T. D. 2/98
Decision rendered on March 11, 1998

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

HUMAN RIGHTS TRIBUNAL
BETWEEN:

DAVID BADER Appellant
(Complainant)

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Appellant
(Commission)

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE
Respondent

DECISION OF REVIEW TRIBUNAL

TRIBUNAL: Norman Fetterly - Chairperson
Jane Shackell - Member
Paul Groarke - Member

APPEARANCES: David Bader for the Appellant
Margaret Rose Jamieson for the Canadian Human Rights Commission
Donald Richards for the Respondent

DATES AND PLACE
OF HEARING: June 17, 18, 19, 20 & 21, 1996
Surrey, British Columbia
November 13, 14 & 15, 1996 and March 5, 6 & 7, 1997
Vancouver, British Columbia

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PRELIMINARY MATTERS

Before addressing the merits of the Appeal there were three preliminary matters which the Review Tribunal was required to deal with. They were as follows:
(a) Was the Review Tribunal the proper forum for hearing the threshold issue of jurisdiction in view of the decision of Mr. Justice Rothstein of the Federal Court before whom the Respondent had brought a writ of prohibition;
(b) Was the Respondent required to file formal notice of its intention to contest the findings of the initial Tribunal which had ruled in favour of the Appellant on the threshold issue of jurisdiction and on the issue of discrimination.
(c) Did the alleged relationship between a member of the Review Tribunal and counsel for the Respondent give rise to an apprehension of bias?
With regard to the forum, Mr. Justice Rothstein, in refusing to grant prohibition on the threshold issue of the Tribunal's jurisdiction ordered that it be referred to a Tribunal. It is likely Mr. Justice Rothstein had in mind a Tribunal consisting of three members in which case the decision of that Tribunal would have been appealable to the Federal Court of Appeal under Section 28 of the Federal Court Act. On the other hand the Act provides that the decision of a Tribunal consisting of fewer than three members must be appealed to a Review Tribunal pursuant to Sections 55 and 56 of the Act. In the event, the Tribunal which was constituted following his order consisted of only one member.
Section 55 provides as follows:
"Where a Tribunal that made a decision or order was composed of fewer than three members, the Commission, the complainant before the Tribunal or the person against whom the complaint was made may appeal the decision or order by serving a notice, . . ." (emphasis added)

The question was whether, given the ruling of the one-member Tribunal on the threshold issue of jurisdiction, the Review Tribunal was the proper forum for revisiting that issue? Or should it have been referred back to the Federal Court as seems to be implied in the Order of Mr. Justice Rothstein? His ruling on the issue of jurisdiction is as follows:
"AND UPON the Court indicating that the Court would cooperate to convert the Applicant's present jurisdictional judicial application to a judicial review of the decision of the Canadian Human Rights Tribunal if such application were made by either the Applicant or Respondent and found meritorious by the court and to hear and decide that judicial review in a timely manner . . ."

It would seem Mr. Justice Rothstein had in mind an appeal under Section 28 of the Federal Court Act from a decision of a Tribunal consisting of not less than three members.

A similar issue arose in Canadian Human Rights Commission v. British American Banknote Company [1981] 1 F.C. Reports, 578, but counsel distinguished it on the basis that the application for a writ of prohibition was made at the outset before the matter went to a hearing on the merits before a Tribunal. By referring the jurisdictional issue to a Tribunal and dismissing the application for prohibition, the Federal Court in the present case has, in effect, decided the Tribunal or by extension the Review Tribunal is the forum better suited to determine its own jurisdiction.

In support of his submission, counsel for the Respondent relied on Re Singh v. Department of External Affairs [1989] 1 F.C., 430 in which the Federal Court of Appeal held as follows:

"An examination of the Canadian Human Rights Act, makes it clear that the Commission is a body whose jurisdiction to enquire includes the jurisdiction to enquire into the limits of its own jurisdiction."

The Review Tribunal is satisfied, by extension, that the principle of the Re Singh case is applicable to a Human Rights Tribunal, the threshold issue of jurisdiction is properly before it and that it is the correct forum in which to try the issue.

Secondly, there is the question whether the Respondent, having succeeded in obtaining an Order dismissing the Complaint on the grounds of bona fide justification is restricted to responding only to that issue on appeal. Or whether it is entitled, notwithstanding the failure to notify either formally or informally the Appellant of its position, to revisit and put in issue those other findings of the Tribunal which went against it.

In that connection it must be said this Review Tribunal, as well as counsel for the Appellant, were taken somewhat by surprise to learn of the position of counsel for the Respondent at the commencement of this hearing. The grounds of appeal as set out in the formal Notice of Appeal are confined to the finding of bona fide justification by the initial Tribunal. It was assumed this was the only issue before the Review Tribunal.

The Canadian Human Rights Act itself is silent with respect to procedures on "cross-appeal" and the case law suggests that a cross-appeal from a final order or a judgment of the Court is pointless if it does not seek to vary the order. We were referred to the emphatic language of Madame Justice Southin, in the case of Kehler v. Surrey (District) 70 B.C.L.R. (2d), 381 where she states as follows:

"A notice of cross-appeal is only required when a respondent seeks relief different from that given to him below. Speaking for myself, I hope never to see again a piece of paper as pointless as this notice of cross-appeal." (emphasis added)

Accordingly, the Review Tribunal finds, absent any provision in the Canadian Human Rights Act for formal notice, that the Respondent is entitled to revisit those issues which were decided against it by the initial Tribunal.

Finally, there was an allegation by the Complainant of bias based on a tenuous relationship between Member Shackell's ex-husband and the Counsel for the Respondent, Mr. Richards. Mr. Richards volunteered the information that he had articled some ten or eleven years prior to the hearing with Member Shackell's former husband. Member Shackell's ex-husband and Mr. Richards eventually became partners in a large Vancouver law firm.

The divorce had occurred many years before Mr. Richards became a partner with Member

Shackell's ex-husband. Member Shackell was frank to admit that her former husband had become a partner of Mr. Richards. She stated as follows:
"However, my former husband and I were divorced many years, well before he [Mr. Richards] became a partner in his firm. And had we been married at the appropriate time, or if we had been married more recently, I think that you would have a concern which would raise a legitimate issue of bias. But frankly it hadn't even occurred to me that there would be any kind of apprehension of bias or any thing like that. Until Mr. Richards raised it himself this morning, I was quite surprised by that." See pps. 65 and 66 of the transcript.

Member Shackell stated she had met occasionally with Mr. Richards when he articled with her ex-husband and that they had not had a personal or business relationship with each other.
Following submissions by Mr. Bader and Commission Counsel, who incidentally disassociated herself from the allegations of bias, and given the facts as presented, the Review Tribunal came to the conclusion that the circumstances did not justify a finding based on a reasonable apprehension of bias. With or without the statement of Member Shackell, it is the opinion of the Review Tribunal, according to its understanding of the facts, that the allegation of bias is based entirely on suspicion and mere speculation.
On the subject of bias it is worth noting that in the proceedings before the initial Tribunal the Complainant also alleged bias on the grounds that counsel for the Respondent had been a student of the Chair of the Tribunal during law school. In that hearing and also before this hearing, the Complainant again made, what can only be described as far-fetched allegations of bias.
In addition there was a motion by the Complainant to invoke the Canadian Charter of Rights and Freedoms, but after consideration and considerable discussion the Complainant voluntarily withdrew his motion.

