

T.D. 2/97
Decision rendered on February 17, 1997

THE CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DANA LAWRENCE

COMPLAINANT

- and -

CANADIAN HUMAN RIGHTS COMMISSION

COMMISSION

- and -

DEPARTMENT OF NATIONAL REVENUE
(CUSTOMS AND EXCISE)

RESPONDENT

DECISION OF THE TRIBUNAL

TRIBUNAL: Norman Fetterly, Chairperson
Julie Pitzel, Member
Guy Chicoine, Member

APPEARANCES: Dana Lawrence, Complainant
Eddie Taylor, Counsel for the Canadian
Human Rights Commission
Darlene Patrick, Counsel for the Respondent

DATES AND LOCATION

OF HEARING: June 24 to 27 and July 30 to August 1, 1996
Vancouver, British-Columbia

On September 27, 1994 Mr. Lawrence, the Complainant, a Canadian citizen and Vancouver resident returned home from a short one week visit to

Amsterdam where he was joined by his daughter who was living in London, England. She was one of his two children from a previous marriage.

Mr. Lawrence, now aged forty-nine years, a former teacher and administrator suffers from AIDS. He had been diagnosed HIV positive in 1991 and developed AIDS after 1994.

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He was then and continues to be under the care of Dr. Philip Sestak who had prescribed some eleven medications for the treatment of his illness when the incident in question occurred. Since then his medications have increased to seventeen in number.

Arrangements had been made for Mr. Lawrence's friend a Mr. Geoff Metcalf, to pick him up at the Vancouver International Airport upon his arrival.

On disembarking in Vancouver from Canada Flight 3000 after a fourteen hour flight from Amsterdam, Mr. Lawrence was checked through Customs primary inspection point. This occurred in the old Customs facility at the Airport which has since been replaced by the more spacious modernized version.

At the primary inspection point international travellers are required to produce their Customs Declaration (since amended) and their passports.

Travellers are then routed by the Customs Inspector at the primary inspection counter to either the green line on the concrete floor which channels them past the baggage carousels to the exit, or the red line which leads to the secondary inspection area. There, duty is paid for items declared to be in excess of the allowable maximum and there also baggage is inspected for suspected contraband.

Mr. Lawrence, the first passenger to recover his single checked bag from the carousel proceeded with it, together with a paper shopping bag and two bouquets of wrapped flowers towards the exit.

As he wheeled his baggage cart toward the exit and while still some distance from the exit doors Mr. Lawrence was approached by a uniformed customs inspector, Mr. Raj Pratap.

Inspector Pratap's duty on this particular day was, in the lingua of the Custom's Branch, to function as a "rover". His function literally called for him to rove among the travellers and to spot suspicious items and to observe suspicious behaviour.

What caught Inspector Pratap's attention was the plant material contained in the two wrapped bouquet of flowers in Mr. Lawrence's possession.

After a brief discussion Mr. Lawrence was asked by Inspector Pratap to follow him. He was led from the exit channel, that is the green line, to the secondary inspection area where there were, at that time a bank of some fifteen identical counters. Mr. Lawrence was led to either counter Three or Four. Opposite this counter and some twelve to fifteen feet away were located two offices. The office most directly opposite this counter was the computer room which was equipped with two automated computer systems.

One system accessing the Police Information Retrieval System or PIRS, is an information system which garners information from Police forces throughout Canada and sorts or classifies that information on three levels. Customs has access to the first level which contains short anecdotal comments concerning the subject and may, in some cases, refer to an individual's criminal record or in other cases refer to an individual who

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witnessed a crime. The display may also contain a coded message but not all Customs Inspectors are educated as to what the message means. The remaining two levels contain classified and privileged information, which is not accessible to customs officers.

The second computer system is the Primary Automated Lookout System or PALS. It is a stand alone Customs information system which records and reveals known Custom violators.

Adjoining the computer room is the office of the Supervisor. Between the secondary inspection area and the exit channel, or green line, there stood at that time a three to four foot high X-Ray machine which also served to demark the secondary inspection area from the exit channel. It stood to the left of the exiting travellers. To their right was the office of the Agricultural Officer.

Inspector Pratap summoned the Agricultural Officer, Officer Ma, by means of an electrical device. On being summoned Officer Ma left his office and walked the short distance to the secondary inspection area where Mr. Pratap and Mr. Lawrence were awaiting his arrival.

Up to this juncture there is no dispute as to what transpired. In addition to the oral testimony of the parties, the Tribunal had the advantage of viewing the former Custom's facilities which are much as they

were in September of 1994 when the incident upon which the Complaint is based occurred.

After their arrival at the secondary inspection counter and the appearance of Officer Ma, the Complainant and Inspector Pratap differ in their views of what developed into the most extraordinary and bizarre series of mishaps leading ultimately to a formal complaint by Mr. Lawrence.

THE COMPLAINT

In particularizing his complaint Mr. Lawrence alleges, inter alia, that upon being forced to publicly state that he had AIDS, the Customs Officer proceeded to obtain and put on rubber gloves..."opened my bag of medication and made a disparaging comment about the number of medications I had in my possession".

In his opening remarks Commission Counsel defined his position in the following words, at Page 6 of the Transcript.

"It is our position that in donning latex gloves after learning of the nature of the Complainant's illness that constitutes differential treatment on the basis of disability which is prohibited under the Canadian Human Rights Act... what I have just stated is the prima facie case of discrimination".

"This type of discrimination has been noted in the Employment context as 'adverse effect discrimination', and at the end of the day I will argue that this construction will present the Tribunal with a novel case of first impression. I will argue that the Respondent has a facially neutral policy of searching travellers in order to prevent prohibited substance from entering Canada".

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"Being subjected, then, to the secondary search based on those conditions is an adverse effect of being ill with chronic illness."

