T.D. 1/96
Decision rendered on January 12, 1996

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DAVID BADER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Lyman R. Robinson, Q.C.

APPEARANCES: M.R. Jamieson, Counsel for the Commission
D.A. Rice and D. Richards, Counsel for the Respondent
David Bader, Complainant

DATES AND PLACE
OF HEARING:
November 22-25, 1994,
December 5-8, 1994,
August 8-12, 1995,
August 14, 1995
Vancouver, B.C.

1.0 THE COMPLAINT

The Complainant, David Bader, alleges that the Department of National Health and Welfare has discriminated adversely against him in the provision of services on the basis of his national or ethnic origin and race in violation of section 5 of the Canadian Human Rights Act.

In support of the complaint, the Complainant testified that the Respondent's policies and actions with respect to the enforcement of the Food and Drug Act and the regulations made thereunder in relation to the importation and sale of certain health foods and herbal products differentiated adversely between the business carried on by Don Bosco Agencies Ltd., in particular, and other health food merchants who are Caucasian, in general, compared to businesses carried on by merchants whose race is Oriental or whose ethnicity is Chinese. The Complainant, whose race is Caucasian and who described his ethnic origin as Canadian, is a shareholder, director and president of Don Bosco Agencies Ltd.

Since 1970, Don Bosco Agencies Ltd. has, with the exception of a period of approximately 6 months in early 1989, engaged in the business of importing and wholesale distribution to health food stores of various health food products including vitamins, minerals, herbal products and other preparations. Neither Don Bosco Agencies Ltd. nor the Complainant have maintained any retail outlets or sold merchandise at the retail level. Neither the company nor the Complainant have engaged in the manufacturing or packaging of any products. Occasionally, the company has contracted with suppliers to produce and package products under the name of Don Bosco Agencies Ltd. Most of the products distributed by the company have been imported.

2.0 RESPONDENT'S NAME AND ADMINISTRATIVE STRUCTURE

Since the date of complaint, the Department of National Health and Welfare has been renamed "Health Canada". The Health Protection Branch was a sub-division of the Department of National Health and Welfare and remains a sub-division of Health Canada. Virtually all of the references in this Decision to the Respondent are references to the Respondent's Health Protection Branch. The responsibilities of the Health Protection Branch have included the administration and enforcement of the Food and Drug Act and regulations. The Health Protection Branch is sub-divided into several Directorates. Some of these Directorates, including the Food Directorate and the Drugs Directorate, are referred to in this Decision. The Branch also has several geographic regions. The Western region is the most relevant region with respect to this case.

3.0 JURISDICTION: COMPLAINANT'S STANDING TO CLAIM RELIEF

The threshold issue raised in this case is whether the Complainant, an individual, is entitled to relief under the Canadian Human Rights Act where the direct impact of any discriminatory practice, which may be found to have occurred, was on a corporation rather than the Complainant. Any impact on the Complainant has been a consequential impact by reason of his capacity as a shareholder, director or officer of Don Bosco Agencies Ltd. or the Complainant's association with trade associations which have been involved with the business of the company.

3.1 Previous Proceedings

After this complaint was referred to the Human Rights Tribunal, the Respondent applied to the Federal Court of Canada for an interlocutory writ of prohibition on the ground that the Tribunal did not have jurisdiction to hear a claim where the direct impact of the alleged discrimination was on a corporation rather than the Complainant. I am informed that the Federal Court dismissed the Respondent's application without prejudice to the Respondent's right to raise the issue of jurisdiction before the Human Rights Tribunal.

An application was then made to the Human Rights Tribunal by way of a preliminary motion, prior to the hearing of any evidence, for a ruling on the Tribunal's jurisdiction to hear the Complainant's claim. The preliminary motion was heard by Ms. Lee Ongman, sitting as a single member Tribunal. Ms. Ongman ruled that she was unable to determine the issue without the benefit of hearing evidence. Therefore, the hearings which are the subject of this Decision were scheduled.

3.2 Relationship between Complainant and Don Bosco Agencies Ltd.

It is desirable to more fully describe the relationship between the Complainant and Don Bosco Agencies. Ltd. A copy of a search report of the corporate records maintained by the Registrar of Companies pursuant to the Company Act of the British Columbia pertaining to Don Bosco Agencies Ltd., as of October 13, 1994, was entered into evidence (Commission's "Additional Documents", Volume 1, Tab 1). The Complainant testified that the information contained in the search report was accurate with the exception of Mrs. Bader's address which is immaterial to these proceedings. The company was incorporated in 1970. The two directors of the company are the Complainant and his wife, Elke Wiltraud Bader. The president of the company

is the Complainant and the secretary of the company is Mrs. Bader. The Complainant testified that he and Mrs. Bader are the only two shareholders and they
are equal shareholders. The Complainant testified that both he and his wife are Caucasian. He testified that her ethnicity is German and that his ethnic origin is Canadian.

3.3 Submission of Counsel for the Commission

Counsel for the Commission submitted that if the alleged discriminatory practices had a consequential impact on the Complainant either as a shareholder of Don Bosco Agencies Ltd. or some other aspect of his individual personality, the Complainant is entitled to claim relief under the Canadian Human Rights Act notwithstanding that the target of the alleged discriminatory practices was Don Bosco Agencies Ltd. In support of this submission, Counsel cited Re Singh, [1989] 1 F.C. 430 (C.A.) and Secretary of State for External Affairs et al v. Menghani, unreported (T-154-92) November 19, 1993 (F.C.T.D.) as examples of where the Federal Court has recognized the jurisdiction of the Human Rights Tribunal to grant relief to a complainant where the target of the discriminatory practice was another individual.

3.4 Submission of the Complainant

The submission of the Complainant was that he did not abrogate his rights as an individual person under the Canadian Human Rights Act when he incorporated Don Bosco Agencies Ltd. to carry on the business of importing and selling health foods and herbal products. He submitted that he had suffered economic loss as a shareholder and an employee of Don Bosco Agencies Ltd. as a consequence of the alleged discriminatory practices. He also referred to numerous references in the documentation prepared by the Respondent's officials which referred to "Mr. Bader" rather than Don Bosco Agencies Ltd.

3.5 Submission of Counsel for the Respondent

Counsel for the Respondent submitted that even if it is established that the Respondent engaged in discriminatory practices contrary to the Canadian Human Rights Act in relation to Don Bosco Agencies Ltd. and those discriminatory practices had some consequential impact on the Complainant either as a shareholder of Don Bosco Agencies Ltd. or in some other capacity in relation to the business carried on by the company, the Complainant is not entitled to relief under the Canadian Human Rights Act.

Counsel for the Respondent submitted that the alleged discriminatory practices in relation to Don Bosco Agencies Ltd. did not have any impact on the Complainant other than in his capacity as a shareholder of Don Bosco Agencies Ltd.

Counsel for the Respondent submitted that neither Re Singh, [1989] 1 F.C. 430 (C.A.) nor Secretary of State for External Affairs et al v. Menghani, unreported (T-154-92) November 19, 1993 (F.C.T.D.) are applicable to the case before this Tribunal because in both of those cases the direct victim or target of the discrimination was a human individual whereas in the case before this Tribunal, the direct victim or target of the alleged discrimination was a corporation.

Counsel for the Respondent submitted that the principle known as the "Rule in Foss v. Harbortie" should be applied which would have the effect of precluding the Complainant, in his capacity of shareholder, director or officer of Don Bosco Agencies Ltd. from claiming relief for any wrong suffered by Don Bosco Agencies Ltd.

3.6 Is the Complainant Entitled to Claim Relief where the Direct Impact of the Alleged Discriminatory Practice is on a Corporation?

No previous judicial precedents were cited to this Tribunal where a complainant, who has been a shareholder, director or officer of a corporation, has obtained relief under the Canadian Human Rights Act where the direct impact of the alleged discriminatory practice has been on the corporation.

3.6.1 The Act

The purpose of the Canadian Human Rights Act is stated in s. 2 of the Act. The language of the section refers to the protection of "individuals" from discriminatory practices and the section uses the personal pronouns "he" and "she" when referring to the equal opportunities that individuals should have. The title of the Act also reflects the purpose of the Act which is to protect "human" rights.

Section 5 of the Act makes it a discriminatory practice in the provision of services customarily available to the public to differentiate adversely in relation to any "individual" on a prohibited ground of discrimination. I think that it is clear from the Act and the jurisprudence that any alleged discrimination must relate to an "individual" human complainant as distinct from a corporation.

3.6.2 The Impact of an Alleged Discriminatory Practice must be "Sufficiently Direct and Immediate"

In Re Singh, [1989] 1 F.C. 430 at 442 (C.A.) the Court stated:

"Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the alleged 'target' of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences which are sufficiently direct and immediate to justify qualifying as a 'victim' thereof persons who were never within the contemplation or intent of its author. (emphasis added by bolding)

In Re Singh was a reference to the Federal Court of Appeal with respect to complaints by a number of different complainants. In all of the cases, the direct impact of the alleged discrimination was on a person other than the complainant. The issue to be decided was whether or not these cases fell within the provisions of the Canadian Human Rights Act. The Court answered the question in the affirmative.

3.6.3 Factors to be Considered in Determining whether the "Impactis Sufficiently Direct and Immediate"

The factors, which should be considered in determining whether the impact of an alleged discriminatory practice has been "sufficiently direct and immediate", were considered in Secretary of State for External Affairs et al v. Menghani, unreported (T-154-92) November 19, 1993 (F.C.T.D.). The

Menghani case was one of the cases referred to the Federal Court of Appeal in Re Singh. After the decision of the Federal Court of Appeal in Re Singh, the Menghani case was heard by a Human Rights Tribunal. In an appeal from the decision of the Human Rights Tribunal, the Federal Court tacitly approved four factors which the Tribunal had considered in determining whether the impact was "sufficiently direct and immediate". Those factors were

"1. Degree of consanguinity of the Canadian relative to the prospective immigrant;

2. The dependency (financial, emotional) of the Canadian relative on the prospective immigrant;

3. Deprivation of significant commercial or cultural opportunities to the Canadian relative by the absence of the prospective immigrant;

4. The degree of involvement of the Canadian relative in supporting the application for immigration under the Immigration Act and regulations."

In Menghani, the complainant's brother had applied for permanent resident status in Canada. At the material time, a family business job offer program was in effect. The complainant provided a sworn declaration of his willingness to support his brother and a company controlled by the complainant offered employment to his brother. The success of the application for permanent resident status depended in part on sufficient proof being provided of the brotherly relationship. The Tribunal found that the brother had been discriminated against in relation to the proof demanded with respect to the brotherly relationship. The complainant testified that the inability of his brother to obtain permanent resident status and work in the family business had contributed directly to the bankruptcy of the business. The bankruptcy of the family business led to the complainant's personal bankruptcy, the break down of his marriage and health problems. On this evidence, the Tribunal found the complainant was a victim of the discriminatory practice. An application was made to the Federal Court Trial Division by way of judicial review seeking to set aside the decision of the Tribunal. Before the Federal Court it was argued that even if there had been discrimination in relation to the complainant's brother there was no discrimination with respect to the complainant. In determining whether or not the complainant was a "victim" of the discrimination, the court adopted the test laid down in Re Singh of whether the consequences suffered by the complainant were "sufficiently direct and immediate" and tacitly approved the use of the four factors enumerated by the Tribunal in determining whether the test had been satisfied.