JURISDICTION - The Threshold Issue

The present appeal is an appeal from a decision dismissing a complaint on the grounds that, while discrimination was found, the Respondent established bona fide justification for its discriminatory practices pursuant to Section 15(g) of the Act.
In reaching a finding of discrimination the Tribunal had first to deal with the problem of whether or not the Complainant, David Bader, was entitled to claim relief where the impact of the alleged discriminatory practice was on a corporation in which he and his wife were the directors and the only shareholders.
When addressing this problem the Chair commented: "No previous judicial precedents were

cited to this Tribunal where a Complainant, who has been (or is) 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." (See p. 5 item 3.6)

This was the "threshold issue" before the original Tribunal and again before the Review Tribunal. As we have already noted, counsel for the Respondent successfully argued at the hearing that he was entitled to raise all of the substantive issues which were adjudicated in the hearing before the original Tribunal.

Counsel for the Respondent strenuously opposed the conclusions of the original Tribunal on this issue. The Tribunal set out in some detail the factual situation as well as the rationale and the authorities which were canvassed in finding, as the Tribunal did, that it had "jurisdiction over the complaint by reason of the 'sufficiently direct and immediate impact' of the alleged discriminatory practices on the Complainant (Mr. Bader) as a shareholder, director, officer and employee of Don Bosco Agencies Ltd. but not in any other capacity". (See p. 14)

In reaching its conclusion on the issue of jurisdiction the Tribunal applied the principle enunciated in Re Singh, [1989] 1 F.C., 430 at 442 where 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)

In determining whether the impact on the complainant's company was "Sufficiently Direct and Immediate" the Tribunal referred to Secretary of State for External Affairs et al v. Menghani, (1993) 21 C.H.R.R. D/427, which sets out at page 6 the four factors applied by the Human Rights Tribunal and tacitly approved on appeal to the Federal Court.

The initial Tribunal then restates the four factors in a more generic form so as to be applicable by analogy to all non-immigration cases including this complaint. The Tribunal describes the four factors in their generic form as follows:

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 a Complainant on a 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.

The Tribunal examined in some detail the evidence relating to the four factors above-mentioned and concluded, (notwithstanding the paucity of evidence with respect to the third factor, namely, the loss or deprivation of significant opportunities), that "the remaining three factors establish a sufficiently direct and immediate impact on the Complainant of the alleged discriminatory practice on Don Bosco Agencies Ltd."

The Review Tribunal is of the opinion it ought not to disturb the Tribunal's findings of fact in this regard. The conclusion of the original Tribunal on the impact of the alleged discrimination on the corporate entity represents a novel approach and a venture into virgin territory. There is, as the Tribunal noted, some potential for an increase in claims under the Act.

In light of the particular circumstances of the case and the criteria for evaluating the impact of

the discriminatory practice as set out in the decision of the Human Rights Tribunal in Menghani and referred to on appeal by the Federal Court Trial Division, supra, the Review Tribunal is of the opinion that the decision of the initial Tribunal is so circumscribed and limited in its application that the threat of a multiplicity of claims is minimal.

Since this premises the Complainant's right to bring a claim on the effect of the alleged discrimination on Don Bosco Agencies Ltd., this may seem to bolster the Respondent's argument that Mr. Bader cannot pursue his claim because the company has no status to complain under the Act. The answer to such an objection seems clear: there is an identity of interest here, and from the perspective of standing, it is not possible to distinguish between the actions directed against the Complainant and the actions directed against the company. In the present case, the interests of Mr. Bader and his company have merged and the substantive wrong is the same in either instance.

The only significant difference between a case brought by Mr. Bader and a case brought by his company appears to be the procedural factor that the company is not entitled to seek a remedy under the Act. As a result, we cannot accept the Respondent's argument without effectively extinguishing the claim of the Complainant. There are other possibilities, however. It might be argued, for example, that there are two persons, in law at least, who are affected by the alleged discrimination. Emotional sensibilities aside, there does not seem to be any overriding reason why the inability of one person, in this case the company, to file a complaint must prevent the other party from doing so.

There are similar issues in constitutional law, where the doctrine of jus tertii permits a litigant like a corporation to assert the constitutional right of a third party in certain restricted circumstances. The force of the constitutional example in the instance of discrimination can be seen in the American case of Craig v. Boren 429 U.S. 190(1976), where the United States Supreme Court ruled that an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18 was unconstitutional. The case is interesting in the present instance because the action before the court was brought by a vendor who was not a member of the discriminated group.

This did not deprive the vendor of standing. As Robert Allen Sedler writes, in "The Assertion of Constitutional Jus Tertii: A Substantive Approach", an article in the California Law Review, (December 1982) vol. 70, pp. 1308-1344, at p. 1333, there was no meaningful distinction between the wrong done to the plaintiff vendor and the discriminated group:

". . . if the state could not validly prevent eighteen-to-twenty-year-old-males from buying beer, it could not validly prevent the plaintiff from selling it to them."

The situation in the present case seems more convoluted, since the decisive issue appears to be whether there is a meaningful distinction between the alleged treatment of the company and the treatment of the Complainant. Nonetheless, the same reasoning seems to apply in both cases and the fundamental question is the same. If the Respondent could not discriminate against Mr. Bader, how could it discriminate against his company?

At least one writer has argued that the policy considerations which inform the American jurisprudence on jus tertii need to be addressed in Canada. In a case comment on R. v. Wholesale Travel (1991) 3 S.C.R. 154 (S.C.C.) in The Canadian Bar Review (June 1992) vol. 71, no. 2, pp. 369-383, at 380 Chris Tollefson writes:

"There are many instances in which it is appropriate for the courts to allow one party to rely on another's constitutional rights for standing and remedial purposes. One is where it is considered necessary to promote or maintain a desirable social relationship of grouping. Another, which the

public interest standing case law recognizes, is where the party actually affected lacks the means of directly asserting the right in question." (emphasis added)

This goes some distance in explaining the significance of the doctrine in the American law, since the ability of the third party to assert his own rights is one of the primary considerations in the American caselaw. This seems particularly important in the context of the Canadian Human Rights Act, which is notable for its remedial character.

The Canadian courts have visited the same kind of issue in deciding questions of public standing under the Charter of Rights, if not in the context of the Canadian Human Rights Act. In a recent decision in the area, Hy & Zel's Inc. v. Ontario (Attorney General) [1993] 3 S.C.R. 675, for example, the Supreme Court dismissed an appeal from an application by third parties for a declaration that the Ontario Retail Business Holidays Act was unconstitutional. Richard S. Kay summarizes the judgement of the majority in Jus Tertii Standing and Constitutional Review in Canada (February 1997) 7 N.J.C.L., pp. 129-169, at p. 130:

"While acknowledging that a serious constitutional issue was presented and that the Act had a direct effect on the appellants, he concluded that the appellants failed to satisfy a third criterion– there were "other reasonable and effective ways to bring the issue before the court". (emphasis added)

Although the litigation in the area is too extensive to review, it is worth noting that this comment captures one of the more prominent themes in the litigation within the area.

The same kind of concern seems to account for the decision in at least one Canadian case which presents a set of facts similar to the facts in the present instance. In Canadian Egg Marketing Agency v. Richardson (1995) 33 Admin. L.R. (2d) 128, the Supreme Court of the Northwest Territories considered a set of circumstances. On the basis of Wholesale Travel, cited supra, the Marketing Agency argued that the Respondent had no standing to advance a constitutional challenge under the Charter of Rights because he carried out his business through one or more companies. Mr. Justice deWeerdt rejected this argument on the basis that there was a serious issue to be tried and, in the circumstances, there was "...no other reasonable and effective manner in which the issue may be determined." (137, emphasis added).

It is notable that the court in Richardson considered an issue under section 15 of the Charter of Rights, since that section, like section 5 of the Canadian Human Rights Act, makes use of the word "individual". This is relevant, in the immediate case, because the courts have not extended the equality rights in section 15 to corporations. As Mr. Justice Joyal put it in Parkdale Hotel Ltd. v. Attorney-General of Canada (1986) 27 D.L.R. (4) 19 (F.C.T.D.), at 36f:

"It appears from the wording of s. 15 [i.e., from the use of the word "individuals"] that its protective umbrella only extends to physical persons and that a corporation or other ‘ personne morale' is left out in the rain as it were."