The remarks of Commission Counsel in his opening statement are significant because, as we understand the complaint, Mr. Lawrence alleges direct discrimination arising from adverse differential treatment in the provision of goods, services, facilities or accommodation pursuant to Section 5(b) of the Canadian Human Rights Act. It should be noted, for the sake of clarity, that adverse effect discrimination is a principle flowing from judicial decisions, see Ontario Human Rights Commission and O'Malley

v. Simpsons-Sears [1985] 2 S.C.R., 536. Section 5 of the Canadian Human Rights Act, on the other hand, when employing the term "adversely" does so in an entirely different context.

The question which troubled the Tribunal on this issue is as follows:

When a specific discriminatory act is alleged, i.e. the donning of latex gloves upon learning that an individual suffers from AIDS, can the facially neutral policies of a Government Agency then form the basis for an allegation of adverse effect discrimination?

The Supreme Court of Canada in *Alberta Human Rights Commission v. Central Alberta Dairy Pool* [1990] 2 S.C.R., 489, held that "direct and adverse effect discrimination ought to be distinguished for purposes of determining the appropriate response to a prima facie case of discrimination" (See head note at page 490).

In her reasons Mme. Justice Wilson states as follows at page 515:

"The duty in the case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the Complainant, short of undue hardship: In other words, to take 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. Cases such as this raise a very different issue from those which rest on direct discrimination. Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question".

In that case and others where the concept of adverse effect discrimination has been an issue, the relationship between the parties was usually one of employer and employee. The factual basis for a claim of adverse effect discrimination in those cases differs significantly from the facts presented here. The Statutory defence of a bona fide justification afforded by Section 15(g) of the Canadian Human Rights Act to a claim of adverse differential treatment of an individual on a prohibited ground is not available as a defence to an allegation of adverse effect discrimination. In those cases where an employer raises the defence of reasonable accommodation he is required to demonstrate that a facially neutral rule is "a condition or rule rationally related to the performance of the job". See *Alberta Human Rights Commission, supra*, quoting with approval *McIntyre J. in Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.* [1985] 2 S.C.R., 536 at 552.

As mentioned, the Tribunal experienced some difficulty in accepting

the appropriateness of the "adverse effect" concept in the circumstances of this case. As mentioned, it is usually applied in employment situations where facially neutral policies adopted and controlled by the employer have an adverse effect on one or more employees.

With regard to the Statutory defence of bona fide justification pursuant to Section 15(g) of the Canadian Human Rights Act if it was available, Counsel for the Respondent appears not to have relied on that defence in her final submissions.

THE ISSUES

The question of when the latex gloves were donned by Inspector Pratap is a crucial factual issue to be determined by the Tribunal. Whether or not the donning of the latex gloves by Inspector Pratap is, in and of itself, discriminatory regardless of when it occurred, given the circumstances, the condition of the Complainant and the rules and practices of the Customs Branch is, perhaps a moot point.

The Customs Act and regulations are, it would seem, enacted for the protection of the general public and in furtherance of the national interest. In *Simmons v. The Queen* (1988) 45 C.C.C. 3rd, 296, appeal to the Supreme Court of Canada, it was held:

"The individuals arriving at the border are subject to a form of restraint from the outset, in that they will be denied entry to the Country until the Immigration and Customs Officials are satisfied that they have the right to enter and that the goods and substances which they have in their possession are such as can be legally brought into Canada...", per L'Heureux-Dubé J., McIntyre J. concurring.

It was further held per Dickson, C.J.C., Beetz, Lamar and La Forest J.J. concurring as follows:

"The degree of personal privacy reasonably expected at Customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries for the general welfare of the nation. Travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process typically requires the production of proper identification and travel documentation and

involves a search process beginning with the completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods."

It is true that this case involves an appeal from a criminal conviction and that the issue was whether the apprehension and body search of the accused was an infringement of her right to privacy under the Charter of Rights. Nevertheless, the comments of the Justices concerning the arrival of travellers from abroad seeking admission to Canada are apropos and instructive.

Finally if the Customs Act creates an adverse effect amounting to

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discrimination, in the exercise of the powers conferred by it, then the remedy lies in amending the legislation and is not, in our opinion, within the remedial powers conferred on this Tribunal.

EVIDENCE

There is a conflict of evidence between the Complainant and Inspector Pratap. The protagonists differ on when the white latex gloves were donned.

Mr. Lawrence testified that this occurred after he was pressed by Inspector Pratap concerning the medication in his baggage. According to Mr. Lawrence, he questioned the right of Inspector Pratap to require this information but eventually and reluctantly revealed the fact that he was a victim of AIDS. Whereupon Inspector Pratap donned the white latex gloves and removed the vials of medication from his baggage and examined their contents.

Inspector Pratap, on the other hand, testified when he left the inspection counter and proceeded to the computer room to conduct a name check under the name of Dana F. Lawrence in the PIRS system that he donned the latex gloves after viewing on the computer screen words to the effect "Associate/Cocaine/Trafficking".

There is also differing versions as to an alleged criminal record of the Complainant's and the manner in which this subject arose. Although the existence or non-existence of an alleged criminal record does not form the

basis of the complaint it is necessary to describe in some detail the position of the parties who maintain conflicting views as to what occurred in that regard.

The Complainant testified as follows:

"The agricultural officer was still there when the Customs agent came out from in front of me and indicated loudly that I had a criminal record. At approximately that same time the agricultural officer was walking away from the area that I was at with the material he had confiscated".

The Complainant was then shown a sketch, not to scale, which he had drawn the day following the incident and on which he had marked his position at the inspection counter and the door to the computer room. He testified as Inspector Pratap emerged from the door to the computer room some twelve feet away was when he announced in a loud voice that he, Lawrence, had a criminal record.

Inspector Pratap's version of how the subject of an alleged criminal record arose differs significantly from the Complainant's version. He testified the alleged criminal record became a subject of discussion only after the Complainant pressed him for the results of the computer name check he had conducted before returning to the inspection counter. He denied having loudly shouted as he emerged from the computer room that the Complainant had a criminal record.

