. I see no relevance to the fact that Radek involved security guards and Phipps involved a police officer.

[113] This court has repeatedly recognized the fifth proposition as a sociological fact. For example, Doherty J.A. has said in *R. v. Parks* (1993), 1993 CanLII 3383 (ON CA), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.), at para. 54:

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes.

114] The Supreme Court of Canada has also endorsed the proposition. For example L'Heureux-Dubé J. and McLachlin J. writing in *R. v. S.* (R.D.), [1997] 3 S.C.R. 484, at para. 46, cited Doherty J.A.'s statement with approval.

[201] All of these decisions involve a situation between a person of authority and a person covered by, and having a characteristic identified in section 3 of the *Act*.

[202] In *Radek*, above, the British Columbia Human Rights Tribunal carried out a careful and thorough analysis of the criteria that must apply with respect to racial profiling and the potential consequences. It is not my intention here to thoroughly revisit that decision.

[203] However, I accept that many stereotypes can exist, consciously or unconsciously, voluntarily or even involuntarily and that it is through a careful analysis of the evidence that the decision-maker must be able to determine whether there are subtle scents of discrimination (see *Basi*, above).

[204] For a detailed analysis of the stereotypes that may exist regarding the presence of discrimination toward Aboriginal people, I refer more specifically to paragraph 135 of *Radek*, which is very informative in that respect.

[205] Recently, the Honourable Judge Michèle Pauzé stated the following at paragraph 173 of the Quebec Human Rights Tribunal's decision in *C.D.P.D.J. v. Service de police de la Ville de Montréal*, 2012 QCTDP 5, ("*Rezko*") dated April 18, 2012:

[173] By nature, profiling constitutes a particular form of discrimination that is exercised in a context of authority and has the effect of nullifying or impairing the right to "recognition and exercise of [a person's] human rights and freedoms, without distinction, exclusion or preference" based on any of the grounds prohibited by the Charter.

[206] Later, she stated the following at paragraph 181, citing the well-known *Johnson* case:

[181] Accordingly, the Tribunal must focus on the factual and circumstantial evidence in order to determine whether improper behaviour such as the police officer's lack of courtesy or his intransigence allows the finding of differential or unusual treatment as compared with usual practices in similar circumstances:

In deciding whether there has been a *prima facie* case of differential treatment, a board of inquiry must try to establish how events usually unfold in a given situation. Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment.

Footnote: [98] *Johnson v. Halifax Regional Police Service (No. 1)*,
supra at para. 57. [(2003) 48 C.H.R.R.D/307 (N.S Bd Inq.).]

B. Analysis of the facts

The sequence of events and the credibility of the key players

[207] In her written arguments that she submitted to the Tribunal, the Complainant argued that the whole VACIS operation was planned in advance to trap her because no handwritten note or report was produced by the officers involved. Similarly, she characterized the events on November 18, 2005, as being acts of terror where she was virtually violated in her Aboriginal Akwesasne identity. Also in her submissions, the Complainant noted a discrepancy between the comments made by Officer Demers and by the Complainant herself during the altercation that occurred on November 18, 2005.

[208] The Complainant's submissions contain several sociological and historical arguments that I do not intend to address in this decision. In fact, the Honourable Justice Harrington of the Federal Court stated the following in *Canada (Attorney General c. Davis*, 2009 FC 1104, at paragraph 59:

[59] I hasten to point out that what is at issue are the events of November 18, 2005 at the border crossing on Cornwall Island, not the history of European settlement in North America.

[209] Consequently, the Tribunal will only rely on the analysis of the events that took place on November 18, 2005, and nothing else.

[210] Regarding the appellant's arguments, the Tribunal disagrees with the statements that the Complainant was purportedly tortured and/or attacked by a group of men. The Tribunal also questions whether the Complainant acted correctly when she used foul language in addressing the Respondent's officers. The Tribunal also questions whether the whole sequence of events constituted a violation of the Complainant.

[211] I will not comment further on the Complainant's written submissions because I consider them as being clearly exaggerated having regard to the factual background for which she filed a complaint.