This did not prevent Mr. Justice deWeerdt from granting standing to the Respondent in Richardson and his view seems to have been implicitly accepted by the Northwest Territories Court of Appeal in (1996) 60 A.C.W.S. 722.

If we follow the reasoning in Richardson to the present case, we are left with a provocative question. If Mr. Bader cannot raise the present complaint under the Canadian Human Rights Act, who can? Certainly his company cannot do so, since the Act refers to "individuals" and precludes a corporation from claiming relief.

As the original Tribunal held, the rule in Foss v. Harbottle (1842) 2 Hare 461, 67 E.R. 189 can

be distinguished on the basis it was developed to prevent separate actions by both the corporation and its shareholders with respect to the same wrong and the potential double recovery for the same loss. If the rule in Foss v. Harbottle were applied to complaints under human rights legislation the purpose of the Canadian Human Rights Act, which is to eliminate discrimination against "individuals" and to extend the principle ". . . that all individuals should have an equal opportunity to make for themselves the life that they are able and wish to have . . .", would be defeated in the instance of cases like the one before this Review Tribunal.

The individual, on the other hand, ought not to be prevented from piercing the corporate veil so as to avail himself of the remedial provisions of the Act. As we understand the rationale behind the Tribunal's decision on this issue, a finding in favour of the Respondent would leave an individual who has suffered discrimination without any means of redress where the loss he suffers is borne by his company.

Although the immediate case raises issues under the Canadian Human Rights Act, rather than the constitution, human rights legislation has been described as "near constitutional" and similar considerations would seem to apply. The courts have stressed that the Canadian Human Rights Act should be given a large and liberal interpretation and it seems invidious to place certain instances of discrimination outside the reach of the Act on the basis that a Complainant ran his business through a closely-held company.

In all the circumstances of the present case, the Review Tribunal is of the opinion that the finding of the original Tribunal on the question of jurisdiction ought not to be disturbed. Accordingly the Review Tribunal has jurisdiction in this matter and may proceed to address the remaining issues.

DISCRIMINATION - Section 5 of the Canadian Human Rights Act

The original Tribunal found a prima facie case of discriminatory practice 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. The Complainant was discriminated against in comparison with retail herbal merchants whose race was Oriental or whose ethnic origin was Chinese. (emphasis added)

Counsel for the Respondent at p. 165 of his submission conceded he had an "uphill battle" on the issue of a prima facie case of discrimination. However he was not prepared to concede that there was discrimination because of what he described as the product-based policy of the Health Protection Branch and the importer/retailer dichotomy which he described as comparing "apples to oranges".

This theme occurs throughout the submission by counsel for the Respondent and is restated at p. 336 of his submission in the following terms:

"I say that because it's product based and because it's import level versus retail level, that there's no discrimination; it's not similarly situated individuals being treated differently."

In finding that there was discrimination the initial Tribunal accepted such an analysis and compared the Complainant and his company, Don Bosco Agencies Ltd. which is an importer, to retail Chinese herbal merchants. (emphasis added)

The Review Tribunal rejects the Respondent's argument, that there is no discrimination because the comparison is not between similarly situated entities, and is of the opinion there is ample evidence that a comparison can be made between ethnic Chinese importers and Don Bosco

Agencies Ltd. as an importer. Although the Review Tribunal accepts the findings of the initial Tribunal on the issue of discrimination it is noteworthy that throughout its analysis of the evidence relating to discrimination, the initial Tribunal focussed on "retail herbal merchants whose race was Oriental or whose ethnic origin was Chinese". (emphasis added) In the opinion of the Review Tribunal the evidence demonstrates that in fact there was no need to restrict the Tribunal's conclusion on this issue to ethnic Chinese retail merchants. The distinction between retailer and importer in the context of the Tribunal's decision is of some importance for the following reasons:

1. It answers the hypothesis advanced by counsel for the Respondent that the comparison is invalid on the basis we are not dealing with similarly situated individuals being treated differentially; and

2. It anticipates the impact, if any, the so-called importer/retailer dichotomy might have on the defence of bona fide justification. In that regard it is useful to refer to the comment at p. 36 of the initial Tribunal's Decision where it states:

"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."
(emphasis added)

This comment appears after that part of the decision which adapts to this case, the subjective and objective tests enunciated by McIntyre, J. in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at 208. In so doing the Tribunal relied on Canada (Attorney General) v. Rosin (1992), 16 C.H.R.R. D/441 at D/453 (F.C.A.) per Linden J.A. (See pps. 29 et seq. of the Tribunal's Decision).

The Complainant, through his company, Don Bosco Agencies Ltd. is an importer of health food, vitamins and herbal products. He purchased products from ethnic Chinese retail merchants in Vancouver's Chinatown during the 1980's and delivered samples of the products to the offices of the HPB in Vancouver as evidence of lack of enforcement at the import level of the Food and Drug Act against products containing Schedule "A" claims. The sample products made Schedule "A" claims, lacked Drug Identification Numbers and contained a high percentage of Dong Quai, which was classified as a new drug at that time. Some 70% of Chinese herbal remedies contain Dong Quai. (See the letter from Dr. R.A. Armstrong to Mr. R.T. Ferrier, dated March 23rd, 1989).

The Complainant's investigation had, perforce, to be conducted at the retail level where there was accessibility to the Chinese herbal products displayed and for sale on the premises.

Surveillance of shipments of Chinese herbal products, at the import level, such as it was, consisted in Canada Customs forwarding the documentation accompanying the shipment to the officials of HPB. It is unlikely the Complainant was in a position to intervene at that stage when the shipments were under the control of Canada Customs.

Turning to evidence of the close relationship between ethnic Chinese importers and ethnic Chinese retailers, a reference may be had to Project DEHA in which Mr. Forbes, Director, Western Region, HPB, comments as follows:

"Individual retailers turn out to be their own importers therefore increasing significantly the control points we (HPB) have to monitor to assess what products are coming into the country." (See Exhibit HR-1, Vol. 1, Tab 21, p. 2 item 3)

Attached as Appendix "I" is a list of fifteen major Chinese importers eleven of which were identified by Inspector Sloboda, under cross-examination by Commission Counsel, as being on Mr. Forbe's list (see pps. 1710 to 1712 of Vol. 12 of the transcript of the evidence).

The DEHA Project was followed on September 22nd, 1987, by the Western Region Visibility Report authored by Inspectors Wozny and Ansari. That report marked Exhibit HR-1, Vol. 1, Tab 42, was missing a list of Chinese importers.

However, a list, which counsel presented to Inspector Sloboda was identified by him as the missing list of the importers selected for the survey.

Although the missing list was not attached to the Western Region Visibility Report, it did contain the names of the 11 Chinese importers identified by Inspector Sloboda and was marked Exhibit "HR-5".

Inspector Sloboda on cross-examination was referred to a letter from Director Forbes to Mr. Riou, Director, Bureau of Field Operations, HPB, Ottawa dated October 7th, 1987 (Exhibit R-1, Vol. 1, Tab 39). This letter was written shortly after the Western Region Visibility Report was published and it is entitled "Regulation of ‘ Ethnic' Drugs". The letter refers in the first paragraph to ". . . a fact finding survey of the ‘ retail' level situation". Opposite an asterisk at the foot of the same page it states "Note that all retailers visited are product importers.".