However, for reasons which appear when reviewing the testimony of the witnesses, the Tribunal has no doubt the alleged criminal record was in fact mentioned by Inspector Pratap and that this most probably occurred

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while he was standing opposite to and face to face with the Complainant at which juncture Officer Ma was about to leave the area.

The Tribunal also finds, as a fact, that the information displayed on the computer screen was misleading and the conclusion apparently drawn from it by Inspector Pratap was erroneous.

The Tribunal understands the Complainant's outrage arising from an accusation or suggestion, however conveyed, that he had a criminal record. In his own words his reaction was "horror, shock and stunned". The Complainant's reaction is even more readily understood when, as it turned out, the implications from the computer read out were in fact unfounded.

However, we believe, it was out of character for Inspector Pratap to loudly shout these remarks while some twelve feet away. We base this finding on the Tribunal's impression of Inspector Pratap while testifying and on the outstanding record for professionalism, fairness and courtesy described by performance reviews written by his superiors up to this point in time (see Tabs 1 and 2 of HR-1 and letters of commendation Exhibit R-9). In addition we find the manner in which Inspector Pratap was alleged to have made these remarks is not in keeping with the Complainant's own testimony which is to the effect that Inspector Pratap was very polite and formal in his conduct. There is also evidence of Officer Ma which will be reviewed in some detail and which we believe refutes the Complainant's contention Inspector Pratap declared in a loud voice that he, Lawrence, had a criminal record.

It is clear the unfounded suggestion, of a criminal record was uppermost in Mr. Lawrence's mind as witnessed by the several letters he wrote to Officials in the Customs Branch and to the Minister of Justice shortly after this incident occurred. In that regard, a reference may be had to a letter dated September 30th, 1994 (Exhibit HR-1 Tab 5) to Mr. Brian Flagel, Operations Manager, Canada Customs in Vancouver. The following paragraph appears on the third page:

"Those are the two elements of the complaint that I formally make to you. The larger issue, that of finding out the facts of my criminal conviction and criminal record in the eyes of Canada Customs is, as I say, much larger than your Office can reasonably be expected to handle, and I am not complaining to you about this erroneous information, nor does it bear on the conduct of your representative".

"The larger issue" was mentioned again in a letter to the Hon. Alan Rock October 2nd, 1994 (Exhibit HR-1 Tab 6). In both cases the recipients of these letters responded with unqualified apologies to Mr. Lawrence for the suggestion that was made concerning a criminal record. See R-1, Tabs 12, 13 and 14.

As a result of his own efforts Mr. Lawrence, through interviews with the R.C.M.P. and the Vancouver City Police ascertained the information on the computer which was observed by Inspector Pratap was related to an incident which had occurred some years previously.

He learned about an incident which occurred in the fall of 1989 during an investigation by Vancouver City Police who had attempted the arrest of a

drug trafficker who happened to be occupying an Apartment next door to Mr. Lawrence's in a condominium complex. At that time Mr. Lawrence was interviewed by the Police as a potential witness. Nothing came of this incident so far as Mr. Lawrence was concerned, but nevertheless the information was fed into the PIRS System.

When Inspector Pratap entered the particulars obtained from Mr. Lawrence's documentation into the computer's PIRS system, the message came up "Associate/Cocaine/Trafficking" or words to that effect. There does not appear to be any justification whatsoever for even those cryptic words and, as mentioned, Mr. Lawrence's displeasure, anger and shock are readily understandable and accepted.

There is one further matter which needs to be addressed before examining and analysing the testimony of Mr. Lawrence and Inspector Pratap about the donning of the gloves. It concerns the length of time which passed from the moment Mr. Lawrence disembarked up to when he and Inspector Pratap parted. There is conflicting evidence as to the duration of time between those events.

Estimates of time, unless one is clock-watching, tend to be largely subjective. The Complainant, Mr. Lawrence, wasn't sure if his flight from Amsterdam, scheduled to arrive in Vancouver at 12:15 P.M., had in fact arrived on time. He estimated the total time from when he picked up his bag from the carousel after exiting the facility as being between an hour and a half and an hour and forty minutes.

After being intercepted by Inspector Pratap and escorted to the secondary examination area, a short walking distance from the green line exit channel, Officer Ma, the Agricultural Officer was called and arrived there quickly in about two minutes. Upon his arrival, Inspector Pratap left for the computer room a short distance from the counter. A couple of minutes later while Officer Ma was still standing at the counter, Inspector Pratap returned. Officer Ma was on the point of returning to his office when the discussion about the alleged criminal record occurred. It was followed by questions, and discussion concerning the alleged criminal record and finally by a search of Mr. Lawrence's bag and the contents of his pockets.

Mr. Lawrence's friend Mr. Metcalf testified he arrived at Vancouver International Airport at approximately twenty-five minutes after twelve noon and that he waited until shortly before 2:00 P.M. when he was joined by Mr. Lawrence.

The record of flights arriving at Vancouver International Airport are recorded in some detail on a document entitled Primary Inspection Line

System or PILS. This document, is kept in the ordinary course of the airline business by Canada Customs. It was admitted and marked Exhibit R-2. The document is dated September 27th, 1994 and on it is listed information concerning the origin, flight number, estimated arrival times, and so on, for the various airlines on a specified date. The E.T.A. or Estimated Time of Arrival is noted and the acronyms "FPAX" at "PIL" or first passengers at Primary Inspection Line and "LPAX" at "PIL" or last passenger at Primary Inspection Line are also noted. Mr. Lawrence's flight which as designated as "CMM" arrived in Vancouver from Amsterdam at 12:47

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P.M. or thirty-two minutes later than scheduled according to the information shown on Exhibit R-2.

According to this document, the first passenger to arrive at the Primary Inspection Line did so at 12:52 P.M. or approximately five minutes after disembarking. Assuming Mr. Lawrence was first in line, there was some thirty-seven minutes delay due to late arrival and disembarkation before he picked up his luggage at the carousel and proceeded towards the exit.