[212] With respect to the actual sequence of events, I also did not find evidence indicating that the victim was personally targeted by the intervention of the VACIS team on November 18, 2005. While the Complainant disagrees with the whole VACIS operation, for all of the reasons that she mentioned in her written submissions, the evidence has shown that the VACIS operation that was carried out was done so in the context of an intelligence bulletin dated June 21, 2005, whereby VACIS unit in northern Ontario had thus found modifications facilitating contraband in a vehicle of the same type as that of the Complainant. In that respect, it was therefore reasonable to think that a similar operation led by the VACIS team could also be carried out at the Cornwall Island border crossing on November 18, 2005.

[213] As the evidence has demonstrated, no information of any kind was submitted in evidence to indicate that the Complainant's vehicle or the Complainant herself might have been targeted by the VACIS operation that was carried out on November 18, 2005.

[214] The first officer who was in contact with the Complainant, that is, Officer O'Brien, had not previously identified the Complainant when her vehicle approached the outskirts of the border crossing on November 18, 2005. As a result, the arguments submitted by the Complainant that she was specifically targeted by the VACIS operation do not appear to me to be founded.

[215] In the sequence of the events that followed, once the Complainant was stopped by Officer O'Brien, and by the Complainant's own admission, no criticism can be made of the two officers who had initial contact with her, that is, Officer O'Brien and Officer Smart, regarding their conduct toward the Complainant.

[216] Consequently, the only elements of the Complainant's complaint regarding discriminatory practices that could have taken place in respect of the Complainant on November 18, 2005, are those involving the conduct of Officer Demers and, partially, the

conduct of Officer Sills, who was also in contact with the Complainant when she was in contact with Officer Demers.

[217] With respect to Officer Sills, I can only find that his conduct and attitude were exemplary and most professional even though the Complainant also used vulgar and disrespectful language toward him. In that respect the evidence does not appear to me to be in any way conclusive to determine that Officer Sills acted with a discriminatory attitude or with discriminatory conduct toward the Complainant. However, it is not so with regard to the exchanges that took place between Officer Demers and the Complainant.

[218] As pointed out in the case law, I must, as a conscientious decision-maker, in a civil case like the one before me, scrutinize the relevant evidence with care to determine “whether it is more likely than not that an alleged event occurred” (see the end of paragraph 49 in the Supreme Court of Canada’s decision in *McDougall*).

[219] What the preponderance of evidence has established in this case is as follows. The Complainant’s attitude toward the Respondent’s officers during the events that occurred on November 18, 2005, was clearly and definitely aggressive, disrespectful, defiant and finally, assertive of her rights as an Aboriginal person who resides on Cornwall Island.

[220] Through the extensive testimony that I had the opportunity to hear, it was clearly and unequivocally established that the Complainant consistently argued that the presence of the border crossing on Cornwall Island was undesirable. In that respect, the Complainant had already been, in the past, someone who had been characterized as arrogant and critical regarding the presence of the border crossing on Cornwall Island.

[221] Furthermore, another incident had occurred on August 6, 2005, where the Complainant had expressed her disagreement with the presence of the border crossing officers on Cornwall Island, threatening that she would blow the border crossing up.

[222] I can understand that, according to the Complainant, she uttered that threat indirectly, but that was sufficient to convince me that, for a long period of time, the Complainant had not accepted, and perhaps she has never accepted the presence of the Respondent's officers on Cornwall Island.

[223] Certainly, the Complainant was entitled to express her disagreement with respect to the presence of the Respondent's officers on Akwesasne territory on November 18, 2005, as long as her disagreement was not expressed by concrete threatening gestures toward the Respondent's officers (see *Johnson*, above, at paragraph 41 *in fine*).

[224] Generally, the Tribunal found several implausibilities or even exaggerations in the Complainant's testimony. In cross-examination, the Complainant admitted that she lied when she referred to certain situations alleged in her affidavit (Exhibit R-1, Tab 16) as well as with respect to other documents that she provided to the Commission for the purposes of its investigation.