When asked to comment on Director Forbes' letter to Mr. Riou and to refer to the list of ethnic Chinese importers which was attached to the DEHA Project, Inspector Sloboda was constrained to answer ". . . yes they are importers and, yes, they are retailers". See pps. 1714-1715 Vol. 12 of the transcript of the evidence before the original hearing. (emphasis added)

The Complainant visited ethnic Chinese retail stores in February of 1984 and again in 1985. He listed the names of those stores which appear in Exhibit HR-1, Vol. 1, Tab 6 and the names so listed can be cross-referenced to the list of major Chinese importers on the Forbes' list and on Appendix "II" to the Western Region Visibility Report. It is apparent the names of ethnic Chinese retail stores visited by the Complainant also appear on the list of major Chinese importers which appear either on Appendix "II" or on the Forbes' list, thus corroborating the observation Mr. Forbes made which was previously referred to, namely, that "individual retailers turn out to be their own importers . . .".

The list compiled by the Complainant names the establishments he visited and the products he purchased. That list describes in detail the name of each product, the claims for its curative properties, (Schedule "A" claims), and whether or not the product has a Drug Identification Number. None of the products on the Complainant's list possess DINs and all make Schedule "A" claims.

The initial Tribunal found prima facie evidence of discriminatory practices against the Complainant by HPB in a number of areas which are described, examined and analyzed in the decision, and which may be summarized briefly as follows:

1. Products imported by Don Bosco Agencies Ltd. refused entry on the grounds that:

(a) The products had the status of "New Drugs";

(b) Products that did not have DINs;
(c) Labelling or information in the package which made Schedule "A" claims even though the same or similar products imported by ethnic Chinese merchants were not refused entry.
2. Generally a number of memoranda, projects and reports including an excerpt from the Western Region Visibility Report of September 22nd, 1987 referred to by the Tribunal and quoted at p. 27 of its Decision, as follows:
"By far the greatest number and degree of violations are with the Chinese community. They have more stores, more products and more importers than any other group." (emphasis added)

In each of these cases the Tribunal concluded there was a prima facie case of differential treatment of the Complainant by the HPB. It is not the intention of the Review Tribunal to revisit the factual basis for each of those findings with one exception. It appears under the heading of a "New Drug" and specifically deals with the substance, Dong Quai.
Dong Quai represents the most conspicuous example of differential treatment by HPB of the Complainant and of the western health food industry generally. The differential treatment manifested itself in HPB's vacillating and contradictory policies as they affected the Complainant and his associates and also in uneven and sporadic enforcement practices by HPB. These policies and practices favoured for whatever reasons the ethnic Chinese import/retail merchants. The evidence before the Tribunal bears this out. The Review Tribunal will have more to say on the subject of Dong Quai when it addresses the defence of bona fide justification.
The submission of counsel for the Respondent that the policy of the HPB is "product based" was not directly addressed in the Tribunal's decision on the issue of discrimination. That issue was addressed when the Tribunal dealt with the defence of bona fide justification available to the Respondent under Section 15(g) of the Act.
The Tribunal did find however that the enforcement of those provisions of the Food and Drugs Act and regulations relating to "new drugs", DIN numbers, Schedule "A" claims and internal documentation within the HPB did have a differential impact on Don Bosco Agencies Ltd. which constituted prima facie evidence of a discriminatory practice contrary to the provisions of the Act. (emphasis added)
In our opinion it is not possible to divorce a stated policy from its application to a particular situation or the failure to apply the policy at all, or in such manner as to undermine its integrity. In that regard it is helpful to refer to Exhibit HR-1, Vol. II, Tab 117, dated January 23rd, l989 in which Mr. Elliot, Director General Field Operations, reviews the enforcement for herbs and botanicals and in particular the status of Dong Quai as a food or a drug.
In summary we are in agreement with the finding by the Tribunal that there was discrimination which resulted in differential treatment of Don Bosco Agencies Ltd. but in our opinion the evidence does not support the finding that the differential treatment involves and is limited to ethnic Chinese retail merchants as comparators.
The evidence does, on the other hand demonstrate quite clearly, that importers and retailers from the Chinese ethnic community were, in almost all cases, one and the same. It follows the comparison between Don Bosco Agencies Ltd. and ethnic Chinese merchants is not a case of importer to retailer or "apples to oranges".
We conclude therefore it does not matter at which level, whether at import or at retail, preferential treatment was conferred on ethnic Chinese merchants in so far as HPB's enforcement policy is concerned.
NEW EVIDENCE

I. The Letter to Trade of May 1st, 1996 (Exhibit C-1) from HPB with its attached list was admitted on the basis it is essential in the interest of justice because it demonstrates that the temporary "fix it" measures by HPB in response to complaints by Mr. Bader provided no lasting solution to the enforcement policies and practices of HPB;
II. A written Summary dated December 14th, 1988 of a meeting between HPB representatives and officials of the Embassy of the People's Republic of China in Ottawa. Contents of this document were discussed during the cross-examination of Mr. Riou, Director of the Bureau of Field Operations. This important document which, although proven, was by some miscue not admitted and marked as an exhibit during the original hearing; and
III. The Affidavit of David Bader to which is attached Exhibit "B" listing numerous purchases made by him at various Canadian cities in the months of September and October 1996. Mr. Bader's list, Exhibit "B", was compared to the "Letter to Trade" dated May 1st, 1996 (Exhibit C-1). That list contains a list of traditional herbal medicines containing "...high levels of harmful heavy metals such as arsenic and mercury that can cause very serious health problems." In Mr. Bader's list Exhibit "B" to his Affidavit, he details products which have no DINs and products which make Schedule "A" claims. Many of these products also appear on the list attached to "Letter to Trade" thus corroborating Mr. Bader's contention that enforcement of HPB's risk assessment policy is an ongoing problem.

The Review Tribunal is of the opinion that it is essential in the interests of justice to admit the documents referred to in items 1 to 3. Accordingly those documents were admitted and marked as exhibits.

RESPONDENT'S BONA FIDE JUSTIFICATION

Before dealing specifically with the merits of the appeal, it seems helpful to review the relevant provisions of the Canadian Human Rights Act, the grounds of appeal, and the order in which they should be considered.

Section 5 of the Canadian Human Rights Act provides:

"It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination."

Section 15 of the Canadian Human Rights Act lists certain exceptions including, inter alia, subsection (g) which reads as follows:

"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 bona fide justification for that denial or differentiation."

In essence the Respondent argues it is entitled to invoke this provision in response to the finding by the initial Tribunal that it engaged in a discriminatory practice because its product based risk assessment policy required that its limited enforcement resources be deployed in areas where it would be most effective and where the perceived risk to the public was greater.

To put it in another way, the limited enforcement resources would not be concentrated in areas where the Respondent perceived the risk to the public was least, namely, in the ethnic Chinese community.

Before addressing the evidence, the initial Tribunal referred to the legal principles applicable to the facts of this complaint.

The Tribunal began by stating that the burden of establishing bona fide justification lay with the Respondent (see p. 29 of the Decision), by which we take it to have meant the burden of proving, on a balance of probabilities, both the subjective and the objective tests enunciated by McIntyre, J. in the Etobicoke case, post, lies with the Respondent.

The Tribunal then on the authority of Canada (Attorney General) v. Rosin (1992), 16 C.H.R.R. D/441 at D/453 (F.C.A.), per Linden, J.A. adapted the tests articulated by McIntyre, J. in Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202 at 208. The objective test was restated at p. 30 of the Tribunal's Decision in the following way:

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

The subjective test was restated at p. 30 of the Tribunal's Decision 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 three elements of the subjective test adapted by the Tribunal from Large v. City of Stratford, [1995] S.C.J. No. 80 (S.C.C.) require 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."

It should be noted the interpretation of the subjective arm of the test containing the three elements above described were proposed by counsel for the Commission in that case. The Court held that the subjective test was applied too rigidly when insisting, as did counsel for the Commission, that in order to satisfy (b) there must be evidence of the employer's state of mind.