In Menghani, the four factors which were used by the Tribunal in determining whether the impact was "sufficiently direct and immediate" were articulated in the context of an immigration case. The description of those factors are not directly transferable to non-immigration cases. However, the factors articulated in Menghani can be restated in a more generic form to make them applicable to all cases. The generic description of these factors would take the following form:

1. The proximity of the relationship between the Complainant and the person who was the target or who felt the

direct impact of the discriminatory practice;

2. The dependency (financial, emotional) of the Complainant on the person who was the target or who felt the direct impact of the discriminatory practice;

3. The deprivation of the Complainant of significant opportunities by reason of discriminatory practices in relation to another person; and

4. The degree of involvement of the Complainant in the affairs of the person who was the target or who felt the direct impact of the discriminatory practice.

3.6.4. Evidence in relation to Impact on the Complainant

It is necessary to consider the evidence in relation to each of the four above mentioned factors.

(a) The Proximity of the Relationship between the Complainant and the Person who was the target or who felt the direct impact of the discriminatory practice;

The legal entity or person which was the target or who felt the direct impact of the alleged discriminatory practices was Don Bosco Agencies Ltd. There is a close proximity in the relationship between the Complainant and Don Bosco Agencies Ltd. The Complainant is a shareholder, director and President of the Don Bosco Agencies Ltd.

(b) The Dependency (financial, emotional) of the Complainant on the Person who was the target or who felt the direct impact of the discriminatory practice;

The legal entity or person which was the target or who felt the direct impact of the alleged discriminatory practices was Don Bosco Agencies Ltd. The Complainant has a financial dependency on Don Bosco Agencies Ltd. by reason of his being a shareholder and employee of the company. There is no evidence before the Tribunal that the Complainant has any other substantial source of income.

(c) The Deprivation of the Complainant of Significant Opportunities by reason of discriminatory practices in relation to another person

The legal entity or person which was the target or who felt the direct impact of the alleged discriminatory practices was Don Bosco Agencies Ltd.

Was the Complainant deprived of significant opportunities by reason of these alleged discriminatory practices?

Counsel for the Commission submitted that the alleged discriminatory practices had a significant impact on the Complainant in his capacity as a shareholder of Don Bosco Agencies Ltd. The Complainant submitted that the alleged discriminatory practices had a significant impact on him as an employee of Don Bosco Agencies Ltd.

To determine whether the Complainant has been deprived of any significant opportunities by reason of the alleged discriminatory practices against Don Bosco Agencies Ltd., it is necessary to determine whether the

alleged discriminatory practices had an adverse impact on the profits of Don Bosco Agencies Ltd. It is only if the profits of Don Bosco Agencies Ltd. were adversely affected that the Complainant may have been deprived of significant opportunities in relation to:

(1) the Complainant's salary as an employee or officer of the company,

(2) the Complainant's fees as director of the company,

(3) the Complainant's dividends as a shareholder of the company, or

(4) capital value of the Complainant's shares of the company.

Very little evidence was adduced before this Tribunal with respect to the financial impact of the alleged discriminatory practices on Don Bosco Agencies Ltd. or the Complainant. No annual financial statements of Don Bosco Agencies Ltd. or other financial information with respect to the profits of Don Bosco Agencies Ltd. was tendered in evidence. No evidence was tendered with respect to:

(1) the salary of other remuneration paid to the Complainant by Don Bosco Agencies Ltd.;

(2) the dividends paid to the Complainant by Don Bosco Agencies Ltd.; or

(3) any fluctuations in the capital value of the shares of Don Bosco Agencies Ltd.

In his testimony, the Complainant referred to a comment which he had made to Inspector Sloboda in 1984 in which he stated that the differential treatment of Don Bosco Agencies Ltd. and other "western" health food importers was a matter of "grave financial concern to our companies". The Complainant testified (Transcript page 360) that the inability of a wholesaler to have medicinal claims printed on labels and inserts of products placed the wholesaler and the wholesaler's customers at an economic disadvantage in relation to the ethnic retailers who were permitted to sell the same or similar products with Schedule A claims on the labels. The Complainant referred (Transcript page 728) to lost sales because of the decision of the Respondent to refuse entry to a product known as "ginkgo" after Don Bosco Agencies had been importing the product for a number of years. Except for the latter incident, there is no evidence that Don Bosco Agencies Ltd.:

1) had orders from its customers with respect to products which were refused entry by the Respondent;

2) lost sales as a consequence of products which were refused entry by the Respondent; or

3) incurred any loss or expense as a consequence of returning products to the foreign supplier where those products had been refused entry by the Respondent.

This does not mean that such evidence does not exist. There is simply no such evidence before the Tribunal.

There is no doubt that the Complainant, as an officer of Don Bosco Agencies Ltd. spent a considerable amount of time challenging and

protesting the enforcement actions of the Respondent but there is no evidence that the volume of sales by the company could have been increased if the Complainant had been able to devote his time to sales promotion. For example, there was no evidence of cancelled sales trips or lost sales opportunities. It is equally plausible that the time which the Complainant devoted to challenging and protesting the enforcement actions of the Respondent was "free" time or "dead" time which had no economic consequences with respect to the profitability of Don Bosco Agencies Ltd.

In his concluding submission, the Complainant submitted that the wages of employees of Don Bosco Agencies Ltd. had been frozen as a consequence of

the alleged discriminatory practices of the Respondent. However, closing submissions are not evidence.

(d) The Degree of Involvement of the Complainant in the Affairs of the Person who was the target or who felt the direct impact of the discriminatory practice.

The legal entity or person which was the target or who felt the direct impact of the alleged discriminatory practices was Don Bosco Agencies Ltd. It is clear from the evidence that the Complainant has been the person who has directed the company's day to day business affairs and consequently he has had a high degree of involvement in the affairs of Don Bosco Agencies Ltd.

Notwithstanding the paucity of evidence with respect to the third factor, namely that the Complainant has been deprived of significant commercial or other opportunities, I find that the remaining three factors establish a sufficiently direct and immediate impact on the Complainant of the alleged discriminatory practices in relation to Don Bosco Agencies Ltd.

(e) The Rule in Foss v. Harbottle

Notwithstanding the immediately preceding finding that the impact on the Complainant has been "sufficiently direct and immediate", there remains the question of whether the rule in Foss v. Harbottle (1842), 2 Hare 461, 67 E.R. 189 should be applied? This rule may be stated in the following form:

A company and its shareholders are different legal entities and only the company is entitled to claim relief for a wrong done to it.

The rule in Foss v. Harbottle was considered by McKenzie J. in Rogers v. Bank of Montreal, [1985] 5 W.W.R. 193 at 210, affirmed [1987] 2 W.W.R. 364 (C.A.). McKenzie adopted the following comment of the English Court of Appeal in Prudential Assur. Co. v. Newman Industries Ltd. [1982], 1 All E.R. 354 (C.A.):

"A personal action would subvert the rule in Foss v. Harbottle and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and

limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting ..."

In McGauley v. B.C. (1989), 39 B.C.L.R. (2d) 223 at 233 (C.A.), Cumming J.A. posed the following question:

"... the question which is relevant is whether the shareholder's loss is the result of some wrong committed against him in his personal capacity or is simply a consequence of the wrong committed against the corporation."

Both of the preceding cases dealt with claims by shareholders. The principle applies equally to claims made by officers and directors in their personal capacities with respect to a wrong done to the company. In both Rogers v. Bank of Montreal and McGauley v. B.C., the following quotation from Martens v. Barrett, 245 F 2d 844 (C.A. 5th Cir., 1957) was quoted with approval. The latter case was described by McKenzie J. in Rogers v. Bank of Montreal
[1985] 5 W.W.R. 193 at 206-7 as being a leading American case on this topic and as being an excellent exposition of the law which is consistent generally with Canadian and British law. The quotation from Martens v. Barrett is:

"And it is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership."

The Complainant chose to incorporate Don Bosco Agencies Ltd. to carry on the business of importing and distributing health foods and herbal products. Incorporation carries with it the advantages referred to in the above quotation and certain advantages which are available to a corporation under the Income Tax Act. There are also some disadvantages and one of

those is that a corporation is not entitled to claim relief under the Canadian Human Rights Act.

The rule in Foss v. Harbortie is a principle developed in the common law courts to prevent separate actions by both the corporation and its shareholder with respect to the same wrong with the potential double recovery for the same loss. Under the Canadian Human Rights Act, a corporation such as Don Bosco Agencies Ltd. does not have standing to assert a claim for relief. Therefore, the primary rationale for the rule in

Foss v. Harbortie is inapplicable. Therefore, the rule in Foss v. Harbortie should not preclude a complainant from seeking relief under the Canadian Human Rights Act where the complainant is a shareholder who has established that the discriminatory practice has had a "sufficiently direct and immediate impact" on the complainant within the meaning of the four factors which have been drawn from the Menghani case and reformulated above.

Without the "sufficiently direct and immediate impact" prerequisite, the recognition of the principle that a shareholder of a company is entitled to claim relief under the Canadian Human Rights Act with respect to discrimination against the company could lead to a significant increase in the number of claims under the Act. Without such a limitation, thousands of shareholders of large public companies could advance claims where it is alleged that the company, in which the complainants are shareholders, has been the target of a discriminatory practice. The "sufficiently direct and immediate impact" prerequisite and the fourth of the four factors which have been drawn from the Menghani case and reformulated above will prevent most shareholders of large public companies from advancing claims under the Canadian Human Rights Act. The fourth factor requires substantial degree of involvement in the affairs of the company. Most shareholders in large public companies do not have a substantial degree of involvement in the management of the company. However, it must be acknowledged that recognition of this principle will mean that a shareholder in a large public company who has a controlling interest and who has a substantial degree of involvement in the management of the company will be entitled, under the "sufficiently direct and immediate impact" test, to claim relief under the Canadian Human Rights Act.

(f) Impact on the Complainant Apart from his Position with Don Bosco Agencies Ltd.

Counsel for the Commission submitted that the alleged discriminatory practices had an impact on the Complainant beyond his capacity as a

shareholder of Don Bosco Agencies Ltd. The Complainant also submitted that the alleged discriminatory practices had an impact on him personally.

The Complainant testified that the business, which forms the sub-stratum of the complaint was carried on under the corporate name of Don Bosco Agencies Ltd. Most of the correspondence sent by the Complainant to the Respondent was written on Don Bosco Agencies Ltd. letterhead and signed by the complainant as president of the company. Most of the correspondence written by the Health Canada concerning this matter was addressed to Don Bosco Agencies Ltd. There was a great deal of personal interaction between the Complainant and the Respondent's officials. Most of this interaction related to the business of Don Bosco Agencies Ltd. and, of course, a company can only interact with others through individual persons who are its directors, officers, employees or agents.