His interception by Inspector Pratap as he was exiting would have occurred a few minutes later. The discussion with Officer Ma was of short duration, probably about five minutes. When Inspector Pratap returned, Officer Ma was about to leave. The discussion between Inspector Pratap and Mr. Lawrence and the search of one item of baggage does not, in the opinion of the Tribunal, justify an inference of some one hour and forty minutes passing between the time Mr. Lawrence picked up his bag at the baggage carousel and his departure from the Terminal.

It may very well have seemed like an hour and forty minutes or an eternity given the stressful incidents which Mr. Lawrence encountered at the end of a long tiresome journey. But in view of his flight's late arrival and the other factors which we have described, the estimated time spent clearing Customs is not realistic. The Tribunal finds, based on the evidence, the elapsed time from disembarkation to exit from the Terminal was probably close to, but no more than one hour.

We will now examine the evidence regarding the donning of the latex gloves. In addition to the Complainant's testimony, there is the testimony of Mr. Geoff Metcalf and of Dr. Sestak who were not witnesses to the event, but who described the Complainant's appearance and behaviour as he emerged from the Terminal, and in the case of Dr. Sestak, the medication prescribed

at the time of the incident, its effect and the condition of Mr. Lawrence at various stages of his illness.

Mr. Metcalf who, it will be remembered, came to Vancouver International Airport to pick up his friend, Mr. Lawrence, and drive him home, agreed that the flight may have been delayed but could not remember whether or not in fact it was.

Mr. Metcalf testified as to the Complainant's appearance, "he looked tired. It's a long flight. Slightly ruffled... He also appeared visibly upset."

In discussing what had happened Mr. Metcalf said that Mr. Lawrence told him he had "one of the worst experiences of his life. He was humiliated, he was upset, he was jumping all over... He was shaken".

Mr. Lawrence gave him a disjointed story "he was sort of jumping and saying different things in different parts here" according to Mr. Metcalf.

Mr. Metcalf testified that Mr. Lawrence described to him how his luggage had been opened and searched. The questioning about his medication which led to his reluctant explanation of his illness adding "at which point - and Dana was quite upset about this - the Custom's Agent put on

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rubber gloves and went through his medications".

Mr. Metcalf testified that Mr. Lawrence "was upset, very upset. He felt that they had discriminated against him. He was humiliated".

Finally, Mr. Metcalf testified "I actually suggested that Dana write down everything that happened as soon as we got home".

Apparently during this discussion with his friend, Mr. Lawrence made no mention of the flowers confiscated by Officer Ma.

In reviewing the Complainant's evidence, it will not be necessary to re-visit those preliminary findings of fact concerning the manner in which Inspector Pratap delivered his message vis a vis the alleged criminal record or the time lapse between the Complainant's arrival at the airport and his departure.

The sketch, Exhibit HR-4 purports to show the secondary inspection area with its counters, the door to the computer room, there were in fact

two doors, and what is described as a "rope barrier". At that time there was in place an X-Ray machine standing some three to four feet high at the location shown as a "rope barrier". Some of the identification marks showing the location of the computer room door and the Complainant's position at the counter appear to have been done when the sketch was drawn i.e. the day following the incident.

The sketch is of doubtful accuracy, incomplete and of necessity self-serving. The Tribunal relies instead on its viewing of the premises and its assessment of the sworn testimony not only of Mr. Lawrence but also all those witnesses who were present at the relevant time.

Given the fact Inspector Pratap, upon returning to the counter, stated or suggested that Mr. Lawrence had a criminal record - at about the same time as Officer Ma was leaving - there then followed a discussion in which Mr. Lawrence denied he had a criminal record and requested that Inspector Pratap go back to recheck his computer. Inspector Pratap's response was that he didn't need to because he had sufficient cause to check Mr. Lawrence's baggage based on what he had seen.

At this point in his testimony, the Complainant referred to a dialogue between he and Inspector Pratap regarding the prescription medications, their purpose, where they had been purchased and whether the Complainant had purchased any drugs in Amsterdam. He responded to Inspector Pratap's questioning by stating the only drugs he had with him were prescription drugs and when he was pressed explained he took the medication for a chronic illness and when questioned further he replied for "AIDS".

Asked for his reaction when informed he had a criminal record, the Complainant testified to being "stunned, horrified and shocked". He further testified Inspector Pratap commented on the "very large number of medications".

Following this exchange "the gentleman opened a number of the vials, the regular pill bottles. He shook them, moved the cotton batten aside and in at least one instance reached in and moved the pills around."

It is noteworthy, up to this point in his testimony, the Complainant had not mentioned the white latex gloves, until counsel produced a memo dated September 28, 1994, which it is claimed consisted of a printout from entries made by the Complainant on his home computer. He testified that this was done in accordance with his practice of documenting important events as they happened.

After some discussion regarding the admissibility of what appeared on its face to be a self-serving document, it was admitted as proof, not of the contents, but solely as an indication the Complainant made notes contemporaneously to the incident complained of. The Tribunal admitted the memo with reservations as to its evidentiary weight. It was marked Exhibit HR-1, Tab 3.

In any case it was referred to the witness who read over the first two pages in order to refresh his memory. Counsel directed his attention to certain passages on these pages. Then he was directed specifically to the second page, third line down, in which he describes the circumstances leading up to the disclosure of the nature of his illness to Inspector Pratap. The next question put to the witness still with memo in his hands was as follows:

Q. Okay. And then you say what?

A. What I say is that immediately upon my identifying, under what I felt was pressure, my illness as AIDS, the Customs Agent quickly returned to the same doorway from where he had come announcing the criminal record check. He was gone some seconds and came back, and as he was walking was in the process of putting on rubber or latex gloves, as he approached me".

No objection was voiced by Counsel for the Respondent to what can only be described as leading questions. The Tribunal recognizes Mr. Lawrence's debilitating illness and the stress of testifying, and that this may have affected his memory of events some two years ago. This line of questioning went beyond its stated purpose, however, and came perilously close to actually prompting the witness in a vital and crucial area of the case.