Before analysing the evidence the Tribunal summarized the Respondent's position with regard to the defence of bona fide justification and any differential effect which may have occurred in the administration and enforcement of the Act as a consequence thereof. The differential effect, in

the Respondent's view, was a result 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." (See p. 31 of the Decision)

In addressing the objective test the Tribunal's analysis which relates to this complaint was as follows:
"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."

After reviewing evidence at some length the Tribunal concluded that the Respondent had satisfied the objective test. Its decision in that regard can be found at p. 44 of the Decision which is as follows:
"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."

After briefly reviewing the evidence with regard to the subjective test, the Tribunal concluded that the Respondent had met that test as well and its decision can be found at p. 46 and reads as follows:
"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."

It should be noted the Tribunal applied the objective test before considering the subjective arm of the test which is the reverse order in which the two arms of the test were set forth by McIntyre, J. in the Etobicoke case. As far as the subjective element of the test is concerned the learned Judge there found no evidence to indicate the motives of the employer were other than honest and in good faith in the sense he described so that the subjective element was not an issue.

Moreover the subjective test followed by the objective test would appear to be more in keeping with the provisions of Section 15(g) of the Act which reads in part as follows:
". . . and there is bona fide justification for that denial or differentiation." (emphasis added)

The correct procedure would seem to require that the subjective element be addressed first and be followed by the objective element. However, since reference is made by the Tribunal in applying the subjective element of the test to matters previously mentioned in applying the objective element, the Review Tribunal considers it convenient to deal with them in the sequence adopted by the Tribunal in its decision.
The Commission and the Complainant filed a Notice of Appeal. The Commission's grounds of appeal are as follows:
"1. That the Tribunal erred in law in respect of the allocation of onus of proof as between the parties with respect to the bona fide justification defence;

2. That the Tribunal erred in law in respect of the evidence which is required in order to establish a bona fide justification;

3. That the Tribunal erred in law in respect of the risk assessment element of the bona fide justification;

4. That the Tribunal erred in fact and in law in respect of the efficient enforcement element of the bona fide justification;

5. That the Tribunal erred in fact and in law in respect the good faith and valid reason elements of the subjective test of the bona fide justification."

The grounds of appeal in the Complainant's Notice of Appeal where they differ from the Commission's are as follows:
"(i) that the Tribunal erred in law in respect of the interpretation of the bona fide justification requirements regarding the Subjective and Objective tests;

(ii) (See item 2. above);

(iii) that the Tribunal erred in its application of the law to the evidence before the Tribunal;

(iv) that the Tribunal and Counsel for the Respondent erred in law and/or against Conflict of Interest guidelines, when they failed to reveal, at the beginning of the Hearing, that the Tribunal Chairman was her former law professor at the University of Victoria, a fact which could be or be perceived to be a Conflict of Interest;

(v) that the Tribunal erred in law by subsequently not allowing cross-examination on documents entered as exhibits, as it previously had stated it would;

(vi) that the Tribunal erred in common fairness by leaving out material punch lines and paragraphs, while quoting from Health Protection Branch memoranda and/or documents."

Item (ii) above is a duplication of item 2. of the Commission's grounds of appeal and item (iv) was disposed of under Preliminary Matters in this Review Tribunal's decision. The Review Tribunal does not impugn the formulation or reformulation of the principles contained in the cases which the Tribunal referred to.

On the other hand the application of those tests, the burden of proof, the assumptions and the quality of the evidence in support of the Tribunal's findings are the issues on this appeal and must therefore be addressed.

STANDARD OF REVIEW

The appointment of a Review Tribunal from the decision of a Tribunal with fewer than three members is provided for in Section 55 of the Canadian Human Rights Act. Under Section 56, subsections 2, 3, 4 and 5 the powers of the Review Tribunal are described as follows:
"Constitution
and powers

(2) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the powers of, a Tribunal appointed pursuant to section 49, and subsection 49(4) applies in respect of members of a Review Tribunal.

Grounds for appeal

(3) An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

Hearing of appeal

(4) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, admit additional evidence or testimony.

Disposition of appeal

(5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.
R.S., 1985, c. H-6, s. 56; R.S., 1985, c. 31 (1st Supp.), s. 67."

Prior to the enactment of the present Section 56 of the Canadian Human Rights Act in 1985, the section describing the powers of the Review Tribunal were to be found in Section 42.1, subsection (6) of the previous provision which reads as follows:
"(6) A Review Tribunal may dispose of an appeal under this section by

(a) dismissing it; or

(b) allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed from should have rendered or made."

Although couched in slightly different language, subsection 56(5) of the current Act and subsection 42.1(6) of the previous enactment, convey to us the same meaning.
Counsel for the Commission argued for a broad application of the powers of the Review Tribunal pursuant to Section 56 and in particular to subsection (5).
She referred to the decision of a Review Tribunal in Butterill et al v. VIA Rail Canada Inc. (1980) 1 C.H.R.R. D/233, in which a ruling was made that Review Tribunals have a broad discretionary power which allows them to substitute their own opinion for that of the original Tribunal.
Although that particular ruling was reversed on appeal, Thurlow, C.J. upheld the power of a Review Tribunal to reverse an original Tribunal on the facts when the same matter went before the Federal Court of Appeal in Butterill et al v. VIA Rail Canada Inc. (1982) 3 C.H.R.R. D/1043, at D/1044-45, as follows:
". . . in any event, having regard to para. 42.1 (6)(b) of the Act, I do not think it is fairly arguable that the Review Tribunal is not empowered to substitute its judgment for that of the Human Rights Tribunal."

At D/1046, he held that:
"It was for the Review Tribunal to deal with these issues on such evidence as there was in the record of the Human Rights Tribunal and such further evidence as they might admit."

"It has become "trite law" that the underlying spirit of the Human Rights legislation requires a broad and liberal interpretation. Review Tribunals have been given the powers to hear additional viva voce evidence and, where appropriate, to render the decision, to make the order, which it feels the original Tribunal should have rendered or made." (emphasis added)

However, the Butterill decision is not the last word from Chief Justice Thurlow, in the light of the decision in Brennan v. The Queen [1984] 2 F.C. 799 (F.C.A.) where he addressed the Review Tribunal's powers under Section 42.1, and stated as follows:
"In the present instance no additional evidence was received.

It will be observed from the passage I have cited that the substance of what the Review Tribunal appears to have done is to reverse the inference of fact drawn by the Human Rights Tribunal that Mrs. Robichaud's participation in the sexual encounters had been with her consent and to substitute a finding that such participation was at least to some extent coerced. That is a finding which, as it appears to me, was open on the evidence and one that it was within the power of the Review Tribunal to make. It is no doubt true that in a situation of this kind where no evidence in

addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well-known principles adopted and applied in Stein et al. v. The Ship "Kathy K" [1976] R.S.C.R. 802, 62 D.L.R. (3d) 1, accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage of assessing credibility which he had in having seen and heard the witnesses. But, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal." (emphasis added)

Since there was no new evidence in the Brennan case, one might conclude that the Review Tribunal can only substitute its findings of fact for that of a Tribunal of the first instance where that Tribunal committed a palpable or manifest error in its factual assessment.

In Cashin v. Canadian Broadcasting Corporation [1988] 3 F.C. 494, MacGuigan J.A. cited the reasoning of Thurlow, C.J. in Brennan and made the following statement:

"The first respondent argued that, whether the Review Tribunal heard additional evidence or not, its power to render the decision "that, in its opinion, the Tribunal appealed from should have rendered" enabled it effectively to conduct a hearing de novo. However, in addition to the authority of the Robichaud case, such an interpretation should not, it seems to me, be given to section 42.1 unless it is the clear intention of Parliament, since the bias of the law runs strongly in favour of fact-finding by the tribunal which heard the witnesses. Parliament's intention, as I read it, appears in fact to be that the hearing should be treated as de novo only if the Review Tribunal receives additional evidence or testimony. Otherwise, it should be bound by the Kathy K principle.