On a few occasions the interaction with the Complainant was in his capacity as a representative of a national or regional trade association of health food merchants or herbalists. This interaction related solely to the business interests of the association and indirectly to the business interests of Don Bosco Agencies Ltd. This Tribunal finds that the impact of the alleged discriminatory practices on the Complainant in relation to his

membership in these trade associations is indistinguishable from the impact on him as a shareholder, officer and director of Don Bosco Agencies Ltd. Therefore, this Tribunal finds that the Complainant is not entitled to claim any relief under the Canadian Human Rights Act in relation to his position as a representative or officer in any trade association.

For the sake of completeness, it is necessary to refer to the position of the Complainant as a principal in a company known as Father Don's Natural Products Co. Ltd. The Complainant testified that this company engaged in the same business as Don Bosco Agencies Ltd. for a very brief period of time. The company has been inactive since 1983. A search report with respect to Father Don's Natural Products Co. Ltd. revealed that the last annual report was filed in 1983. The complaint does not refer to this company and there is no evidence that this company suffered any loss as a consequence of the enforcement policies or activities of the Respondent. Therefore, this Tribunal finds that the Complainant is not entitled to claim any relief under the Canadian Human Rights Act in relation to his position as a principal in Father Don's Natural Products Co. Ltd.

Counsel for the Commission referred to several instances where the Complainant stated that he believed that "he" had been discriminated

against by the enforcement practices of the Respondent (Transcript pages 153 and 617 and Exhibit 19). However, this Tribunal finds that the Complainant frequently did not separate his own persona from that of the companies in which he was a director, shareholder and president.

In the many meetings between Mr. Bader and representatives of Health Canada, this Tribunal finds that Mr. Bader was treated with courtesy and respect. On several occasions during these proceedings, Mr. Bader expressed the opinion that he had no personal complaint or animosity toward the officials of Health Canada. His complaint was with the policies adopted by Health Canada and the application of those policies to Don Bosco Agencies Ltd. in particular and the non-ethnic health food industry, in general.

(g) Conclusion on Issue of the Complainant's Standing to Claim Relief under the Act

Counsel for the Commission submitted that where an issue is raised with respect to whether or not a Human Rights Tribunal has jurisdiction over a complaint, the party who raises the issue has the burden of persuasion. Counsel for the Commission cited Secretary of State for External Affairs et al v. Menghani, unreported (T-154-92) November 19, 1993 (F.C.T.D.) as authority for that proposition. I am not sure that Menghani is authority for that proposition. When the court in Menghani discussed the burden of persuasion with respect to matters of jurisdiction, it was considering the role of the Court in light of s. 18.1(4) of the Federal Court Act, when the Court is reviewing a decision of a Human Rights Tribunal on an application by way of judicial review. In that context, McKay J. stated at page 16:

"In my approach to assessing 'correctness' of the tribunal's conclusion about jurisdiction, my initial consideration in light of s-s. 18.1(4) of the Federal Court Act is that the ultimate burden is on the applicants to establish that the tribunal 'acted

without jurisdiction, acted beyond its jurisdiction..."

When the issue of jurisdiction is raised before a Human Rights Tribunal, it is my view that, in the absence of any prevailing statutory or judicial authority, the Tribunal must be satisfied that it has jurisdiction over the complaint.

I find that this Tribunal has jurisdiction over the complaint made by the Complainant by reason of the "sufficiently direct and immediate impact"

of the alleged discriminatory practices on the Complainant as a shareholder, director, officer and employee of Don Bosco Agencies Ltd. but not in any other capacity.

4.0 DID THE RESPONDENT ENGAGE IN DISCRIMINATORY PRACTICES

Section 5 of the Act makes it a discriminatory practice in the provision of services customarily available to the public to differentiate adversely in relation to any individual on a prohibited ground of discrimination.

Counsel for the Respondent submitted that a corporation cannot be the subject of a discriminatory practice in the context of section 5 of the Canadian Human Rights Act because section 5 provides that the discriminatory practice must be either be in relation to an individual or it must consist of the denial of a service to an individual. He submitted that the term "individual" in this context does not include a corporation. He cited a number of cases involving an interpretation of s. 15 of the Charter of Rights and Freedoms where the term "individual" has been interpreted as not including a "corporation". He submitted that the word "individual" in sections 2 and 5 of the Canadian Human Rights Act should be given the same interpretation. In the Charter cases cited by counsel for the Respondent, a corporation which was seeking to claim the benefit of s. 15 of the Charter of Rights and Freedoms and the courts held that a corporation was not entitled to claim the benefit of s. 15 of the Charter. In the case before this Tribunal, it is an individual who is claiming relief under the Canadian Human Rights Act. Therefore, in my view, the cases cited by counsel for the Respondent are not applicable to this case.

Notwithstanding that the Complainant in this case is an individual human as distinct from a corporation, the Complainant is claiming relief on the ground that there was a sufficiently immediate and direct impact on him as a consequence of discriminatory practices where the target or direct impact was in relation to a corporation. This was considered in Re Singh, [1989] 1 F.C. 430 at 440 (C.A.). After reproducing s. 5 of the Canadian Human Rights Act, the Court articulated the following formula for the purpose of determining whether a consequential impact should be recognized:

"Restated in algebraic terms, it is a discriminatory practice for A, in providing service to B, to differentiate on prohibited grounds in relation to C."

This algebraic formula may be restated for the purposes of the case before

this Tribunal in the following manner:

It is a discriminatory practice for the Respondent, in providing service to Don Bosco Agencies Ltd., to differentiate on prohibited grounds in relation to the race or ethnic origin of the Complainant David Bader.

Applying the above restated formula, it was not disputed that the Respondent has been engaged in the provision of services to Don Bosco Agencies Ltd. and the Tribunal makes that necessary finding of fact. There is no requirement of proving discrimination against the company. The only issue is whether the Respondent differentiated, in the provision of services to Don Bosco Agencies Ltd., on prohibited grounds in relation to the race or ethnic origin of the Complainant David Bader. On this analysis, I have concluded that the submissions of counsel for the Respondent that a corporation cannot be the subject of a discriminatory practice are not relevant to the issue as framed by Re Singh.

5.0 PRIMA FACIE CASE:

5.1 Burden of Proof on Complainant

The burden of proof on a complainant in human rights cases was articulated by McIntyre J. in Ontario Human Rights Commission and O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536 at 558-59 where he said:

"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 allegation 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."

This statement of the burden of proof was made in the context of an allegation of discrimination against an employer under the Ontario Code however the above quotation has been adopted and applied in many cases under the Canadian Human Rights Act.

If a prima facie case is made out, the burden of proof shifts to the Respondent to establish, on the balance of probabilities, a bona fide justification for its practices in relation to the Complainant.

The complainant need only show that the alleged prohibited ground of discrimination was one of the factors which led to his differential treatment. It need not be the only factor. In Canada (Employment and Immigration Comm.) v. Lang (1991), 18 C.H.R.R. D/223 (F.C.A.), Linden J.A. writing the judgment of the Federal Court of Appeal, stated:

"In order for there to be discrimination, all that is required is a finding that discriminatory conduct is one reason for the decision; it need not be the only reason for the decision. As Mr. Justice MacGuigan has stated in Holden and Canadian Human Rights

Commission v. C.N.R .... 14 C.H.R.R. D/12):
"... it is sufficient that the discrimination be a basis for the employer's decision"
...

5.2 Prima Facie Case: Evidence in Support of

Before beginning an analysis of the evidence, several qualifications need to be expressed. This Decision is the distillation of evidence tendered during 14 days of hearings including testimony of witness recorded on over 1800 pages of transcript and 14 large bound volumes of documentary evidence. In this Decision, it is neither feasible nor necessary to expressly review and relate the hundreds of documents and the testimony of each witness to the issues of whether they establish a prima facie case or whether they establish a bona fide justification. This portion of the Decision only reviews the evidence which supports a finding of a prima facie case - it does not, for the most part, consider other evidence which may explain the action taken or the language used in a document.

Don Bosco Agencies Ltd. has been in business since 1970. Over a period spanning three decades, the Complainant has accumulated a litany of complaints relating to the manner in which the Respondent administered and enforced the Food and Drugs Act. A number of the Complainant's criticisms with respect to the manner in which the Respondent has administered and enforced the Food and Drugs Act did not relate to the allegation of discrimination based on race or ethnic origin. The Complainant has a philosophical opposition to much of government regulation of the health food and self-medication industries. He advocates that members of the public should have more freedom to choose remedies for their own self-medication without government regulation. His philosophical position is reflected in a question that he posed in one of his meetings with the

Respondent's officials in 1984 and which he adopted (Transcript pages 145-46) in his testimony before this Tribunal:

"Why does Canada and the HPB want to regulate, register and control harmless vitamins, minerals and herbal products as drugs, when no other industrialized country in the world agrees with that position?"

The only issue which is relevant to these proceedings is whether there has been discrimination based on race or ethnic origin. Unless evidence was relevant to this issue, it should not have been admitted into evidence. Unfortunately, with respect to much of the evidence tendered by the Complainant himself, it was often not possible to determine whether evidence had some tangential relevance to the complaint until the testimony had been heard.

The year 1983 is stated in the complaint as being the year when the Respondent allegedly began to treat Don Bosco Agencies Ltd. differentially compared to ethnic merchants in relation to the importation and sale of health foods and herbal products. It is alleged that the effect of this differential treatment did not permit the Don Bosco Agencies Ltd. to compete on an economically level commercial playing field with the

merchants whose race was Oriental or whose ethnic origin was Chinese.

This alleged differential treatment of Don Bosco Agencies Ltd. manifested itself in a number of ways. It included evidence of the availability for purchase at retail stores operated by ethnic herbal merchants of products which either:

(1) Were essentially the same or similar to those which had been the subject of enforcement action by the Respondent against Don Bosco Agencies Ltd.; or

(2) Failed to comply with provisions of the Food and Drug Act and the regulations thereunder where those provisions had been enforced against Don Bosco Agencies Ltd.

Much of the evidence of this nature can be sub-divided into the following sub-categories:

5.2.1 Products Imported by Don Bosco Agencies Ltd which were Refused Entry on the Ground that the Product had the status of being a "New Drug"

Regulation C.08.001 promulgated under the Food and Drugs Act defines a "new drug" as a substance that has not been sold as a drug in Canada for sufficient time and in sufficient quantity to establish in Canada the safety and effectiveness of that substance for use as a drug. As long as a substance has a "new drug" status, the substance may not be imported into or sold in Canada. A manufacturer or importer may apply for a Notice of Compliance however before a Notice of Compliance is granted, a New Drug Submission must be filed. Such a submission would involve proving the safety and efficacy of the product. If a Notice of Compliance is issued, the product may be marketed in Canada.