The Complainant then went on to describe in some detail the search of his possessions including the contents of his pockets which he emptied out at the request of Inspector Pratap. He testified to the fact that after the search was concluded Inspector Pratap removed the latex gloves from his hands and accepted an offer to shake hands. The Complainant characterized his interaction with Inspector Pratap as "polite to the point of exaggeration. He was very very polite".

When the Complainant left the Custom's area, he described his condition as "fairly frazzled". He then described in detail the course of action he took in the days following the incident which included, as he was advised to do by Inspector Pratap, visits to the R.C.M.P. and the Vancouver City Police regarding the alleged criminal record. He further described in some detail his own feelings of humiliation, embarrassment, anger and hurt

which was engendered by this treatment and he concluded that "it was a long while, as I say, before I had found enough information on my own to be able

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to put the criminal record part of that problem to rest".

An Affidavit of Dr. Sestak sworn on June 7th, 1996, is contained in Exhibit HR-1 under Tab 1. Dr. Sestak also appeared in person at the adjourned hearing to give evidence on behalf of his patient Mr. Lawrence.

Dr. Sestak has wide experience in the treatment of HIV and AIDS, having thus far treated about 350 patients. He began treating Mr. Lawrence on November 1st, 1991. According to Dr. Sestak's affidavit he diagnosed Mr. Lawrence as suffering from Immuno Deficiency because of the HIV virus. Other symptoms, as described by Dr. Sestak, caused Mr. Lawrence to be weak, have a reduced tolerance for exercise and mild shortness of breath. In addition he suffered from an unrelated condition known as spastic dysphonia which preceded his HIV infection. This condition according to Dr. Sestak "produces a spastic vocal presentation which results in a manner of speaking which is tentative, lacks control and "breaks" easily. The hesitant speech pattern can often be mistaken as evasion".

Dr. Sestak described, in some detail, the medication which Mr. Lawrence is receiving for his illness. He testified that Dana, as he referred to the Complainant, was given a "cocktail" of medications for a period of some two and one-half years from 1992. Dr. Sestak described in some length the medications he prescribed, their use and their effects. Notwithstanding the potential for serious side effects of the "cocktail" of medicines administered to his patient, Dr. Sestak maintained that Mr. Lawrence's condition had stabilized in 1994 and he based this finding on the fact that Mr. Lawrence had never made a complaint which he felt could be related to his medications or to a combination of them. He stated that in his experience a combination of drugs administered to Mr. Lawrence were not likely to have a cognitive effect on him.

When questioned regarding his observations as to what psychological impact, if any, the wearing of gloves might have on a person suffering from AIDS, Dr. Sestak testified at some length concerning the treatment of AIDS, the attitude of caregivers and others towards this disease going back to 1981. Apparently it is still "a huge problem" even at St. Paul's Hospital when staff who bring food trays in and out of the rooms choose to wear gloves. This is allowed even though according to Dr. Sestak there is overwhelming evidence that there is no risk of getting the virus. He stated that it would certainly make him feel very uncomfortable if he was

ill and persons who were treating him wore gowns and gloves where there was an extremely low risk of being infected by the virus.

He did state that the wearing of gloves when handling needles might afford some protection.

The Respondent called three witnesses, Mr. Crossley, Officer Ma and Inspector Pratap. Mr. Crossley has been employed with Custom's Canada for nineteen years. During that time he performed a variety of functions. He is currently with the Director Customs Border Services, Pacific Region, where he monitors programs implemented by the Department and the operations at various Customs Offices throughout the region. His duty is to ensure that the policies, procedures and programs of the Department are properly carried out by the Line people.

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It should be noted that the investigation of Mr. Lawrence's complaint and interviews of the persons involved was the immediate responsibility of Superintendent Pringle who, unfortunately, was unable to attend the hearing due to illness.

Upon receiving a copy of Mr. Lawrence's written complaint, presumably the letter of September 30th, 1994, to Mr. Fligel, Tab 5 of Exhibit HR-1, Mr. Crossley instructed Superintendent Pringle to conduct an investigation and to interview all of the witnesses and gather all of the documentation and to forward the results to him.

Mr. Crossley reviewed all the investigative reports and recommended the response to Mr. Lawrence's complaint. He authored the letter to Mr. Lawrence from the Regional Collector containing an apology for the reference to a criminal record.

He concluded from his investigation there was no evidence of discrimination. "However, we did note that the Officer had made a reference to Mr. Lawrence being in the PIRS Data Base and that was inappropriate and ... I recommended to the Director that we caution the Inspector against him saying such things in the future".

Mr. Crossley testified, after weighing the probabilities, he decided that if Inspector Pratap had followed procedure and based upon his written statement he most probably put the gloves on before Mr. Lawrence stated that he had AIDS. This was his conclusion.

Mr. Crossley was referred to a page derived from the Customs Enforcement Manual contained in the Respondent's book of documents, Exhibit R-1 under Tab 9. The Manual quoting in part from Section 98(1) of the Custom's Act, states:

"98(1) An Officer may search:

(a) Any person who has arrived in Canada, within a reasonable time after his arrival in Canada";

and then quoting from Section 99 of the Act which states in part:

"99(1) An Officer may:

(a) At any time up to the time of release, examine anygoods that have been imported...

(e) ...suspects on reasonable grounds that...any act has been contravened...examine the goods..."

Mr. Crossley referred to Section 5 of the Manual which authorizes a Customs Officer to "search any person entering Canada" whether a resident or a visitor, pursuant to the provisions of the Act, if the Officer suspects on reasonable grounds that any relevant Act of the Parliament of Canada has been contravened. He may examine in those circumstances the goods in the traveller's possession for contraband.