The findings of the adjudicator must therefore stand unless she committed some palpable and overriding error."

Without referring directly to Cashin, a differently constituted panel of the Federal Court of Appeal made a similar pronouncement in Canada (Attorney General) v. Mongrain [1992] 1 F.C. 472:

"It is correct to state that the powers of a review tribunal established under the Canadian Human Rights Act are analogous to those of a court of appeal in the ordinary judicial hierarchy. Accordingly, the Attorney General is correct in stating that the review tribunal could only intervene if there were an error of law or manifest error in assessing the facts."

There are other authorities which take a similar stance, and there is a helpful summary of the relevant law in Heincke v. Brownell (1992) 4 Admin. L.R,. (2d) 212 (Ont. Div. Ct.), which sets out the scope of a review of a Board of Inquiry under s. 41 the Ontario Human Rights Code, S.O. 1981, c.53.

Nonetheless, the law relating to the powers of an appellate body on a review of a decision by an original Tribunal has been complicated by the decision of the Supreme Court of Canada in University of Alberta v. Alberta (Human Rights Comm.) (1992) 17 C.H.R.R. D/87, which considered the scope of an appeal to the Alberta Court of Appeal from a decision of the Alberta Human Rights Commission under section 33(2) of the Individual Rights Protection Act, S.A. 1972, c.2. The provision in question merely allowed an appeal on fact or mixed fact and law with leave of a judge of the Court of Queen's Bench. At D/99, Cory J., for the majority, held as follows:

"On a plain reading of the IRPA, it is clear that the legislature specifically intended that appellate courts should examine the evidence anew and if deemed appropriate, make their own findings of fact. Under this Act, no particular deference is owed by the Court of Appeal to the findings of the initial trier of fact...

[29] in support of this position, I would note that the provision for appeal in the IRPA is similar to that in the Ontario Human Rights Code (formerly R.S.O. 1970, c. 318) which this court considered in Etobicoke, supra. The statutory basis for an appeal from an Ontario Board of Inquiry is found in s. 42(3) of the Code, R.S.O. 1990, c. H.19. It provides for an appeal on any question of law or fact and states that the Court may substitute its opinion for the Board's. In Etobicoke, McIntyre J. held that this section (then s. 14d(4) granted an appellate court broader powers to review findings of the trier of fact than exist at common law. The wording of s. 42(3) is more explicit than that found in s. 33(2) of the IRPA. However, the import of the two sections must be the same, as the right to an appeal on questions of fact would be meaningless if the appellate court were not empowered to substitute its own opinion for that of the Board." (emphasis added)

Since s. 56(3) of the Canadian Human Rights Act permits an appeal on "any question" of fact, the ruling in the University of Alberta case would support the view that a Review Tribunal is entitled to substitute its opinion on the facts for the original Tribunal. This does not necessarily detract from the principle that a Review Tribunal should always bear in mind that the original Tribunal had the opportunity to observe the witnesses and gauge their credibility.

Cory J. recognizes that a tribunal may be entitled to some form of curial deference in recognition of its "specialized expertise" in a particular field. One of the oddities of the situation, perhaps, is that this appears to militate in favour of extending broad powers of review to a Review Tribunal, since it shares the expertise of the original Tribunal and has the benefit of the deliberations of two additional members.

The decision of the Federal Court of Appeal in Canada (CHRC) v. Canada (Canadian Armed Forces) (Bouchard) (1993) 152 N.R. 316, is also of interest in this context. There, the Canadian Human Rights Commission appealed a decision of the Review Tribunal in which it was claimed:
"(1) the Review Tribunal exceeded its jurisdiction by intervening in the assessment of the evidence made by the original Tribunal, since the original Tribunal had committed no manifest error, and

(2) the Review Tribunal erred in law by applying the medical standards of the Canadian Armed Forces without considering the question of whether they constituted a genuine defence of bona fide occupational requirement."

In that case the Court held that the efforts of the Commission in challenging the decision of the Review Tribunal were not well founded. It stated as follows:
"The review tribunal was correct to criticize the original tribunal for not having taken into account evidence which was not tainted by any ambiguity . . ."
And further that:
"The review tribunal was also correct to criticize the original tribunal for having incorrectly attributed a dominant position to the obesity factor . . ."
And then concluded as follows:

"We therefore cannot say that the review tribunal exceeded its jurisdiction, or committed an error of law which could justify our intervention."

Finally, in Canada (Attorney General) v. Lambie (23 December 1996), Ottawa T-2250-95 (F.C.T.D.), Nadon J. when interpreting the powers of a Review Tribunal under the present language of Section 56 (5) of the Act and quoting from Mr. Justice MacGuigan's comments in the Cashin case states as follows:
"[para 15] Where, as here, the Review Tribunal hears additional evidence, it must assess that evidence in the light of the overall evidence which necessarily includes the evidence adduced before the First Tribunal. It goes without saying that because the Review Tribunal heard evidence which was not before the First Tribunal it was entitled to take a view of the facts which differed from that of the First Tribunal."

With regard to a principle or principles which must govern the Review Tribunal it appears that:
1. The Review Tribunal must accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage of assessing credibility which it had in having seen and heard the witnesses;
2. The Review Tribunal must address the question of whether there is an error in the original Tribunal's conclusions as to the law and/or a manifest error in its assessment of the facts; and
3. If new evidence is presented to the Review Tribunal it must assess that evidence in the light of the overall evidence which necessarily includes the evidence adduced before the First Tribunal.

In conclusion, it may be helpful to refer again and to emphasize the comments of Mr. Justice Thurlow in the Brennan case, supra, in which he refers to The Ship "Kathy K" which were as follows:
"...but, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal."

In a circumstance where a Review Tribunal finds a manifest or palpable error in the original Tribunal's view of the facts, there seems no reason to agonize over the issue whether an error of a lesser magnitude is sufficient to meet the standard of review under the Act.

GROUNDS OF APPEAL

The grounds of appeal may be restated in briefer form as follows:
The Tribunal erred in law and in fact with regard to:
Ground 1. The onus of proof;
Ground 2. The quality and weight of the evidence;
Ground 3. The risk assessment element of the objective test for bona fide justification i.e. low risk policy;
Ground 4. Efficient enforcement element, for the objective test for bona fide justification, in that it found (a) there was equal enforcement between importers including Chinese ethnic importers

and (b) that the difference in enforcement was not the result of race or ethnic origin; and Ground 5. The Tribunal found the Respondent acted in good faith and for valid reasons.

Grounds 3 and 4 refer to the objective test and the fifth ground refers to the subjective test.

With respect to the objective test the Tribunal summarized its analysis of the evidence under the following headings:

(a) Economical and Efficient Enforcement of the Act.

(1) Deployment of inspection resources primarily at the manufacturing and importation points in the distribution chain;

(2) Product risk assessment.

(b) Protection of the Safety of the General Public.

(c) Conclusion on the Objective Test.

Ground 1: Onus of proof

The Tribunal at p. 41 found that the assessment of risk was based on assumptions. Quoting from its Decision commencing from the bottom of p. 40 and over to p. 41 which reads:

"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 1980's Mr. Riou testified (transcript p. 1220) that the perception of the Respondent was that there was little flow of herbal products out of the Chinese ethnic communities." (emphasis added)

The Tribunal went further in its comments by acknowledging there was no empirical data to support the assumptions other than the fact very few complaints had been filed from within the ethnic Chinese communities in regard to violations of the Act.