During the period extending from 1983 until mid-1989, Don Bosco Agencies Ltd., sought to import into Canada a products known as "don quai" and products containing don quai as an ingredient. The importation of these products by Don Bosco Agencies Ltd. was refused entry by the Respondent on the ground that don quai had the status of a "new drug" "Don quai" is a herb which comes from China. It is known by several names including dang kwei, tang kwei, tan kwe, angelicae and angelicae sinensis. The latter is the botanical name. It has been imported into Canada and sold in several forms including its natural root form, liquid extract, tablets and capsule forms. There is evidence before the Tribunal that don quai is an ingredient in perhaps as many as 70 per cent of traditional Chinese preparations which are used as food supplements and for medicinal purposes.

The classification of don quai as a "new drug" occurred in the early 1980s and perhaps earlier. An internal memorandum from R. J. Mulherin, the Respondent's Chief, Product Regulation Division, Bureau of Nonprescription Drugs dated December 12, 1983 (Exhibit HR-1, Vol. 1, Tab 5), stated:

"Dong Quai, having no known use except as a medicinal agent, has always been considered a New Drug, even in the absence of overt claims."

Some of the attempts by Don Bosco Agencies Ltd. to import products containing don quai were refused entry notwithstanding the absence of any medicinal claims on the product's labels or packaging. Examples of unsuccessful attempts by Don Bosco Agencies Ltd. to import products containing don quai were documented by Exhibit HR-1, Tab 4 (October, 1983) and Exhibit HR-1, Vol. 1, Tab 25 (1986). After the 1986 attempted

importation, the Respondent advised Don Bosco Agencies Ltd. by certified mail dated June 30, 1987 (Exhibit HR-1, Vol. 1, Tab 37) that "Dong Quai (Solaray)" was considered to be a "new drug" and that drug notification requirements must be met prior to the sale or advertising of all such products. The Complainant testified that after receiving this letter, Don Bosco Agencies Ltd. stopped selling dong quai.

Notwithstanding the Respondent's classification of don quai as a "new drug", the Complainant testified that he purchased products containing dong quai at various times in the early and mid-1980s at retail stores operated by ethnic herbal merchants in the district of Vancouver known as "Chinatown" and at other locations across Canada. In particular, he purchased either don quai in its natural root form or tablet form on November 27, 1984. The Complainant and another health food wholesaler, Mr. Albo, presented these purchases to the Respondent's Health Protection Branch .in Vancouver for the purpose demonstrating that the Food and Drugs Act and regulations were being differentially enforced. The fact that the Respondent's officials were aware of the violations of the Act and regulations by the retail ethnic herbal merchants is demonstrated by a memorandum from S. Ansari, one of the Respondent's drug inspectors addressed to the Respondent's Chief, Product Regulation Division, Bureau of Nonprescription Drugs, dated October 25, 1983 (Exhibit HR-1, Vol. 1, Tab 4) where Inspector Ansari stated in relation to a sample seized from an importation by Don Bosco Agencies Ltd.:

"We are also concerned with the many brands (no label claim) of similar products marketed in ethnic pockets such as 'China town' that can readily be cited by the importer as examples of non-uniform enforcement of C.08.002."

In a memorandum addressed to J.E. Sloboda, Supervisor, Drug & Environmental Health Inspection Division from Drug Inspectors Wozny and Ansari dated September 22, 1987 (Exhibit HR-1, Vol. 1, Tab 42) Re: Western Regional Visibility Strategy, the authors reported on visits which they made to Vancouver's Chinatown and commented at page 5:

"A third kind of Tang Kwei product that was frequently seen in Chinatown is the product in dosage form, with drug claims on labels and/or on package inserts. Tang Kwei liquids are commonly sold in Chinatown. One such product bore a (Schedule A) claim for the treatment of leukemia."

A letter from J.M. Forbes, Director of the Respondent's Western Region, addressed to the Complainant in his capacity as Director General of the Canadian Health Food Protective Association dated March 31, 1988 (Exhibit HR-1, Vol. 1, Tab 59), stated:

"2. No enforcement action has taken place against the sale of

Dong Quai sold in Chinese herbal emporiums in Western Region since December 1984 except where such action was taken in response to your specific complaints."

The immediately preceding quotation is in stark contrast to the warning contained in a letter of the same date from J.M. Forbes, Director of the Respondent's Western Region, addressed to the Complainant in his capacity as President, Don Bosco Agencies Ltd. where he stated:

"... I am compelled to advise you that legal sanctions will be applied to shipments of Dong Quai consigned to our company that are encountered at Customs."

The status of don quai was changed by the Respondent in 1989. In a "Letter to Trade" (Exhibit HR-1, Vol. 2, Tab 128) dated June 16, 1989, J.R. Elliot, the Respondent's Director General, Field Operations Directorate, Health Protection Branch, advised the trade that dong quai need not be regulated as a drug and may be sold as a food. This change of policy followed a recommendation by Dr. R. A. Armstrong. In Dr. Armstrong's recommendation (Exhibit HR-1, Vol. 2, Tab 125), he recommended that if drug claims are made, they would require substantiation and, if persisted in, would make the product subject to regulations pertaining to drugs.

Another product which Don Bosco Agencies Ltd. attempted to import in 1984 was called Pau D'Arco. The Respondent refused entry to this product on the basis that it was a new drug. With respect to the attempts by Don Bosco Agencies Ltd. and Father Don's Natural Products Ltd's to import Pau D'Arco and other products, Inspector Sloboda sent a memorandum to F.W. Krause, Chief, Drug & Environmental Health Inspection Division, Health Protection Branch dated December 3, 1984 (Exhibit HR-1, Vol. 1, Tab 19) in which he stated:

"Surveillance on importations of Chinese drugs is almost non existent and many violative products are being sold in Chinatown. HPB import surveillance is selective at Customs and certain importers are watched more closely. Obviously present inspection resources are insufficient to provide full effective Customs surveillance. I believe these resources should be increased and more attention be paid to surveillance at Customs for all importers."

The Complainant purchased other products from Chinese retail herbal merchants which, based on the information printed on the labels, originated in the orient and which, from the Complainant's experience, he believed the Respondent would regard as being "new drugs". He took those purchases to the Health Protection Branch's Vancouver office for the purpose of demonstrating the differential enforcement of the Act and regulations. Some or all of these purchases were forwarded to Dr. R. A. Armstrong, the Respondent's Assistant Director and Chief, Drug Evaluation Division, Bureau of Nonprescription Drugs. He made two reports both dated March 9, 1984, (Exhibit HR-1, Vol. 1, Tabs 11 and 12). These reports concluded that several of these products would be regarded by the Respondent as new drugs and would require a DIN number in order to comply with the Act and regulations.

The above described evidence illustrates that the enforcement of those provisions of the Food and Drug Act and regulations concerning "new drugs" had a differential impact on Don Bosco Agencies Ltd. compared to retail herbal merchants whose ethnic origin was Chinese. This differential impact constitutes prima facie evidence of a discriminatory practice based on a prohibited ground of discrimination.

5.2.2 Products which were Refused Entry on the Ground that they had did not have a DIN number

Regulation C.01.005 promulgated under the Food and Drugs Act provides that the main panel of labels of a drug sold in dosage form shall show in a clear manner the drug identification number (DIN) assigned by the Director of the Health Protection Branch to the manufacturer or importer of the drug. Prior to assigning a DIN number, the Respondent must be satisfied that the product is safe for consumption.

The Complainant testified that Don Bosco Agencies Ltd. had a number of its importations refused entry on the ground that the products lacked DIN numbers.

The Complainant testified that the same or similar products were offered for sale by the Chinese ethnic retail herbal merchants in Vancouver's Chinatown. A list of products purchased by the Complainant on February 11, 1984 is found in Exhibit HR-1, Vol. 1, Tab 6. The Complainant testified that none of the products referred to in this Exhibit had a DIN number. The Complainant took his purchases to the Vancouver office of the Respondent's Health Protection Branch for the purpose of demonstrating the differential enforcement of the Act and regulations. Some or all of these

purchases were forwarded to Dr. R. A. Armstrong, the Respondent's Assistant Director and Chief, Drug Evaluation Division, Bureau of Nonprescription Drugs. He made two reports dated March 9, 1984, (Exhibit HR-1, Vol. 1, Tabs 11 and 12). These reports concluded that several of the products would require a DIN number before their importation and sale would be permitted under the Act and regulations.

In a memorandum addressed to J.E. Sloboda, Supervisor, Drug & Environmental Health Inspection Division from Drug Inspectors Wozny and Ansari dated September 22, 1987 (Exhibit HR-1, Vol. 1, Tab 42) Re: Western Regional Visibility Strategy, the authors reported on visits which they made to Vancouver's Chinatown and commented at page 2:

"... we saw many violations. Hundreds of patent medicines (i.e. products in dosage form, packaged and labelled for the treatment of diseases) are available without DINs."

And later on page 4 of the memorandum:

"In the Asian ethnic stores, the absence of DINs for herbal drugs is pandemic."

The above described evidence illustrates that the enforcement of those provisions of the Food and Drug Act and the regulations concerning DIN

numbers had a differential impact on Don Bosco Agencies Ltd. compared to retail herbal merchants whose ethnic origin was Chinese. This differential impact constitutes prima facie evidence of a discriminatory practice based on a prohibited ground of discrimination.

The Complainant filed approximately 117 applications for DIN numbers with respect to herbal products which he had purchased in retail stores operated by herbal merchants whose ethnic origin was Chinese. His motive for filing these applications is not entirely clear. He testified that if any of the applications had been successful, he intended to import and serve as a wholesale distributor of the products. Another and perhaps more oblique motive, if the applications were unsuccessful, was to seek either

(1) to prevent ethnic merchants from selling the products because there would be a formal ruling by the Respondent that the product did not qualify for a DIN number; or

(2) if the Respondent continued to permit these products to be sold by ethnic merchants despite the ruling that they did not qualify for a DIN number, the Complainant could use that as evidence of differential treatment.

None of the Complainant's applications for DIN numbers were successful. The applications were rejected by the Respondent for a variety of reasons. Notwithstanding the rejection of the Complainant's applications for DIN numbers for those products, the Complainant testified that those products or similar products continued to be available for purchase in retail stores operated by herbal merchants whose ethnic origin was Chinese. No evidence was tendered with respect to any DIN applications made by herbal merchants whose race is Oriental or whose ethnic origin is Chinese. Consequently, the Tribunal finds that evidence referred to in this paragraph does not contribute to Complainant's prima facie case of discrimination.

5.2.3 Products which were Refused Entry on the Ground that the labelling or information in the package made Schedule "A" claims

Section 3(2) of the Food and Drugs Act provides:

"(2) No person shall sell any food, drug, cosmetic or device

(a) that is represented by label, or

(b) that he advertises to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states mentioned in Schedule A."

Schedule A lists approximate 50 diseases, disorders or abnormal physical states.

Regulation A.01.040 promulgated under the Food and Drugs Act provides that no person shall import into Canada for sale a food or drug the sale of which in Canada would constitute a violation of the Act.