Under the heading "Occupational Safety and Health", the Manual contains a sub-heading entitled "Drugs" which is found at Page 26, Tab 9 Exhibit R-1 where the following paragraphs appear:

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"50. Officers should not become careless or complacent when searching for drugs or when handling them. Caution should be used to avoid harmful traps that drug smugglers may have set; razor blades, broken glass and hypodermic needles are the most common pitfalls.

51. To protect themselves, officers should always wear gloves and should not freely run their hands into hidden areas without first trying other inspection methods such as mirrors. When substances are found which are suspected of being illicit drugs, latex gloves should be put on immediately. Use of these gloves will serve the dual function of protecting the officer from the possible harmful effects

of the drug, while at the same time protecting potential evidence from fingerprint contamination."

The emphasis is ours and relates to Mr. Crossley's earlier testimony regarding "following procedure".

When asked what tools Officers use in conducting a search, Mr. Crossley mentioned a number of things including the use of rubber gloves which are used quite frequently. He explained that gloves were worn, not only for the protection of the Customs Officer, but also so as to prevent inadvertently contaminating baggage of one passenger with baggage of another passenger being searched by the same Officer.

The Tribunal when viewing the old facilities as well as the new Terminal noted that the secondary inspection counters were and are equipped with drawers in which there are found, amongst other items, white latex gloves.

Mr. Crossley testified as to the procedures and how they differed as between primary inspection and secondary inspection. At primary inspection the Custom's Officer asks routine questions and requires the production of the traveller's passport and Custom's Declaration form. The secondary inspection, if it occurs, involves a more in-depth questioning of the traveller.

As noted the Complainant passed through the primary inspection point without being questioned regarding the bouquet of flowers in his possession.

Mr. Crossley described the kind of things which might arouse the suspicions of a Custom's Inspector. They would include, in the case of a Canadian Resident, where their flight originated, their behaviour on being questioned, goods they acquired while Overseas, and what they were carrying with them. Both the passport and the declaration form contain information as to Airline, the flight number and where the traveller is coming from. The Custom's Declaration form currently in use is essentially the same as the one completed by Mr. Lawrence. The form asks the traveller to state whether any plant, cuttings, grape vines, vegetables, fruits in season, nuts, buds, roots, soil is being brought into Canada.

When asked what kind of reasonable suspicions or what are the indicators a Customs Officer might consider when asking further questions,

Mr. Crossley replied as follows:

"A Canadian Resident might be such things as nervousness, appearing hesitant, carrying something that obviously looks like it needs inspection, would be an obvious indicator. What else? Their appearance, that sort of thing".

"The Passport gives an indication of where the person has been, what Countries they have been in. Certain Countries, we, through experience and intelligence information, know are higher risks contraband, than, say, other Countries would be."

"We would take somewhat of a closer look, if, coming from, say, Thailand, coming from Columbia, coming from anywhere in the Caribbean, coming from Amsterdam. Those Countries are specifically ones that we're concerned with narcotics, for example. (The emphasis is ours.)

Officer Ma, a Graduate of the University of Waterloo in Biology and a certified medical lab technologist, was employed at the time of this incident as an Inspector acting only on referrals from Canada Customs at the old Vancouver International Airport facility.

He was located in a separate office at the old facility to the right of passengers following the green channel to the exit doors.

He testified that he was familiar with the use of gloves by Customs Officers and that they were used frequently by some Customs Officers and infrequently by others. It was variable, but he says he would see gloves being worn quite often and "its not unusual".

He testified he had worked in the same area as Inspector Pratap for some eight years. On the 27th of September, 1994 he was summoned by Inspector Pratap by an electronic buzzer to the secondary inspection area to deal with some plant material in the possession of the Complainant, Mr. Lawrence.

Officer Ma noted some cut chrysanthemums in Mr. Lawrence's possession, presumably from the bouquet of flowers, and he explained why these were restricted entry into Canada. He continued to ask further questions, as he had been trained to do, whereupon Mr. Lawrence volunteered he also had some bulbs in his possession which he had purchased in Amsterdam or Holland.

Officer Ma then asked Mr. Lawrence "Can you please get them out for viewing?" When Mr. Lawrence removed the bulbs, Officer Ma noted "they were in a box with some other toppings like clothing and socks over them". He

cannot recall whether the bulbs were removed from Mr. Lawrence's luggage, i.e. the bag, or from the paper bag, but in any case they, together with the chrysanthemums, were confiscated.

Officer Ma testified that normally he is next to the Customs Officer when an inspection is done and in this incident he had "a feeling that initially we were together". "I had a feeling that he left the situation, he had left to go somewhere and somehow he came back".

When he was questioned concerning the wearing of gloves, Officer Ma testified he did see an Officer opening a vial wearing gloves. He stated

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as follows:

"I cannot tell you whether they were put on while I was there or not, but he did have gloves on, yes....in all fairness I -I know that I saw him with gloves when I was leaving the area. I do recall that. I don't know whether he came on, into the area with gloves on or off, I cannot say".

Officer Ma testified at no time during the course of the discussion between Inspector Pratap and Mr. Lawrence did he hear Mr. Lawrence mention that he had HIV or AIDS.

Officer Ma added that his job really isn't on "the interrogative aspects...even though I could be present, doing my job, with a Customs Officer close to me, I wouldn't actually be sensitive to the questions being asked of the Officer".

He was referred to his reports of which there were two marked Exhibits R-4 and R-5 apparently written at different times. In one of the reports, Exhibit R-5, he referred to a statement made "face to face at the secondary counter that he had some criminal record", referring to a conversation between Inspector Pratap and Mr. Lawrence. In the other report, the word "that" was struck out, initialled and the word "whether" substituted. The effect of this change was to alter the meaning from a statement to an inquiry.

Much was made of this alteration by Counsel for the Commission in his cross-examination of Officer Ma. He agreed he made the change soon after the report was written but did not agree that it changed the meaning in the context. When asked as to the meaning of "whether" and "that" he stated he was not aware they were two different things and testified "I did not have

any intent either way. I simply changed it and I can't say why I changed it".