[225] Additionally, the Tribunal found that the Complainant left towards the end of her cross-examination for medical reasons. Several times, I approached the Complainant's representatives to encourage her to come back to complete the cross-examination that the Respondent's representative intended to continue. However, the Tribunal was informed by the Complainant's representative that she was able to return to work while she could have easily come to finish the cross-examination to which she was subject.

[226] In light of the fact that the documentation submitted by the Complainant contained many inaccuracies, even exaggerations, and that she admitted to the Tribunal that she had in fact lied on a number of occasions, I have come to the conclusion that the Complainant's credibility was seriously damaged.

[227] However, I can certainly understand that the Complainant had been personally affected by the presence of the Respondent's officers for quite some time prior to the events of November 18, 2005. The events of November 18, 2005, certainly gave the Complainant the opportunity to express her exasperation and anger directly toward the Respondent's officers.

[228] At the hearing, I was able to see the Complainant's extreme sensitivity regarding her Aboriginal status with respect to the presence of the Respondent's officers on "her territory".

[229] In that respect, I can understand the actions taken and comments made by the Complainant toward the Respondent's officers and regardless of the Complainant's defiance, it was up to the Respondent's officers and more specifically Officer Demers to prevent the situation from deteriorating and especially, to try to calm her down. That was Officer Demers' responsibility, and in light of the answers he provided to the Complainant, I do not believe that Officer Demers took steps to maintain control of the dialogue between himself and the Complainant or even to calm her down (see *Maynard v. Toronto Police Services Board*, [2012] O.H.R.T.D. No 1122, at paragraph 189).

[230] In reality, the Complainant's comments to Officer Demers had an aggressiveness that was deliberately defiant and assertive with respect to her being a young Mohawk woman.

[231] The Complainant first reiterated her Aboriginal status to Officer Demers, and then adopted an assertive attitude regarding the territory on which the Cornwall Island border crossing is located and where the Respondent's officers were on November 18, 2005. Acting in that manner, the Complainant directly invoked her Aboriginal identity and used it to provoke Officer Demers.

[232] However, I referred previously to *Maynard*, which advanced the paradigm that it is the responsibility of the officer who is in the presence of an aggressive person to maintain control of the dialogue and make an effort to calm her down (see *Maynard*, above).

[233] What is the situation in this case?

[234] It has been held that the existence of prejudice behind a policing action must be inferred from the totality of the evidence and not just from the perception of the victim (see *Rezko*, above, at paragraph 185 in reference to *Shaw v. Phipps*, 2010 ONSC 3884).

[235] Consequently, the Tribunal must therefore analyze Officer Demers' conduct as well as the responses that he provided to the Complainant to assess whether Officer Demers committed discriminatory practices in violation of section 5 of *Act*.

[236] In that analysis, the Tribunal was able to make the following findings:

- (a) Prior to the facts on November 18, 2005, Officer Demers admitted that it was general knowledge that there was a dispute between the Canadian government and the Mohawk authorities regarding the territory on which the Cornwall Island border crossing was located;
- (b) Also in his testimony, Officer Demers admitted that he had had no specific training on knowledge gained regarding the culture and traditions of Aboriginal communities;
- (c) Officer Demers raised his voice in dealing with the Complainant's conduct in an attempt to assert his authority and what he called "force continuum";
- (d) In his discussions with the Complainant, Officer Demers pointed to his badge to identify himself to the Complainant, who was questioning him in that respect;
- (e) Officer Demers questioned the Complainant about what job she could hold, for no apparent reason;
- (f) In response to a direct statement by the Complainant on the territorial aspect of the location occupied by the Respondent's border crossing on Cornwall Island, the evidence clearly established that he answered by saying that he was on the "the property of Canada Customs";

- (g) Furthermore, in light of the Complainant's aggressive and defiant attitude, Officer Demers stated that the Complainant's conduct could, in his experience, be an assertion that she had done something wrong.

[237] According to the Complainant, other racist statements were also made by Officer Demers, but he has not acknowledged them.