Mr. Riou testified (Transcript page 1197) that overt Schedule A claims have always been considered as a serious violation of the Act.

Don Bosco Agencies Ltd. has had a number of its importations refused entry on the ground that the products made Schedule A claims. In discussions which the Complainant had with the Respondent' officials, he

was informed that the only basis on which he could import certain products was if the labelling did not make any Schedule A claims. Nevertheless, the Complainant purchased similar products from retail ethnic merchants in Vancouver and elsewhere which made Schedule A claims. In the course of his testimony, the Complainant produced several of these products which were marked as exhibits. One example was "Peking Royal Jelly". Don Bosco Agencies Ltd. was permitted to import Peking Royal Jelly oral liquid (Exhibit HR-2a) provided that it did not make any Schedule A claims. The Complainant testified that he purchased Peking Royal Jelly oral liquid (Exhibit HR-2b) from a Chinese retail merchant in the area of Pender and Keefer Streets in Vancouver, British Columbia where the labelling or packaging made a number of Schedule A claims including treatment of arthritis, gastric ulcers and liver disease.

Another example was a product sought to be imported by Don Bosco Agencies Ltd. under its own label known as Prostaway. It was refused entry by the Respondent on the basis that its labelling made Schedule A claims with respect to benefiting the prostate gland. The Complainant purchased a similar product in Calgary from Lamda Ltd. on September 30, 1987, under the brand name of "Prostate Gland Kai Kit Wan" which made similar claims.

With respect to the products purchased by the Complainant in Vancouver's Chinatown on February 11, 1984 (Exhibit HR-1, Vol. 1, Tab 6), the Complainant testified that, in his opinion, all of the products referred to in this Exhibit made Schedule A claims. Some or all of these purchases were forwarded by the Respondent's Vancouver office to Dr. R. A. Armstrong, the Respondent's Assistant Director and Chief, Drug Evaluation Division, Bureau of Nonprescription Drugs. In Dr. Armstrong's reports dated March 9, 1984, (Exhibit HR-1, Vol. 1, Tabs 11 and 12), he concluded that several of these products made Schedule A claims.

The Complainant visited the same or similar ethnic retail outlets in the vicinity of Vancouver's Chinatown district in November, 1984. This visit revealed that the same or similar products continued to be offered for sale by the Chinese retail herbal merchants. A list of products purchased by the Complainant on November 20, 1984 is found in Exhibit HR-1, Vol. 1, Tab 14. The Complainant testified that virtually all of the products referred to in this Exhibit made, in his opinion, Schedule A claims. These products were taken to the Respondent's Vancouver office. In a report on that meeting with the Complainant, Inspector Sloboda stated in a memorandum dated November 23, 1984 (Exhibit HR-1, Vol. 1, Tab 15:

"Cursory examination of labels and insert for the 25 products purchased by Mr. Bader on November 20, 1984 at [name and address of the merchant] reveals many Schedule A claims."

It is also noteworthy that the preceding paragraph from Inspector Sloboda's memorandum states:

"Five of the latter products were brought to the attention of HPB

with Mr. Bader's earlier complaint in February, 1984 and Schedule A violations confirmed and seizure action taken by HPB."

On several occasions between 1984 and 1987, inclusive, the Complainant made purchases at ethnic health food stores which violated the Act and regulations. Details of the following purchases were tendered in evidence:

September 30, 1987, in Calgary
(Exhibit MR-i, Vol. 1, Tab 43)

October 7 & 8, 1987, in Winnipeg
(Exhibit HR-1, Vol. 1, Tab 43);

December, 1987, in Vancouver.
(Exhibit HR-1, Vol. 1, Tab 87);

July 30, 1988, in Vancouver
(Exhibit HR-1, Vol. 1, Tab 87);

In a memorandum addressed to J.E. Sloboda, Supervisor, Drug & Environmental Health Inspection Division from Drug Inspectors Wozny and Ansari dated September 22, 1987 (Exhibit HR-1, Vol. 1, Tab 42) Re: Western Regional Visibility Strategy, the authors reported on visits which they made to Vancouver's Chinatown and commented at page 2:

"... we saw many violations. Hundreds of patent medicines (i.e. products in dosage form, packaged and labelled for the treatment of diseases) are available without DINs. Many of these products are labelled for the treatment of Schedule A diseases."

The Complainant testified (Transcript page 246) that in his opinion, based on his observations which he has made in retail stores of Chinese herbal merchants across Canada, there is very little difference between 1984 and 1994 in terms of the number of products without DIN numbers and with multiple Schedule A claims. He testified that the only difference in 1994 is that he occasionally sees stickers placed over the medicinal claims on some of these products.

The above described evidence illustrates that some enforcement actions have been taken against retail herbal merchants whose ethnic origin is Chinese with respect to Schedule A claims but the enforcement against those merchants does not appear to have been persistent. The evidence illustrates that the enforcement of those provisions of the Food and Drug Act and regulations with respect to Schedule A claims had a differential impact on Don Bosco Agencies Ltd. compared to retail herbal merchants whose ethnic origin was Chinese. This differential impact constitutes prima facie evidence of a discriminatory practice based on a prohibited ground of discrimination.

5.2.4 Products which were Refused Entry into Canada on the Ground that the labelling was not in both official languages of Canada

There is a requirement that packaging in Canada contain both of Canada's official languages, English and French.

The Complainant testified (Transcript page 267) that he has purchased products from retail ethnic herbal merchants where the packaging did not

contain both official languages of Canada.

In the Report of the Expert Advisory Committee on Herbs and Botanical Preparations dated January 1986 (Exhibit R-7, Tab 2, page 17), the Committee stated:

"The Committee recognized that certain ethnic groups that sell herbs and botanical preparations enjoy relative freedom from enforcement in that their products are not generally labelled in English and French."

This statement by the Expert Advisory Committee was contradicted by the testimony of Mr. Shelley, who is the current Chief, Drug and Environmental Health Inspection Division, Western Region, Health Protection Branch. He testified that herbal products have not been rejected at the point of importation because of a lack of labelling in French.

The evidence demonstrates that the language labelling requirements were not being enforced with much rigour against those retail herbal merchants whose ethnic origin was Chinese. Similarly there is no evidence that these labelling requirements have been enforced, at least in recent years, with much rigour against Don Bosco Agencies Ltd. Consequently, the Tribunal finds that the evidence with respect to labelling in Canada's

official languages does not contribute to the Complainant's prima facie case of discrimination.

5.2.5 Generally

A number of documents were tendered as evidence of differential treatment based on race or ethnic origin of the merchant. The particulars of these documents are summarized below in their approximate chronological order:

(a) Memorandum from J.M. Forbes, the Respondent's Director,Western Region, Health Protection Branch, addressed to J.R. Elliot, Director General, Respondent's Field Operations Directorate dated January 24, 1985 (Exhibit HR-1, Vol. 1, Tab 21)

After referring the Complainant's criticisms of the Respondent, stated:

"Mr. Bader, has on two occasions now presented formal trade complaints against specific products sold in Vancouver's Chinatown which we subsequently investigated and found were clearly in violation of the law. Appropriate enforcement action was taken but we must recognize that our cumulative action to date has done little to permanently resolve the problem. In the past we (HPB) have given the so called Chinese drugs a low priority because of our understanding that traditional Chinese medications have been limited to, used by and understood in that ethnic community for several generations. With limited resources available little enforcement activity as taken place in Chinatown in recent years." (emphasis added by holding)

(b) Report of the Expert Advisory Committee on Herbs and Botanical Preparations dated January 1986 (Exhibit R-7, Tab 2, page 17)

The Committee, after referring to the sale of herbs and botanical preparations by ethnic herbal merchants, stated:

"Furthermore, these products are frequently directed to an ethnic market with a tradition of using herbs for a variety of medicinal and non-medicinal purposes. While recognizing these factors, the Committee concluded that equality of enforcement must exist in

the market place and that competitive advantage of this nature must be eliminated over a period of time."

The Expert Advisory Committee's report does not contain a recitation of the evidence on which the Committee's conclusion is based. The observation may have been well founded but without recitation of the underlying evidence on which the Committee based its observation, this Tribunal has no basis on which to make an assessment of the reliability of the observations of the Expert Advisory Committee. Consequently, the Tribunal finds that this aspect of the Committee's Report does not contribute to the Complainant's prima facie case of discrimination.

(c) Memorandum addressed to J.E. Sloboda, Supervisor, Drug & Environmental Health Inspection Division from Drug Inspectors Wozny and Ansari dated September 22, 1987 (Exhibit HR-l, Vol. 1, Tab 42) Re: Western Regional Visibility Strategy

The authors reported on visits which they made to Vancouver's Chinatown and commented at page 7 under the heading, Factors bearing on enforcement & compliance:

"Importers who are used to unregulated enterprise do not want to spend the money, time and effort to bring their products into compliance. In an unregulated marketplace, a firm complying with restrictive and costly rules is at a competitive disadvantage; at present, the ethnic Asian drug market place is precisely that unregulated."

And at page 8:

"By far, the greatest number and degree of violations are with the Chinese ethnic community. They have more stores, more products, and more importers than any other group. Also, the compliance problems have had more immediate health concerns than with other groups (i.e. the presence of hazardous substance in OTC products). However, the distribution and advertising of their products has been generally limited to their own community."

(d) Memorandum from Inspector Sloboda to Helen Quesnel of the Respondent's Operations Compliance Division dated February 8, 1989 (Exhibit HR-1, Vol. 2, Tab 120) enclosing a list of ethnic products which had been refused entry in the period April, 1988 to November 22, 1988

Inspector Sloboda made two statements in this memorandum:

"This reflects the enforcement activity undertaken by our region ... wherein we reacted at Customs to the more gross violations with ethnic products -Certainly we did not refuse entry to technical violations such as labelling of DINs."

This was followed by the following postscript:

"At present we have completely 'backed off' import surveillance over Chinese importations further to R. Elliot's policy statement of Jan. 23/89."

The reference in the immediately preceding quotation to the policy statement of R. Elliot was a reference to a memorandum dated January 23, 1989 by J.R. Elliot, who was the Respondent's Director General Field Operations Directorate, addressed to the Director of each enforcement region of Canada (Exhibit HR-1, Vol. 2, Tab 117). The subject of the memorandum was "Enforcement Policy for Herbs and Botanicals". The memorandum refers to an on-going review of the Respondent's policy with respect to herbs and botanicals in general and with respect to don quai in particular for the purpose of better defining the health and safety hazards associated with these items. Pending the completion of this review, Mr. Elliot gave the following direction to the regional offices:

"In the interim, please ensure that enforcement activities involving herbal preparations are restricted to clear cut hazard areas until the Branch policy has been clarified."

In his testimony, Mr. Riou expressed the view that Mr. Elliot's direction was consistent with the Respondent's policy of addressing products which have the highest level of risk. The Respondent's Operational Policy Directive 860-1 (Exhibit R-10, Tab 7) is discussed later in this Decision.