Notwithstanding the assumptions and perceptions vis-à-vis the ethnic Chinese community and the nature of the herbal product imported and sold in that community (see the evidence of Mr. Riou at pps. 1111 to 1124 inclusive) and the lack of empirical data above referred to, the Tribunal states at p. 41 and we quote:

"...Nevertheless, there is no evidence before the Tribunal which would suggest that the assumptions were unwarranted." (emphasis added)

These comments by the Tribunal appear in its analysis of the evidence under item (ii) namely, product risk assessment in which the Tribunal sets forth the four classes of risk contained in Operational Policy Directive 86-0-1 (Exhibit R-10, Tab 7) which appear at pps. 38 to 40 inclusive of its Decision. There is no necessity to repeat the classification of risk or the compliance strategies contained in the Directive except to observe that there is no written policy to support the practice followed by HPB of concentrating its resources at the import level, nor in its practice of assigning a low level of risk to ethnic Chinese herbal products.

The Tribunal concluded at the top of p. 42 as follows:
"...The lack of empirical evidence to support some of the assumptions made by the Respondent's officials in making its risk assessment does not detract from the bona fides of the risk assessment."

It should be noted that this conclusion based on the bona fides of the risk assessment is more properly part of the subjective test.
In that regard we refer to Canada (Attorney General) v. Rosin and Canadian Human Rights Commission (1992) 16 CH.R.R. D/441 (F.C.A.), which is a case where Mr. Rosin complained he had been denied a public service and discriminated against with respect to employment because of a disability.
On appeal from a Human Rights Tribunal the Court held that Mr. Rosin was denied a public service and discriminated against when he was dismissed from participating in a summer course in parachuting as a result of a monocular vision defect, (a visual problem in one eye). In addition the Court held that his participation in the course constituted employment within the meaning of the Canadian Human Rights Act. It was held that:
". . . it might be concluded that the two phrases - ‘ bona fide occupational requirement' (as in Section 15(a)) and ‘ bona fide justification' (as in Section 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 a prima facie discrimination, therefore, are matters of style rather than of substance." (emphasis added)

At paragraph [33] the court commented on the onus of proof and referred to Central Alberta Dairy Pool:
"The onus is on the employer to establish that the rule or standard is a BFOR. It is not enough to rely on assumptions and so-called common sense: to prove the need for the discriminatory rule convincing evidence and, if necessary, expert evidence is required to establish this on the balance of probabilities. Without that requirement, the protection afforded by human rights legislation would be hollow indeed. Hence, it is necessary, in order to justify prima facie direct discrimination to demonstrate that it was done in good faith and that it was ‘ reasonably necessary to do so' which is both a subjective and objective test (see Central Alberta Dairy Pool [1990] 2 S.C.C. 489)"

In our opinion therefore, it is not correct to hold, as did the Tribunal, that once a prima facie case of discrimination is made out, a defence of bona fide justification based on perceptions and assumptions satisfies the onus of proof. The onus remains throughout with the party which is attempting to establish it, i.e. the Respondent. In order to satisfy that onus, there must be a sufficiency of evidence, based on something more than impressions garnered from undocumented observations, perceptions and assumptions, in the absence of any studies or hard empirical data on which to base those impressions. The weight and the quality of the evidence will be addressed under the next topic.
In the opinion of the Review Tribunal, the statement by the original Tribunal that there was no evidence to suggest the assumptions were unwarranted, begs the question and is simply wrong in law. The assumptions were unable to provide a factual basis on which the Tribunal was entitled to make its decision.
As counsel for the Commission aptly put it, this effectively transferred the onus of establishing a

BFJ from the Respondent to the Complainant. This was a fundamental error of law. In this case the burden of proof remains throughout with the Respondent who asserts there is a bona fide justification for its discriminatory acts. This is variously described as the legal burden or the "tie breaker".

In general, according to Phison on Evidence, 14th ed, (London Sweet & Maxwell, 1990) par. 4-10(b) et seq. the rule which applies is "he who invokes the aid of the law should be the first to prove his case" It follows that the party who relies on the bona fide justification must bear the burden of establishing it.

This rule is founded on considerations of good sense and as well, the general observation that, in the nature of things, a negative is more difficult to establish than an affirmative. See also Robins v. National Trust Company, [1927] A.C. 515, [1927] 2 D.L.R. 97, [1927] 1 W.W.R. 692 (P.C.).

Subsection (g) of Section 15 of the Canadian Human Rights Act makes an exception to the prohibition against discriminatory practices if "...there is a bona fide justification for that denial or differentiation".

In Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202, McIntyre, J. enunciated the two branches of the tests previously referred to. In that case the learned Judge considered the Ontario Human Rights Code and stated as follows:

". . . non-discrimination is the rule of general application and discrimination, where it is permitted, is the exception."

Justice McIntyre placed the burden of proof squarely on the party which invokes the BFOR exception as a defence of its discriminatory practices.

Ontario Human Rights Commission v. Simpson-Sears Ltd. [1985] 2 S.C.R. 536 is a case in which the Court's decision arose out of an appeal by the Complainant against the employer alleging discrimination in the conditions of employment. The Board of Inquiry dismissed the complaint by concluding as follows:

"Taking into account all of the circumstances of the case and the entire context of the Ontario Human Rights Code, I have concluded that the Commission has not satisfied its onus of establishing that the Respondent acted unreasonably in the steps which it took to accommodate the Complainant after learning that the general condition of employment was incompatible with her religious observance."

In that case there was an insufficiency of evidence to establish a bona fide justification. When faced with this insufficiency, Professor Ratushny, who sat as the Board of Inquiry, decided to put the onus back on the Complainant and the Commission. This was the error to which the Supreme Court was referring when it said:

"Professor Ratushny recognized this inadequacy but reached his conclusion on the basis that the Commission had not discharged the onus upon it of proving inadequate accommodation. He considered the question of onus of proof and discussed it at some length. He concluded that the Commission, which had the conduct of proceedings at the outset, had the burden of showing a case of prima facie discrimination, in this case out of discriminatory effect. He then said that once the discriminatory effect had been established an onus of proof would pass to the Respondent employer.

. . . He was reluctant, however to impose a strict burden of proof upon the employer, reasoning that the Ontario Human Rights Code itself did not impose any duty of accommodation or burden of proof."

In our view, this is precisely the error that the Tribunal has made in this case by suggesting that there was no evidence before it "... which would suggest that the assumptions were unwarranted".

The Supreme Court concluded in the Simpson-Sears case at the top of p. 558 as follows:

"It will be seen that Professor Ratushny departed from the rule respecting the onus of proof expressed in Etobicoke. It was held in that case that at least in direct discrimination cases, where the Complainant has shown a prima facie case of discrimination on a prohibited ground, the onus falls on the employer to justify, if he can, the discriminatory rule on a balance of probabilities."

The Court found that the burden of proof should also apply in cases of adverse effect discrimination when it stated as follows:

". . . The assignment of a burden of proof to one party or the other is an essential element, the burden need not in all cases be heavy - it will vary with particular cases - and it may not apply to one party on all issues in the cases; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to assure a clear result in any judicial proceeding, to have available as a ‘ tie-breaker' concept of the onus of proof. ... Therefore there must be a clearly recognized and clearly assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-set rules in civil cases, the Plaintiff bears the burden. He who alleges must prove."

The Court, after applying the above rule in cases of adverse effect discrimination, continues at the top of p. 559 where His Lordship says:

"It seems evident to me that in this kind of case the onus should again rest on the employer for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence.... In my view, the Board of Inquiry was in error in fixing the Commission with the burden of proof."

Other than the Rosin case, supra, there do not appear to be any Court rulings with regard to BFJ under Section 15(g) of the Act. The Simpson-Sears case, the Etobicoke case and the Central Alberta Dairy Pool case all arise out of employment contracts.

There are, however, numerous references in previous Tribunal decisions to the effect that the Respondent bears the onus of proving a BFJ under Section 15(g).