[238] Thus, the Complainant claimed that Officer Demers asked her if she was carrying contraband cigarettes, which Officer Demers denied in his examination.

[239] Furthermore, Officer Demers denied saying the following: "Do you know what our society thinks of your people?" (referring to Aboriginal people).

[240] Regarding those last two statements, the evidence is not conclusive as to whether Officer Demers made such statements. I will therefore focus on Officer Demers' conduct as I stated in paragraph 236, above.

[241] It is true that in analyzing the facts, the credibility of the key players, that is, the Complainant and Officer Demers, must be weighed, but I cannot find that either of these two players had it completely right or wrong. As previously stated, the Complainant's testimony contained numerous inaccuracies, even lies, considering the documentation she submitted. I therefore accept as being more credible Officer Demers' responses that he did not ask the Complainant whether she was carrying contraband cigarettes or about what society thought about Aboriginal people.

[242] Did Officer Demers' other responses and conduct constitute grounds of discrimination based on the fact that the Complainant was identified as being an Aboriginal person and in that respect, was she a victim of differential treatment under section 5 of the *Act*? (See paragraph 236.) These are the principal questions that I must answer.

[243] In order to answer the above principal questions, the Tribunal referred to the Supreme Court of Canada's decisions in *Moore*, above, as well as the British Columbia Human Rights Tribunal's decision in *Radek*.

[244] In referring to the provisions in the Supreme Court of Canada's decision in *Moore*, above, if the Complainant has established a *prima facie* case, the burden shifts to the Respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. As stated in *Moore*, if it cannot be justified, discrimination will be found to occur. (See also the well-known principles in *O'Malley*, above).

First point

[245] The first test seems to me to have been satisfied to a large extent, meaning that the Complainant was part of a clearly identified group that could be the subject of prohibited discrimination. In fact, at the time of her interaction with Officer Demers, she admitted to him that she was an Aboriginal person and the written evidence entered in the record confirmed the Complainant's identity as an Aboriginal person. This first point was therefore met.

Second point

[246] Regarding the second test, I also find that this factor was met considering that the Complainant experienced an adverse impact with respect to the services that the Respondent was required to provide to her. In that respect, I find that Officer Demers' conduct as well as the responses that he provided to the Complainant were factors that I consider as being a form of differential treatment of the Complainant. I therefore find that the second aspect was also met adequately by the Complainant. Indeed, the comments made by Officer Demers appeared to me to be unjustified, even aggressive, and defiant toward the Complainant.

Third point

[247] I have no doubt in also finding that the Complainant's protected characteristic, that is, that she is an Aboriginal person, was a factor in the adverse impact that she was a victim of.

[248] In fact, all of the responses Officer Demers provided to the Complainant, as well as his conduct in general were in response to the Complainant's provocation relating to her Aboriginal status and to the territorial assertions she made to Officer Demers.

[249] In other words, in responding directly to the Complainant's provocations, and in raising his voice, Officer Demers provided responses that were similar to those given by the Complainant.

[250] In doing so, I find that Officer Demers overreacted and provided responses that indicated behaviour that was marked by racist stereotyping toward the Complainant. (See the question asked with respect to her job for no apparent reason: *Radek*, above, at paragraph 135, fifth point).

[251] Consequently, I therefore find that the Complainant established a *prima facie* case of discrimination. Did the Respondent justify its conduct or practice, within the framework of the exemptions available under the *Act*? In the alternative, did the Respondent rebut the inferences arising from the evidence submitted by the Complainant? (See, for example, *Rezko* at paragraph 192; *Johnson*, at paragraphs 35, 63; *Pieters*, at paragraph 68.)

[252] I answer these questions in the negative.

[253] In fact, Officer Demers told the Tribunal that he raised his voice to keep the situation under control. He also stated that that approach was supposed to be a way to initiate an appeasement process with respect to the altercation that took place between himself and the Complainant. In light of the evidence, I find that the opposite reaction ensued.