(e) Project DDAB - Surveillance of Drugs for Self-Medication dated February 13, 1991 (Exhibit R-10, Tab 4)

This is a document which was prepared by the Respondent for the purpose of providing guidance to field staff who were engaged in enforcement activities. The document contains references to several herbs which are of Chinese or Asian origin. At page 8, it states:

"Historically, the Branch has maintained a hands-off approach to ethnic stores, addressing compliance action predominantly toward non-ethnic importers or manufacturers. While this was based on an assessment of relative degree of risk, this difference in approach is no longer acceptable."

And further on the same page:

"Because of the sensitivity of the issues involved with this module, compliance and enforcement activity in the ethnic sector were minimal in 1988-90. This has resulted in different treatment of the ethnic and non-ethnic sectors of the herb and botanical drug industry and differing levels of compliance."

The above described documents, subject to the exceptions which have been noted, are evidence that the enforcement of the Food and Drug Act and the regulations had a differential impact on Don Bosco Agencies Ltd. compared to retail herbal merchants whose ethnic origin was Chinese. This differential impact constitutes prima facie evidence of a discriminatory practice based on a prohibited ground of discrimination.

5.3 Conclusion on Prima Facie Case

The evidence reviewed above constitutes a prima facie case of discriminatory practices by the Respondent based on the Caucasian race and Canadian ethnic origin of the Complainant who is a shareholder, director, officer and employee of Don Bosco Agencies Ltd. compared to retail herbal merchants whose race was Oriental or whose ethnic origin was Chinese.

6.0 RESPONDENT'S BONA FIDE JUSTIFICATION

6.1 The Law:

Section 15(g) of the Canadian Human Rights Act provides:

"15. It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities ... and there is a bona fide justification for that denial or differentiation."

The Respondent has the burden of establishing its bona fide justification on a balance of probabilities.

In Canada (Attorney General) v. Rosin (1992), 16 C.H.R.R. D/441 at D/453 (F.C.A.), Linden J.A. made the following comment about the interpretation of the meaning of the words "bona fide justification" which are found in subsection (g):

"Similarly, it might be concluded that the two phrases - 'bona fide occupational requirement' (as in s. 15(a) and 'bona fide justification (as in s. 15(g)) convey the same meaning, except that the former is applicable to employment situations, whereas the latter is used in other contexts. The choice of these different words used to justify prima facie discrimination, therefore are matters of style rather than of substance."

In Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, McIntrye J. set out a subjective test and an objective test which a respondent must satisfy.

6.1.1 The Objective Test:

The objective arm of the test was articulated by McIntyre J. in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at 208 in the following manner:

"In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

The interpretation of s. 15(a) of the Act by McIntrye J. related to a case of discrimination in employment and the objective test and requires some restatement in order to apply it to s. 15(g) of the Act. With respect to s. 15(g), the objective test could be restated for the purposes of this case in the following manner:

The policy or practice must be related in an objective sense to the enforcement of the legislation concerned, in that the policy or practices reasonably necessary to assure the efficient and economical enforcement of the legislation and protecting the safety of the general public.

6.1.2 The Subjective Test:

The subjective arm of the test was articulated by McIntyre J. in Etobicoke at page 208 in the following manner:

"To be a bona fide occupational qualification and requirement a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code."

The interpretation of s. 15(a) of the Act by McIntrye J. related to a case of discrimination in employment and the subjective test and requires some restatement in order to apply it to s. 15(g) of the Act. With respect to s. 15(g), the subjective test could be reformulated for the purposes of this case in the following manner:

To be a bona fide justification, the policy or practice must be imposed honestly, in good faith, and in the sincerely held belief that such policy or practice has been adopted in the interests of the adequate enforcement of the Act or regulations with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Canadian Human Rights Act.

The subjective arm of the test has been interpreted as having three elements (See Large v. City of Stratford, [1995] S.C.J. No. 80 (S.C.C.),which have been restated to make them applicable to the context of the complaint before this Tribunal. The three elements are that the policy or practice must have been:

(a) imposed honestly, in good faith; and

(b) in the sincerely held belief that such policy or practice is imposed in the interest of the adequate enforcement of the Act and regulations with all reasonable dispatch, safety and economy; and

c) not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Canadian Human Rights Act.

With respect to the subjective test, Sopinka J. in Large v. City of Stratford, [1995] S.C.J. No. 80 (S.C.C.) stated:

"It would be too formalistic to invariably insist on evidence as to the employer's state of mind when, objectively, the impugned rule or policy is adopted for valid occupational reason and the purpose of the subject element of the test is otherwise accomplished. In some circumstances the subjective element can be satisfied when, in addition to satisfying the objective test, the employer establishes that the rule or policy was adopted in good faith for a valid reason and without any ulterior purpose that would be contrary to the purposes of the Code."

6.2 The Evidence of Bona Fide Justification

The Respondent's justification for any differential effect which may have occurred in relation to the administration and enforcement of the Food and Drugs Act and the regulations in relation to Don Bosco Agencies Ltd. compared with ethnic herbal merchants is that the differential effect is a consequence of:

(1) The Respondent's policy of concentrating the deployment of its enforcement personnel primarily at the import and manufacturing levels rather than at the retail level; and

(2) The Respondent's policy of risk assessment classification which:

(i) has attached a low risk assessment to the consumption of traditional herbal remedies by members of the ethnic communities; and

(ii) had assumed that sales by ethnic retail herbal merchants were primarily confined to members of their respective ethnic communities.

The Respondent submits that the development and application of these policies have not and do not discriminate against importers or merchants on the basis of the prohibited grounds of race and ethnic origin. I will examine the evidence in relation to these policies first in relation to the objective test and then in relation to the subjective test.

6.2.1 The Objective Test

The objective test articulated by McIntyre J. in Ontario Human Rights Commission v. Etobicoke, may be analysed in relation to this case in the following manner:

The policy or practice must be related in an objective sense to the enforcement of the Food and Drugs Act and regulations, in that:

(1) the policy or practice is reasonably necessary to assure the efficient and economical enforcement of the legislation; and

(2) the policy or practice protects the safety of the general public.

(a) Economical and Efficient Enforcement of Act

With respect to whether these policies and practices are reasonably necessary to assure the efficient and economical enforcement of the Food and Drugs Act and regulations, it is necessary to consider

(1) the object of the Food and Drugs Act and regulations;

(2) the enforcement resources which have been available to the Respondent; and

(3) the scope of the Respondent's enforcement responsibilities.

With respect to the enforcement resources which have been available to the Respondent, the respondent has a finite amount of resources made available to it by Parliament. The Respondent has the responsibility for administering and enforcing many federal statutes in addition to those provisions of the Food and Drugs Act with respect to which this proceeding is concerned. It is not the function of this Tribunal to review the allocation of funds within a Department's overall budget. I adopt the position taken by Desjardins J.A. In Distribution Canada Inc. v. M.N.R., [1993] 2 F.C. 26 (F.C.A.), where she stated at pages 40-41:

"The respondent is limited in his operations by such elements as budget restraints, limited facilities, personnel requirements etc. To compel him to proceed the way the appellant is asking this Court to direct him would be to enter into an area where the respondent by necessity, must be the only one to manoeuvre."

And on page 41, she concludes:

"Only he who is charged with such public duty can determine how to utilize his resources. That is not a case where the Minister has turned his back on his duties or where negligence or bad faith has been demonstrated."

The Respondent's Health Protection Branch had at all material times limited personnel resources to employ in the enforcement of the Food and Drugs Act and regulations as well as other statutes and regulations for which the Health Protection Branch has responsibility. Mr. Riou testified that across the whole of Canada there are currently the equivalent of approximately 50 full-time inspectors carrying out inspection activities in relation to those provisions of the Food and Drugs Act and regulations which are the subject matter of this proceeding. Mr. Shelley who is the current Chief, Drug and Environmental Health Inspection Division, Western Region, Health Protection Branch testified that there are currently the equivalent of 3.5 full time inspectors serving the Western region.

Inspector Sloboda testified that he supervises a staff of 5 inspectors from his Burnaby office. Presumably, this number is reconciled with Mr. Shelley's number on the basis that not all of the 5 inspectors under Inspector Sloboda's supervision have full-time responsibilities as inspectors in relation to the Food and Drugs Act.

With respect to the scope of the responsibilities of the Health Protection Branch, Mr. Shelley testified with respect to the increasing volume of imports which must be processed by the inspectors in the Western region. By way of illustration, he testified that in fiscal year 1990-91, the inspectors in the Western Region processed 2,536 importations. Some of these importations would contain numerous types of products. By fiscal year 1994-95, the number of importations had increased to almost 4,000. Evidence before the Tribunal also established that the number of retail merchants who market products which are subject to the Food and Drugs Act and regulations has increased over the past ten years. In a memorandum prepared by M.L. Hayes of the Respondent's Operations and Compliance Division addressed to the Director, Bureau of Field Operations dated November 30, 1987 (Exhibit C-i, Tab 12), he estimated that there were over 100 ethnic merchants involved in the sale of ethnic herbal products at the retail level in the Vancouver area. This estimate did not include non-ethnic merchants engaged in the sale of ethnic herbal products. He estimated that with the enforcement personnel then available it would take at least 3 years to visit each of the ethnic merchants.

In these circumstances of limited resources and increasing responsibilities, the Respondent's managers must make choices with respect to how their limited resources may be most efficiently and effectively employed. The Respondent's Health Protection Branch developed two related policies to maximize the effective deployment of its finite enforcement resources. One of these policies was to concentrate the deployment of its enforcement personnel primarily at the points of manufacture or importation rather than at the retail level. The other policy was to develop a system of product risk classification.

(i) Deployment of Inspection Resources primarily at Manufacturing and Importation Points in Distribution Chain

With respect to the deployment of its enforcement personnel, the Respondent's policy was to concentrate its enforcement activities where they would have the greatest impact. Mr. Riou testified that it is a more efficient and effective use of the Respondent's enforcement resources if non-conforming products can be prevented from reaching the retail market. He described (Transcript page 1054) the rationale for this policy as follows:

"Our most effective use of resources is to contain problems before products get into distribution. So obviously if we can identify non-compliant problems at the import, manufacturer, or wholesale level, they can more easily be contained, more effectively be contained than once in distribution at retail.

"Once they are in distribution at retail, in order to, for example, to contain the problem, this involves many, many more sites to investigate and numerous actions to take, should that be required."

And further at Transcript page 1221:

"And this is why I mentioned earlier that it would be our preference to work at the highest level of distribution as opposed to the retail level, where any activity at the retail level is extremely labour intensive."

The Respondent's policy was based on the conclusion (see the testimony of Mr. Riou at Transcript page 1213) that the most efficient and

economical use of its enforcement resources could be achieved by attempting to intercept violative products:

(1) with respect to products manufactured in Canada, at the point of manufacture; and

(2) with respect to products manufactured outside of Canada at the point of importation as opposed to the retail level.