Under questioning by Member Chicoine, Officer Ma testified he was with Mr. Lawrence for about five minutes at the inspection counter. He was unable to estimate the total time the Complainant remained at the inspection counter. He testified in response to further questioning by the Tribunal that he wrote his report rather quickly and the amendments he made by striking out the word "that" and substituting the word "whether" was made "about three-quarters into the time period of which this event occurred to the day we are here, where I had some recollections, and whether it was a statement or an interrogation. I wasn't sure which one it was. Even though I wrote this report I have had to think it over and I wasn't sure whether it was or not. Even though it sounds like this is a statement, I don't know whether it was a question, put as a question or put as a statement by Inspector Pratap."

Whether the allegation was put by Inspector Pratap as a statement or as an inquiry to Mr. Lawrence is not as important as the fact that it was made at all. Earlier the Tribunal held we did not accept the Complainant's version as to the manner in which the statement or the inquiry was made, namely, in a loud voice, while some twelve feet away from him.

Officer Ma testified Inspector Pratap came back as he was leaving the

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inspection counter and something occurred while they, that is, Mr. Lawrence and Inspector Pratap were face to face, when he heard a raising of the voice slightly by Mr. Lawrence who sounded edgy and irritated causing Officer Ma to look back. He says he heard Inspector Pratap responding in an "impassioned" manner by which Officer Ma said he meant in a drone or monotone saying something about a criminal record.

Officer Ma stated Inspector Pratap was very "impassioned" and that "he just dealt with the features of the conversation" and was quite unlike "some Officers who are not so good at being challenged, they break or they quaver".

Officer Ma was not the most satisfactory witness. He had difficulty recalling events sequentially and tended to form "pictures" or impressions of what happened. He also lacked some appreciation for the meanings and use of English words. It is our belief however that Officer Ma was essentially truthful.

Inspector Pratap was employed with the Customs Branch for approximately nine years prior to this incident. Shortly after commencing his employment he was involved in the detection and interception of thirty pounds of liquid hashish imported in a windsurfer in 1985. In recent years he has done an outstanding job in intercepting contraband. See letters of commendation, Tabs 2 and 8 of Exhibit R-1 and further letters of commendation produced when he was challenged to do so by Counsel for the Commission, see Exhibit R-9.

His performance record, as viewed by his Supervisors for several years prior to the incident involving Mr. Lawrence, was fully satisfactory and in comments under Section C of the Performance Appraisals found at Tab 1 of R-1 there are, for example, statements as follows:

"Your decisions are consistently fair and reasonable. You are also careful to explain your actions (and the reasons therefor) to the Public".

"You have a good grasp of natural justice. See Pages 1-2. At Page 3(a) and at 3 the following appears:

"You are always careful to consider whether benefit of the doubt should extended (sic) and do so when warranted. While effecting such actions you conduct yourself in a very professional manner".

And at Page 5, Tab 1, Exhibit R-1, the following comments appear:

"Your interactions with the travelling public, your peers and Supervisors in (sic) good. Keep up the good work in 1993".

Inspector Pratap testified after noticing the bouquet of flowers carried by the Complainant he intercepted him and asked him to produce his Passport and Customs Declaration Form. He noted that the Complainant had failed to declare plant material and he then asked the Complainant to follow him to the secondary inspection area which is quieter and away from the flow of exiting passengers.

The Complainant followed Inspector Pratap to Counters Three or Four of the existing fifteen counters in the Inspection area. Inspector Pratap then buzzed for the Agricultural Officer, Officer Ma. While awaiting Officer Ma he checked the Complainant's Passport and Declaration and ascertained that he had just arrived from Amsterdam.

When Officer Ma arrived, Inspector Pratap told the Complainant "I will do a quick name check and I will be right back". He then left the counter for the computer room which was about twelve feet behind the counter and disappeared from sight.

In the computer room Inspector Pratap fed into the PIRS System the Complainant's name, then observed the monitor displaying the words "Associate/Cocaine/Trafficking", or words to that effect. This was a 10 or a "hit" on a scale of 1 to 10 according to the prevailing usage by the Customs Branch.

Inspector Pratap testified that on the ledge behind the computer there were a lot of tools, gloves and inspection material. After applying some body powder to his hands, he put on gloves and walked back to the Inspection area where Officer Ma was finishing off his examination.

According to Inspector Pratap, the Complainant said "Why the gloves?" and he responded by saying "It's routine. Out of certain Countries we use them".

Inspector Pratap testified that he knew ahead of time he was specifically targeting certain materials. On cross-examination when asked by Counsel whether he had made up his mind to search the Complainant's luggage, when he saw the words displayed on the monitor, Inspector Pratap testified that he didn't make up his mind to inspect the Complainant's bags at that particular time. Counsel for the Commission chose to leave it at that and Counsel for the Respondent did not on re-examination ask when in fact Inspector Pratap made up his mind to do the search.

It was argued by Commission Counsel an inference ought to be drawn from this exchange that Inspector Pratap decided to conduct a search of the Complainant's bag later when he learned Mr. Lawrence suffered from AIDS. He allegedly quickly returned to the Computer room to don gloves according to the Complainant's testimony.

Inspector Pratap categorically denies he returned to the Computer room a second time. There would in fact have been no point in doing so without first checking to see if there were gloves at the counter in the drawers provided for that purpose. We accept his evidence in that regard as truthful, consistent and in accordance with the situation as it developed.

He said his practice was to request from the traveller the production of the Passport and Customs Declaration Card. Depending on the nervousness and demeanour of the person, he would follow up with questions as to where the person was coming from, the nature of the person's business, the purpose of the trip and how long away from Canada.

With respect to the Complainant, Inspector Pratap stated he was "a bit nervous, would be a slight agitation" when he was first approached. He

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learned from his Customs Declaration and Baggage tags that he had boarded his flight in Amsterdam. He failed to declare, albeit unintentionally, he had in his possession prohibited agricultural products.