[254] Second, the responses that he provided to the Complainant regarding his badge, the reaffirmation that he was on territory owned by Canada Customs, and that the Complainant's aggressive conduct could be a kind of admission that she had done something wrong, can only lead me to conclude that there was racist stereotyping toward the Complainant.

[255] In cross-examination, the Commission argued that Officer Demers did not conduct himself according to the criteria in paragraph (f) of chapter 3 of the Code of Ethics and Conduct, which was filed as an exhibit and entitled as follows: Contact with the Public-Sensitivity and Responsiveness – such that Officer Demers apparently did not act appropriately:

You must not make any abusive, derisive, threatening, insulting, offensive, or provocative statements or gestures to, or about, another person.

If you have the type of job in which you sometimes need to overcome an obstinate lack of cooperation on the part of the client, for example if you are a **customs or tax official** responsible for enforcement, a determined, persistent, professional stance will sometimes be needed on your part. (see Exhibit HR-2, paragraph f) (Tribunal's emphasis added.)

[256] Even if I acknowledge that my jurisdiction does not extend to an analysis of a breach of the Code of Ethics and Conduct that was put in evidence in this case, I can only find that Officer Demers' conduct did not meet the criteria stated therein.

[257] In that respect, *Johnson*, above, and *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909, and *Abbott v. Toronto Police Services Board*, 2010 HRTO 1314, draw an interesting parallel between the situations in those decisions with respect to the facts in this case.

[258] In *Johnson*, the following was established: Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment (see paragraph 57 of the decision).

[259] In that same decision, in reference to another cited decision, that is, *R. v. Zwicker*, [1938] 1 D.L.R. 461 (N.S. Co.Ct.), it was established that Constable Sanford did not display the

reasonable tolerance and tact required in a similar situation with respect to his position. It was thus inferred that race was a major factor in that professional failing (see paragraph 60 *in fine*).

[260] In the *Abbott* decisions, above, the Human Rights Tribunal of Ontario, applying the principles stated in *Radek*, also above, drew negative inferences from the police officer's conduct in the case taking into consideration the criteria set out by the Supreme Court of Canada in *R. v. S.*, (R.D.) [1997] 3 S.C.R. 484.

[261] In that respect, I adopt the following citation from *Abbott* (2009), above, where the following is stated at paragraph 45 of the decision:

[45] Most often, racial discrimination emanates from unconscious attitudes and belief systems.

[262] And further in the same paragraph, the Human Rights Tribunal of Ontario stated the following:

There is no evidence before me that Sergeant Ruffino consciously subscribes to any such attitudes or belief systems. But these kinds of attitudes and belief systems are part of our historical and social fabric, and are imbued in all of us through social interactions, the education system, the media and entertainment industries, and other means. (see paragraph 45)

[263] Furthermore, in *Rezko*, above, I also adopt the comments of the Honourable Judge Pauzé when she stated the following at paragraph 191:

[191] In other words, if race, or another prohibited ground of discrimination, is one of the factors that led the person in authority to apply differential treatment, then profiling has been exercised and cannot be justified on other legal grounds for intervening. [Footnote omitted.]

[264] In her decision, the Honourable Judge Pauzé reproduced paragraph 91 of *Peart v. Peel Regional Police Services Board*, 2006 CanLII 37566 (ON CA), where the following is stated:

Racial profiling is wrong. It is wrong regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race. For example, a police officer who sees a vehicle speeding and decides to pull the vehicle over in part because of the driver's colour is engaged in racial profiling even though the speed of the vehicle could have justified the officer's action.

[265] In the present case, I have no doubt that Officer Demers replied to the Complainant taking into consideration the fact that the Complainant was asserting her rights as an Aboriginal person. I cannot consider Officer Demers' inappropriate exercise of authority toward the Complainant as sufficient justification. That approach seems to me to be completely consistent considering the case law that I cited above and more specifically, the above-mentioned cases of *Johnson*, *Abbott* and *Peart*.

[266] In *Johnson*, it was argued that a comparative test could be applied by taking into account a police officer's conduct if he had been confronted by a white person instead of a black person.