With respect to products which were manufactured outside Canada, enforcement personnel were deployed to examine and reject non-conforming merchandise at Canadian ports of entry. With respect to products which were manufactured in Canada, enforcement personnel were deployed to ensure that the Canadian manufacturing facilities complied with both good manufacturing practices and that the packaging was in compliance with the Act and regulations. In addition to employing personnel in this manner, personnel have also been deployed to respond to consumer complaints, complaints from trade competitors, and reports from other countries.

Even within this resources deployment policy in relation to products manufactured outside Canada and being imported into Canada,

the Respondent found that its enforcement activities had to be selective. The Respondent did not have the resources to check every importation. Their inspections had to be selective. Mr. Riou described (Transcript page 1221) some of the criteria which have been used to determine which importations would be inspected:

"Looking at sizes of shipments could be a factor in determining the work load that we're taking on. It is very labour intensive to examine many, many small shipments as opposed to concentrating on larger shipments. So in assessing how we will address surveillance in general, for example, it is more productive and there is a greater element of health protection if we concentrate on area of larger distribution."

With respect to imported products, the Respondent relies on the examination of invoices by Canada Customs officials. Where a Canada Customs official encounters import documentation which appears to include products that may not comply with the Food and Drugs Act or

regulations, a copy of the documentation is sent to the Respondent's Health Protection Branch for examination. Where it does not appear to Canada Customs personnel that an importation is subject to custom's duty or the duty imposed on goods is not above a certain threshold level, Canada Customs may not closely scrutinize the import documentation. Consequently, direct imports by either ethnic or non-ethnic retailers may escape scrutiny by both Canada Customs and the Respondent where the number of units of product being imported and the dollar value have been relatively low and the description of the goods on the customs documentation has been generic. No ethnic retail merchants were called to testify. Consequently, there is no direct evidence before the Tribunal on whether the products sold by ethnic retail merchants were imported directly by the retail merchants or whether the products were acquired from a wholesale distributor who had imported the products.

Having made the policy decision to apply its enforcement resources with respect to products manufactured outside Canada primarily at ports of entry, the implementation of this policy posed a daunting task given the array of products being imported, the number of importers and the number of ports of entry. Consequently, the Respondent developed two "national watch lists". One of these lists was list of products. This list included both generic products and specific brands of products. The other watch list contained the names of importers. These watch lists are referred to in Project DDXQ - Import Surveillance of Drugs dated May 8, 1991 (Exhibit R-10, Tab 5, pages 5-7. Both Mr. Shelley (Transcript page 1464) and Mr. Riou (Transcript page 1057) testified that the latter list was compiled on the basis of the Respondent's previous experience with an importer whose importations had been subject to "refused entry" on the ground of a failure to comply with the Food and Drugs Act and regulations. A related factor which was used in compiling the latter list was whether an importer was typically engaged in the importation of products which were more subject to being in violation of the Act and regulations. One of the primary reasons for the development of these watch lists was that the initial screening of importations for violations of the Food and Drugs Act is made by Canada Customs personnel. Their primary responsibility is to collect any customs duty which may be payable. As a secondary responsibility, Canada Customs have undertaken to scrutinize imports on behalf of several of the government departments including the Respondent which have responsibilities under other federal legislation. These watch lists were provided to Canada Customs to assist them with their initial screening of importations.

Concentrating the deployment of its resources primarily at the manufacturing and importation points was an objectively reasonable use of the Respondent's enforcement resources.

The Complainant and the Commission have compared the differential enforcement of the Food and Drugs Act and regulations against Don Bosco Agencies Ltd., which is an importer/wholesaler with the enforcement of the Act and regulations on retail Chinese herbal merchants. This is like comparing, to use the words of counsel for the Respondent, apples and oranges. Relevant comparisons would have been to compare the enforcement of the Act and regulations in relation to health foods and herbal products

(1) between ethnic and non-ethnic retailers; or

(2) between ethnic and non-ethnic importers/wholesalers.

With respect to the comparison of ethnic and non-ethnic retailers of health foods and herbal products, no evidence was tendered with respect to the extent of compliance with the Food and Drugs Act and regulations by non-ethic health food retailers. The Respondent's policy was not to deploy its enforcement personnel at the retail level except in response to specific complaints from consumers or by competitors. Therefore, the Respondent has little empirical data with respect to the extent of compliance at non-ethnic retail stores. As an aside, Inspector Sloboda testified that during the lunch break on one of the hearing days, he had observed infractions of the Act and regulations at a non-ethnic retail store. There is evidence before the Tribunal that in 1985, when certain amino acids were declared to be a "new drug", and enforcement action taken by the Respondent, both non-ethnic herbal merchants and Chinese herbal merchants were treated in the same manner in accordance with Operational Policy Directive 86-0-1.

Another relevant comparison would be to compare ethnic and non-ethnic importer/wholesalers. Exhibit R-2 is a volume of documents consisting of Reports to Customs with respect to attempted importations by Don Bosco Agencies Ltd. which had been refused entry during the years 1978 - 1994. Exhibit R-17 is an even larger volume of documents consisting of Reports to Customs by inspectors of the Respondent's Health Protection Branch with respect to well over one hundred attempted importations by apparently ethnic merchants during

the years 1988 - 1994, where importations were either "Refused Entry" or the importer agreed to a "Voluntary Disposal". Many of the these importers were companies. Many of these companies have names which appear to be oriental. The Complainant and Inspector Sloboda were familiar with the principals of some of the corporate importers and testified that their ethnic origin was Chinese. Some of the attempted importations contained in Exhibit R-17, were by ethnic retail merchants in Vancouver's Chinatown from whom the Complainant had purchased herbal products.

On a balance of probabilities, this Tribunal is satisfied that the differentiation in enforcement which occurred was not as a consequence of the race or ethnic origin of the importer but rather there was a differentiation between enforcement at the retail level compared to enforcement at ports of entry into Canada.

Before leaving the topic of deployment of the Respondent's enforcement resources, it is necessary to comment on the Complainant's assertion that some ethnic merchants believed that the Respondent had exempted 'them from enforcement of the Food and Drugs Act and regulations in relation to herbal products. The Complainant's impression may have been reinforced by Inspector Sloboda's memorandum to Ms. Quesnel of the Respondent's Operations Compliance Division dated February 8, 1989 (Exhibit HR-1, Vol. 2, Tab 120) wherein he stated:

"At present we have completely 'backed off' import surveillance over Chinese importations further to R. Elliot's policy statement of Jan. 23/89."

First, it must be observed that reference is to "Chinese importations" rather than "Chinese importers" Secondly, it must be observed that Mr. Elliot's policy still required enforcement in relation to herbal products where there were clear cut health hazards.

Mr. J.M. Forbes the Respondent's Director, of the Health Protection Branch, Western Region, in a letter addressed to the Complainant dated March 28, 1988 (Exhibit C-l, Tab 14), stated in response to a letter from the Complainant:

"Please be advised the Chinese herbalist have not been given a temporary exemption from compliance with the Food and Drugs Act."

Mr. Riou also testified (Transcript page 1366) that no exemptions were ever given to Chinese herbalists or any other group.

(ii) Product Risk Assessment

With respect to the efficient and economical enforcement of the Food and Drugs Act and regulations, the second policy adopted by the Respondent was to identify levels of risk associated with different types of products and to develop compliance strategies to respond to each level of risk. The Respondent's risk assessment policy is described in its Operational Policy Directive 86-0-1 (Exhibit R-10, Tab 7). The four classes of risk are described at page 3:

"(i) Class I is a situation in which there is a reasonable probability that the use of, or exposure to, a violative product will cause serious adverse health consequences or death.
ex.: Anabolic Steroids Starch Blockers Mispackaged herbs (eg. Mallow leaves that contained Bella-donna).

(ii) Class II is a situation in which the use of, or exposure to, a violative product may cause temporary adverse health consequences or where the probability of serious adverse health consequences is remote.
ex.: Comfrey Root Single Amino Acids.

(iii) Class III is a situation in which the use of, or exposure to, a violative product is not likely to cause any adverse health consequences.
ex.: DIN violations
Aphrodisiac claims

(iv) Class IV relates to a product which does not have generally recognized or supported therapeutic value being promoted in such a way that avoidance of recognized therapy occurs, and where such avoidance could lead to injury or death as in Class I or Class II above.
ex.: Taheebo tea Laetrile Glucomannan Aloe Vera Beulah Oil"

After setting forth the classes of risk, Operational Policy Directive 86-0-1 proceeds to describe compliance strategies with respect to each of the above classes of risk. They are:

"Class I: Notify the manufacturer(s)/importer(s). Possible actions include product detention, seizure, refusal at customs, recall to wholesale and/or retail levels and consideration of a public alert. A Class IV Risk Category product may be treated in this manner.

Examples include: New drugs based on safety considerations, toxic herbal preparations packaging errors.

Class II: Notify the manufacturer(s)/importer(s). Possible actions include product detention, seizure, refusal at customs, recall to wholesale and/or retail levels. A Class IV Risk Category product may be treated in this manner.

Examples include: Schedule A, New Drugs based on efficacy considerations, serious labelling errors,eg. dosage, warning statements, etc.

Class III: Advise the manufacturer(s)/importer(s). A period of time will be allowed for correction (up to 12 months); possible action (sic) include detention in the case of flagrant disregard, complaints etc. Continued sale of existing stock would normally be allowed.

Examples include: "Mildly exaggerated claims, technical labelling violations, DIN violations."

This Tribunal is satisfied on a balance of probabilities that the considerations articulated in the classes of risk in Operational Policy Directive 860-1 are all objectively related and relevant to the assessment of risks to the health of the public and that the compliance strategies of the Policy were all reasonably and objectively related to the respective classes of risk.

When the Respondent's Health Protection Branch officials assign a class of risk to a particular product, a number of factors have been considered including the toxicity of the ingredients, the concentration of the ingredients in the product, and the nature of distribution of the product.

With respect to traditional herbal products being marketed to the ethnic communities during the early and mid-1980s, the Respondent's officials concluded that these products had a relatively low level or class of risk. This is reflected in a letter from the Deputy Minister of Health, David Kirkwood, to the Complainant dated December 28, 1984 (HR-1, Vol. 1, Tab 20) where he stated:

"The position of my Department on Chinese Herbal products up to this time reflected our understanding that traditional Chinese medications have been limited to, used by and understood in that ethnic community. On this basis the priority for action and allocation of the Regional Health Protection Branch resources, of my Department, to this area has been low."

The letter included an important qualification:

"It must, however, be pointed out that, except in high risk situations, such response would not include a visit to every individual retail store."