His evidence was the Complainant was by himself carrying with him two pieces of luggage consisting of a paper shopping bag and a black leather knapsack which were "filthy".

Inspector Pratap testified "it's not only the answers that he gives to your question, it is the body language, the eye movement, the type of clothing, the shoes..." and other factors including, one assumes, the manner of speech from which he would reach a decision as to whether or not he would wear gloves in a particular case. He said that he wore gloves in about half the cases where he conducted a baggage search.

It is therefore reasonable to infer from the circumstances as described by Inspector Pratap, that they would lead him to make the decision to search the Complainant's luggage before he entered the computer room to conduct the name search. When the monitor displayed words to the effect "Associate/Cocaine/Trafficking" his suspicions, although in part misinformed, were apparently confirmed and provided him with reasonable grounds to examine the Complainant's luggage.

Inspector Pratap was asked on cross-examination whether he had made a statement face to face with the Complainant at the secondary inspection counter to the effect he had a criminal record. His response was as follows:

"When Mr. Lawrence during examination, asked again "What does the computer record say about me?" and this is face to face and very close, and this is during the examination or just the beginning of the examination, I said to him, "Mr. Lawrence, why do you think you have a criminal record?"

"And that question is a diversion basically used when I don't want to relay what is on the Computer...".

Inspector Pratap testified that the Complainant repeatedly asked him what was on the Computer and it was only then that he responded by saying "Why, do you think you have a criminal record?"

The Tribunal accepts Inspector Pratap's version of the conversation between he and the Complainant Mr. Lawrence regarding the criminal record while recognizing there was some evident reluctance during his testimony to concede to the subject being discussed at all. Those remarks should not have been made and Inspector Pratap is aware of that as were his Superiors who, as mentioned, wrote the Complainant with full apologies.

The Tribunal in *Stadnyk v. Canada (Employment and Immigration Commission)* (1993), 22 C.H.R.R. D/173 was also faced with the task of determining whether certain questionable conduct on the part of the Respondent amounted to a violation of the Canadian Human Rights Code. The Tribunal stated as follows:

The respondent presented to the Tribunal a number of cases where a respondent had exercised bad judgment, poor taste, insensitivity,

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etc., and where the complainant had a sincere genuine belief that such actions were based or directed at them on a prohibited ground of discrimination. However, the adjudicating bodies have ruled that such conduct did not amount to violation of applicable human rights codes. See *Dhami v. Canada Employment and Immigration Commission* (1989), 11 C.H.R.R. D/253 (Can.Trib.); *Fu v. Ontario Solicitor General* (1985), 6 C.H.R.R. D/2797 (Ont.Bd.Inq.); *Makkar v. Scarborough (City)* (1987), 8 C.H.R.R. D/4280 (Ont.Bd.Inq.); *Syed v. Canada (Minister of National Revenue)* (1990), 12 C.H.R.R. D/1 (Can.Trib.); *Aragona v. Elegant Lamp Co. Ltd.* (1982), 3 C.H.R.R. D/109 (Ont.Bd.Inq.); *Nimakov v. Canada National Hotels* (1987), 8 C.H.R.R. D/3985 (Ont.Bd.Inq.); and *Watt v. Niagara (Regional Municipality)* (1984), 5 C.H.R.R. D/2453 (Ont.Bd.Inq.)

But the complaint is based on the donning of gloves after learning that the Complainant suffered from AIDS and not on imprudent remarks or suggestions by the Customs Officer pertaining to a non-existent criminal record.

CONCLUSION

This has been a difficult case and the Tribunal has gone into some detail in evaluating the evidence. There is no question the Complainant, as a traveller, was faced with a series of unpleasant and frustrating invasions of his privacy. Anyone who has occasion to travel abroad can relate to and empathize with his situation.

In accepting Inspector Pratap's version of the circumstances involved in the donning of the white latex gloves, the Tribunal does not think it necessary to question the Complainant's veracity. There are, we believe, any number of explanations as to why the Complainant's version may be incorrect. These include weakness, tiredness, frustration and his extreme sensitivity to the wearing of white latex gloves in that setting.

Inspector Pratap on the other hand appeared clear headed, civil and courteous not only while testifying but also it seems throughout the encounter with the Complainant. His main purpose in searching the Complainant's luggage and asking the pertinent questions was based on reasonable suspicions, given Amsterdam as the point of origin and the other factors previously described, that the Complainant was in possession of narcotics. Even after the vials of medication had been extracted and placed on the counter Inspector Pratap's suspicions were not completely allayed as he continued to probe with his gloved finger the medications. It was only then, after further questioning, that the Complainant revealed he had AIDS. Following that admission and before parting Inspector Pratap accepted and shook the Complainant's proffered hand after first removing his gloves.

This is a case where the principles enunciated by the Courts and other Tribunals on the proper interpretation of the Canadian Human Rights Act are of little assistance and the Tribunal must perforce rely on its own common sense and experience in reaching its conclusion based on the facts as we find them.

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We find as a fact the donning of the white latex gloves occurred before Inspector Pratap learned the Complainant suffered from AIDS while performing his duties in accordance with the procedure required of him in conducting a search of a traveller entering Canada, in this case the Complainant Mr. Lawrence.

The burden of proof lies with the Complainant and the Commission to establish a prima facie case. If the burden is discharged, the burden of proving justification shifts to the Respondent.

"The complaint in proceedings before human rights tribunal 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 complaint's favour in the absence of an answer from the respondent-employer". See Ontario Human Rights

Commission and O'Malley v. Simpson-Sears Ltd. [1985] 2 S.C.R.
p.558.

The Tribunal is not persuaded after a careful review of the evidence that the Complainant and the Commission have, on a balance of probabilities, established in this case a prima facie case of discrimination.

It follows from this that a prima facie case of discrimination has not been established and the complaint is therefore dismissed.

Dated this day of January, 1997.

NORMAN FETTERLY, CHAIRPERSON

JULIE PITZEL, MEMBER

GUY CHICOINE, MEMBER