[267] With respect, and considering the particular facts of this case, I find that that comparative analysis is not necessary. A simple review of Officer Demers' conduct, in light of his attitude in general, as well as the responses he provided to the Complainant are sufficient for me to recognize that Officer Demers acted, even unconsciously, based on racial stereotype. (As regards for the peripheral reduced role of comparative evidence, see: *Canadian Human Rights Commission v. Canada (Attorney General)*, 2005 FCA 154 (*Morris*), at paragraphs 27-30; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, at paragraphs 16-18).

[268] In its arguments, the Commission also argues other grounds that could suggest racial profiling in this case. As such, it argues that one of the officers provided incorrect identification regarding the badge that he was wearing.

[269] Taking into account that the evidence does not make it possible for me to establish the grounds underlying that refusal to provide appropriate identification, I cannot find that there was a ground of discrimination based on that factor alone.

[270] Similarly, the Commission argues that the closing of the Cornwall crossing following the events on November 18, 2005, is another indication of racial stereotyping linking Aboriginal people to violence.

[271] First, it is possible in light of the facts in this case to find that the closing of the Cornwall Island border crossing on November 18, 2005, could constitute another racist stereotype making it possible to link Aboriginal people to violence.

[272] However, it is difficult for me to directly link the closing of the Cornwall Island border crossing to the violence that could have been committed by an Aboriginal group identified as the Mohawk Warrior Society.

[273] In fact, the evidence was not determinative as to indicate the exact nature of what is known as the Mohawk Warrior Society. In that respect, several witnesses have expressed divergent views on the existence of the Mohawk Warrior Society and on the fact that it was a violent group.

[274] More specifically, I accept the comments of the Complainant herself, who indicated that the Aboriginal people in the Mohawk Warrior Society were a peaceful group that helped other members of the Akwesasne Aboriginal community.

[275] In the absence of more probative evidence on the existence of such stereotype, as the Commission submits, I cannot find that that element alone allows me to acknowledge that the Respondent acted in a discriminatory manner in this case.

IV. Conclusion

[276] As a result, and considering the evidence that was established in this case, I therefore indeed find that the Complainant's complaint is well founded in part, in fact and in law, according to section 5.

[277] Under the provisions of section 53 of the *Act*, I must therefore examine the corrective measures necessary to stop the discriminatory practices.

[278] In light of the evidence submitted, I am of the opinion that it would certainly be appropriate to grant the following remedies:

A. Remedies with respect to the Complainant

[279] Regarding remedies, I must therefore rule on the Complainant's requests. In that respect, the Complainant argues four points with respect to which I should award her damages.

[280] For the purposes of this decision, I group the first three points together and award the Complainant an amount of \$5,000 under the provisions of paragraph 53(2)(e) of the *Act*.

[281] With respect to all of the circumstances of this case and considering the reprehensible conduct of one of the Respondent's officers for which, moreover, I allowed the Complainant's complaint, I consider the amount of \$5,000 to be fair and appropriate.

[282] I also award interest for the above-mentioned amount, in accordance with subsection 53(4) of the *Act* and subsection 9(12) of the Tribunal's Rules of Procedure.

[283] In establishing the above amount, that is, \$5,000, I more specifically take into account the provisions of the Federal Court in *Chopra v. Attorney General of Canada and Canadian Human Rights Commission*, 2007 FCA 268, where, at paragraph 37 of the decision, it is indicated that there must be a causal link between the discriminatory practice and the loss claimed.

[284] In that respect, the Complainant did not prove in a clear and concise manner the extent of the damages that she intended to claim. Similarly, no expertise, be it psychological or medical, was provided to the Tribunal regarding physical or moral harm that she might have experienced following the actions toward her by one of the Respondent's officers.

[285] However, considering the causal link between the discriminatory practices and what the Complainant allegedly suffered in her proceedings and at the hearing, I find that \$5,000 seems appropriate considering all of the circumstances in this case for which I was provided evidence.