Mr. Riou testified (Transcript pages 1112-16) that when making the risk assessment with respect to traditional herbal remedies being sold and used in ethnic communities, the Respondent considered the nature of the product, the nature of its distribution, its promotion and the ethnic consumers' familiarity with the products. The Respondent's risk assessment was also based on the following assumptions. First, sales by ethnic retailers were limited to their immediate ethnic community. Second, the consumers in the ethnic community had the requisite knowledge with respect to the proper usage of these herbal products. Third, in the early 1980s, Mr. Riou testified (Transcript page 1220) that the perception of the Respondent was that there was little flow of herbal products out of the Chinese

ethnic communities. This perception changed in the mid-1980s. When cross-examined on these assumptions, officials of the Respondent acknowledged that there was no empirical data to support these assumptions other than the fact that "very, very few complaints" were received by the Respondent from consumers in relation to Chinese herbal products (pages 1256 and 1257 of the transcript). Nevertheless, there is no evidence before the Tribunal which would suggest that the assumptions were unwarranted. Furthermore, Mr. Riou testified at page 1255 that notwithstanding the low risk classification, the Health

Protection Branch of the Respondent would intervene where significant risks to the publics' health were identified. He referred to two examples. One instance involved Chinese herbal preparations which were adulterated with drugs enumerated in Schedule F of the Food and Drugs Act (see the reference at page 1256 of the transcript). Another instance related to the discovery of heavy metals poisoning attributed to some ethnic products (see Project DDAB, Surveillance of Drugs for Self-Medication in Exhibit R-10, Tab 4). Enforcement of the Act and regulations among ethnic retailers of herbal products is also reflected in the memorandum addressed to J.E. Sloboda, Supervisor, Drug & Environmental Health Inspection Division from Drug Inspectors Wozny and Ansari dated September 22, 1987 (Exhibit HR-1, Vol. 1, Tab 42) Re: Western Regional Visibility Strategy. In commenting on the enforcement of s. 3(1) of the Act in Vancouver's Chinatown with respect to Schedule A claims, the inspectors observed at page 4:

"HPB has traditionally enforced Section 3(1) of the Food and Drugs Act with uniform rigor. Product has been seized, literature has been seized, and importations have been detained at Customs for recommendation of refusal wherever violations of Section 3(1) have been brouqht to our attention."

With respect to the knowledge base on which the Respondent made its risk assessments, Mr. Riou testified that the assessments were based on information gathered from several sources including inspectors in the field who made observations and who spoke to people. The perception these inspectors gained was that the customers of the retail ethnic merchants were largely not from outside the ethnic community (Transcript page 1119). He also testified that the Respondent acquired information from the Chinese embassy in Canada and from trips to China by officials of the Respondent (Transcript page 1111). The lack of empirical evidence to support some of the assumptions made by the Respondent's officials in making its risk assessments does not detract from the bona fides of the risk assessment.

The Respondent's risk assessment policy must also be viewed in the context of a memorandum dated January 23, 1989 by J.R. Elliot, who was the Respondent's Director General Field Operations Directorate addressed to Director of each enforcement region of Canada (Exhibit HR-1, Vol. 2, Tab 117). The subject of the memorandum was "Enforcement Policy for Herbs and Botanicals" which refers to an on-going review of the Respondent's policy with respect to herbs and botanicals in general and don quai in particular. Pending the

completion of this review, Mr. Elliot gave the following direction to the regional offices:

"In the interim, please ensure that enforcement activities involving herbal preparations are restricted to clear cut hazard areas until the Branch policy has been clarified."

The effect of this memorandum on the enforcement of the Food and Drug Act and the regulations thereunder against both Don Bosco Agencies Ltd. and ethnic merchants was demonstrated by several bound volumes of Reports to Customs by inspectors of the Respondent's Health Protection Branch. Exhibit R-2 is a volume of documents consisting of Reports to Customs with respect to attempted importations by Don Bosco Agencies Ltd. during the years 1978 - 1994. Exhibit R-17 is a larger volume of documents consisting of Reports to Customs by inspectors of the Respondent's Health Protection Branch with respect to attempted importations by ethnic importers during the years 1988 - 1994. Prior to the date of Mr. Elliot's memorandum (January 23, 1989), some of the attempted importations were stopped for what Mr. Shelley described as technical violations. Examples of technical violations were described by Mr. Shelley as including a lack of DIN numbers or labels which did not comply with language or other requirements. Mr. Shelley testified that after the date of Mr. Elliot's memorandum, those technical violations would not have been used to stop a shipment unless there was also a clear cut health hazard associated with the product.

With respect to the risk assessment of products which did not have labels printed in both official languages of Canada, Mr. Riou testified that notwithstanding the official language requirement applied to all sectors of the health food industry, a failure to have packaging in both official languages with respect to sales in ethnic communities was not considered to be a high risk in the Respondent's product risk classification. The Tribunal finds this to be a reasonable where the vast majority of consumers in some ethnic areas of Vancouver, would not, for example, understand French and may have only a limited understanding of English. Canada is a multi-cultural country. On the other hand, Don Bosco Agencies Ltd., being a wholesale distributor was selling its products to retailers across Canada

where they could be offered for sale to consumers who may only be proficient in one of Canada's two official languages.

With respect to the risk assessment of products not bearing DIN numbers, Mr. Shelley testified that since 1989, the absence of DIN numbers on labels or packaging of imported products has been regarded as a technical violation regardless of the identity of the importer and such products have not been rejected where the absence of a DIN number was the only contravention of the Act or regulations.

(b) Protection of Safety of General Public

- 41 -

The second branch of the objective test requires a determination of whether the policies and practices with respect to the deployment of the Respondent's enforcement resources and risk assessment are related in an objective sense to the enforcement of the Food and Drugs Act and regulations, in that they protect the safety of the general public. This Tribunal finds that these policies and practices do, in an objective sense, protect the safety of the general public in two ways. First, the risk assessment policy directs that greater compliance and enforcement action be taken with respect to products which present greater risks to the health of the public. Second, concentrating the deployment of enforcement resources primarily at the points of manufacture and importation has the greatest opportunity of preventing products which may be dangerous to the health of the general public from getting into the distribution chain to the general public.

Objective evidence of the application of these policies is contained in Exhibit R-17. This Exhibit is a volume of documents consisting of "Refused Entry" or "Voluntary Disposal" forms with respect to well over one hundred attempted importations by apparently ethnic merchants during the years 1988 to 1994 inclusive. Many of these importers were companies. Many of these companies have names which appear to be oriental. The Complainant and Inspector Sloboda were familiar with the principals of some of the corporate importers and testified that their ethnic origin was Chinese.

- 42 -

Notwithstanding the concentration of its enforcement personnel at the points of manufacture and importation, the Respondent still responded at the retail level to complaints from consumers and trade competitors. There

is evidence before the Tribunal of seizures being made from retail ethnic merchants where products had clear cut health hazards.

(c) Conclusion on the Objective Test

The questions which this Tribunal must answer with respect to the objective test are whether the policies and practice with respect to risk assessment and deployment of resources at points of importation rather than at the retail level:

(1) were reasonably necessary to assure the efficient and economical enforcement of the legislation; and

(2) whether the policies and practices protected the safety of the general public.

This Tribunal finds that the evidence establishes on a balance of probabilities that these policies and practices satisfied both branches of the objective test. The Respondent's policies and practices were a reasonable response to the Respondent's legislative mandate given the resources made available to the Respondent and the scope of the Respondent's enforcement responsibilities.

This Tribunal finds that it is not contrary to the Canadian Human Rights Act for the Respondent to differentiate among products based on the ethnic origin of a product.

6.2.2 The Subjective Test

As stated above, the subjective test may be analysed as having three elements.

(1) The policies and practices were imposed honestly and in good faith;

(2) The policies and practices were imposed in the sincerely held belief that the policy or practice was imposed in the interest of the adequate enforcement of the Act and regulations with all reasonable dispatch, safety and economy; and

(3) The policies and practices were not imposed for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Canadian Human Rights Act.

I will examine the evidence in relation to the Respondent's policies and practices with respect to each element of the subjective test.

(a) Policies and Practices were Imposed Honestly and in Good Faith

In Large v. City of Stratford, [1995] S.C.J. No. 80 (S.C.C.) Sopinka J. stated that this element of the subjective test was satisfied if in addition to satisfying the objective test, the respondent establishes that the rule or policy was adopted in good faith for a valid reason and without any ulterior purpose that would be contrary to the purposes of the Canadian Human Rights Act. This Tribunal has found that the Respondent has satisfied the objective test on the balance of probabilities.

The Tribunal finds that the policies and practices were adopted either

(1) in relation to ethnic origin of products as distinct from the ethnic origin of importers or their principals;

(2) in relation to points of enforcement in the product distribution system (point of importation as distinct from the retail level; or

(3) in relation to an assessment of risk relating to products and consumers of those products as distinct from the race or ethnic origin of the importer or vendor or one of its principals.

This Tribunal finds on the balance of probabilities that policies and practices adopted by the Respondent were adopted in good faith for valid reasons and without any ulterior purpose that would be contrary to the purposes of the Canadian Human Rights Act.

(b) The Policies and Practices were Imposed in the Sincerely Held Belief that policy or practice was Imposed in the Interest of the Adequate Enforcement of the Act and Regulations with all Reasonable Dispatch, Safety and Economy

Mr. Riou was for most of the period which is relevant to this complaint, the Respondent's Director of the Bureau of Field Operations with responsibility to coordinate the National Compliance Enforcement Program for the Health Protection Branch in relation to foods, drugs and medical devices. He described (Transcript pages 1211-12) the mandate of the Respondent in relation to the Food and Drugs Act and regulations as being to protect the health of the public. He testified that this mandate is fulfilled in part by protecting the public from unsafe products and practices. This includes protecting the public from products where the

representations made about the product by its manufacturer or vendor are fraudulent, misleading or deceptive.

This Tribunal has already found with respect to the objective test that the evidence establishes on a balance of probabilities that the Respondent's policies and practices were an efficient and economical response to the Respondent's legislative mandate. This Tribunal also finds on the balance of probabilities that the Respondent's policies and practices which are under consideration were imposed in the sincerely held belief by the Respondent's officials that policies and practices were imposed in the interest of the adequate enforcement of the Act and regulations with all reasonable dispatch, safety and economy.

(c) The Policies and Practices were Not Imposed for Ulterior or Extraneous Reasons Aimed at Objectives which could Defeat the Purpose of the Canadian Human Rights Act.

There is no evidence that any of the Respondent's policies or practices were crafted for the purpose of conferring a benefit on a particular race or ethnic group. The policies and practices were directed at violative products. This Tribunal is unable to find any evidence which would suggest that the policies and practices under consideration were imposed for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Canadian Human Rights Act.

(d) Conclusion with respect to the Subjective Test:

This Tribunal finds that the evidence establishes on a balance of probabilities that the Respondent's policies and practices which are under consideration satisfied the three elements of the subjective test.

6.3 Conclusion on Bona Fide Justification

The Tribunal finds that given the Respondent's resource limitations, the scope of Respondent's responsibilities and Respondent's assessment of the potential risks to consumers, the Respondent has established a bona fide justification for the development and application of policies and practices with respect to the enforcement of those provisions of the Food and Drugs Act and regulations which have been reviewed in this case.

7.0 DECISION

The complaint is dismissed.

Dated at Victoria, Province of British Columbia, this 14th day of November, 1995.

Lyman R. Robinson, Q.C.