[286] Regarding the fourth point, which is a request with respect to costs against the Respondent, it is impossible for me to grant such request given the provisions of the Supreme Court of Canada in *Mowat*, cited as *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, which did not recognize that the *Act* could allow the Tribunal to compensate a Complainant for any legal expenses incurred for the purposes of an appearance before the Tribunal.

B. Remedies sought by the Commission

[287] At paragraph 256 of its submissions, the Commission argues six points with respect to measures that would allow all of the Respondent's officers to have sufficient training in regard to discrimination and other accessory measures.

[288] I will therefore adopt all of the Commission's recommendations and, in that respect, I therefore order, under paragraph 53(2)(a) of the *Act*, that the Respondent adopt the following measures in consultation with the Commission, whose recommendations are as follows:

- (a) take steps to ensure that its current Code of Conduct contains a specific statement to the effect that the *CHRA* prohibits Border Service Officers (BSOs) from discriminating on the basis of prohibited grounds when processing travelers seeking admission to Canada;

- (b) provide BSOs working at the Cornwall border crossing with training material regarding the range of different perspectives within the Akwesasne community, and within the CBSA itself, regarding the Warrior Society, and/or others in the Akwesasne community who may be recognized as Keepers of the Peace;
- (c) develop and implement a policy or directive that specifically prohibits all forms of race-based discrimination under the *CHRA*, including racial profiling;
- (d) prepare training, separate from the existing on-line Diversity and Race Relations module, that includes discussions of the new policy or directive on race-based discrimination, as well as current case law concerning the phenomenon of racial profiling;
- (e) retain independent consultants with appropriate expertise with respect to the above noted matters to assist in the preparation of the required materials, policies or directives; and
- (f) ensure that within a reasonable period of time, (i) all BSOs have been provided with the training mentioned above, (ii) adequate measures have been put into place to ensure the training is provided to new recruits, and is refreshed periodically as appropriate, and (iii) the CBSA provides confirmation to Ms. Davis and the Commission that these steps have been completed.

[289] Additionally, and more specifically considering the facts in this case, I find that another recommendation should be applied by the Respondent, in consultation with the Commission, in particular that no operation of the same type as or similar to that which was conducted on November 18, 2005, shall be conducted without the direct participation of the Akwesasne Mohawk Police Service or any other Aboriginal police force elsewhere in the country.

[290] In fact, it seems essential to me that members of Aboriginal police forces be present with the Respondent's officers in any operation like the one in this case in order to preserve the distinct character of the Aboriginal peoples.

[291] In that manner, Aboriginal people subject to similar search operations at border crossings should be reassured that their culture, identity and security as Aboriginal people will be better preserved and protected in the future. I issue this recommendation considering that the current agreement with the Akwesasne Mohawk Police Service permits their intervention only on arrest and detention and following a request by the Respondent's officers. (See Exhibit C-6.)

[292] Finally, and considering the recommendations previously issued, the Tribunal will retain jurisdiction in this case for an additional period of six months until the parties have confirmed that all of the above-mentioned orders have been duly applied.

Signed by

Robert Malo
Tribunal Member

Ottawa, Ontario
December 9, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1342/7208

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

Decision of the Tribunal Dated: December 9, 2014

Date and Place of Hearing: November 13 to 16, 2012
November 19 and 20, 2012
November 26 to 30, 2012
January 14 to 16, 2013
January 23 to 25, 2013
February 11 to 13, 2013
May 29 to 31, 2013
June 25 to 28, 2013
July 18 to 19, 2013
August 26 to 28, 2013
October 7 to 9, 2013
October 16 to 18, 2013
November 6, 2013
December 2 to 6, 2013
January 28 to 31, 2014
February 19, 2014
May 7 to 9, 2014
May 26 and 27, 2014
Cornwall, Ontario

Appearances:

Janet (Katenies) Davis and Kakweraias, for the Complainant

Brian Smith and John Unrau, for the Canadian Human Rights Commission

Sean Gaudet and Laura Tausky, for the Respondent