In Lawrence T.D. 2/97, at issue was discrimination in the enforcement of the Custom rules and regulations. This was thus a "services" case. The Tribunal noted:

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

In MacNutt T.D. 14/95, the service being provided was social assistance benefits. The Tribunal found:

"The Tribunal concludes therefore that the Complainants have made out a prima facie case of discrimination and the burden now shifts to the Respondent to show justification for its treatment of the Complainants."

In Raphaël T.D. 10/95, at issue was the furnishment of inter alia hunting and building permits as well as access to language courses. The Tribunal proceeded as follows:
"The Tribunal will first analyse the facts proved on each aspect of the complaints to determine whether the prima facie evidence of a discriminatory practice has been established. Second, it will examine whether the respondent has, in those cases where it will be necessary to do so, discharged the onus on it to prove that there was bona fide justification for the alleged discriminatory practice."

In Thiffault T.D. 11/89, the evidentiary obligation was expressed as follows in the context of providing air transportation services:
"Since I have come to the conclusion that the complainant was a victim of discrimination, by virtue of the Etobicoke decision [1982], 1 SCR 202, the burden of proof has now been shifted to the respondent, Québecair-Air Québec, as the organization providing the service."

Other cases which deal with the burden of proof are Canadian Paraplegics Association 2/92, Naqvi T.D. 2/93 and McKenna T.D. 18/93, reversed on other grounds.
The Review Tribunal therefore concludes that the burden in law should have remained with the Respondent. The onus of proof lay upon the Respondent to establish that its risk assessment practice or policy of low risk as it pertained to ethnic Chinese products was reasonably necessary to assure the efficient and economical enforcement of the legislation and the protection of the general public.
In respect to the onus of proof, the Review Tribunal finds that the original Tribunal erred in law in respect of the allocation of onus of proof as between the parties with respect to the defence of bona fide justification.

Ground 2: Quality and Weight of the Evidence

Counsel for the Commission did not suggest that there was no evidence to support the Respondent's defence of bona fide justification but that the quality and sufficiency of that evidence was not such that it could support the exception of bona fide justification pursuant to Section 15(g) of the Canadian Human Rights Act.

In submitting that the original Tribunal erred in law by accepting that a BFJ had been established on the basis of perceptions and assumptions, counsel for the Commission referred in particular to the risk assessment policy or practice of HPB where the Tribunal said that there was no evidence which would suggest that the assumptions were unwarranted.

The Tribunal's findings with regard to risk assessment appear at p. 40 where it says:

"This Tribunal is satisfied on a balance of probabilities that the considerations articulated in the classes of risk in Operational Policy Directive 860-1 (Exhibit R-10, Tab 7) 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."

Those classes of risk and compliance strategies are not challenged by the Commission or the Complainant. What is challenged is the application of the compliance strategies, which the Respondent engaged in, based on undocumented policies or practices of low risk assessment apparently under the aegis of the Operational Policy Directive.

In addition to the classification of risks, the Operational Policy Directive deals with policy in general. Item (b) at the top of p. 2 reads as follows:

"When a product is one of a class and which, supported by advertising, literature, folklore or public perception, is considered to be in violation, all like products must be treated in the same manner."

(emphasis added)

In theory then HPB's risk assessment policy must be product oriented and the classes of risk and the compliance strategies must then all be product based and treated in the same manner.

One assumes that the practice coincides with the theory. In fact, however, the low risk policy was user oriented. A prime example of that is Dong Quai which was not only assessed on the basis of the user but also on the basis of groups defined by ethnicity i.e. the Chinese ethnic community. In that regard reference may be had to the WRVS Report (see p. 5 Exhibit HR-1, Vol. 1, Tab 42); to the "Refusal Criteria for Product Seeking Entry into Canada", item 8, drugs containing ‘ Western ingredients' (see Exhibit R-15 and attached list); to the "Regulation of Traditional Chinese Herbal Medicines" contained in DEHA of January 24th, 1985 (see Exhibit HR-1, Vol. 1, Tab 21); to the "Quick Distinction Profile" in which importers are classified as either "ethnic H&B importers" or "Health Food (H&B) importers". Of course we also know there was discrimination based on ethnicity when it came to enforcement.

Dong Quai is an ingredient in 70% of Chinese herbal products. From the evidence it is apparent that neither the Field Inspectors (see the testimony of Inspector Sloboda at Vol. 12, pps. 1725-26) or the Drug Evaluation Division of HPB in Ottawa possess any real or scientifically based knowledge of this product. Prior to 1989 it was considered to be a drug, see for example the memo from R.J. Mulherin dated December 12th, 1983 entitled ‘ Extracts of Dong Quai" in which he refers to Dong Quai as having no known use except as a medicinal agent, which he says has always been considered a New Drug even in the absence of overt claims. This is to be

found in Exhibit HR-1, Vol. 1, Tab 5.

For unexplained reasons it was reclassified in June 1989 as a "food" by HPB. This was the first official and public notification that this had occurred. See Exhibit HR-1, Vol. 2 at Tab 128. Prior to the reclassification of Dong Quai as a "food" there was a letter from Dr. Armstrong to Director Ferrier dated March 21st, 1989 in which he states as follows:

"Determining the appropriate regulatory status of Dong Quai involves several problem areas:

1. The numerous Schedule "A" claims which are put forward in Chinese literature, product labels and package inserts for which there is literally no supportive scientific literature." (emphasis added)

In spite of his uncertainty Dr. Armstrong concludes that Dong Quai may be accepted as a "food" in the absence of drug claims. (See Exhibit HR-1, Vol. 2 at Tab 125)

Although the Tribunal itself refers to "assumptions and perceptions" by Mr. Riou and the observations of inspectors in the field, it is not necessary to review in detail their testimony. Nonetheless, it might be useful at this point to cite some examples of assumptions for which no empirical data or studies were presented and which in some cases, were in conflict with the situation as it developed in the 1970's and 80's. The following does not purport to be an exhaustive list of those assumptions and perceptions:

1. That the customers for ethnic Chinese herbal products were mainly from that community. However in increasing numbers since the 1980's these products were becoming available to non-ethnic Chinese customers (see for example the memo from J.M. Forbes dated January 24th, 1985 re "Regulation of Chinese Herbal Medicines" at p. 2);

2. A perceived familiarity of consumers, in an insular Chinese community, with Chinese herbal products, permitting HPB to assign a low level of risk to those products based on unsubstantiated assumptions.

The perception of a ghetto-like enclave within the traditional "China Town" is invalid even to a casual observer.

Nonetheless, the more important feature of the case is the fact that HPB was never in a position to gauge the familiarity of the Asian community with Chinese herbal products and made no serious effort to do so;

3. That the sale of herbal products in the Chinese community presented low risks to health due to the tendency for these products to be perceived as ‘ good for you' (i.e. for ‘ wellness') rather than as a cure for disease.

This memo by Mr. Riou dated May 10th, 1990 (Exhibit C-29) was written in the face of an abundance of Schedule "A" claims referred to in the WRVS Report. In addition Mr. Riou himself testified from his own experiences to instances of contamination with lead poisoning in ethnic Chinese herbal products dating back to the mid-70's;

4. That the Health Protection Branch perceived the risks were greater with Western herbal products than with Chinese Asian herbal products. But see Project DDAB of February 13th, 1991 (Exhibit R-10, Tab 4) where it states "During the last year or so, several instances of poisoning from heavy metals in ethnic drug products have occurred in Canada." at p. 4. Compare this with the findings of the Western Region Visibility Strategy Report in which there are no "Schedule "A" claims by European importers who "exhibit a greater degree of compliance with good manufacturing practices";

5. That the quantities of ethnic Chinese importations were in small packages. Whereas, in fact,

those importations were packaged in containers. (See minutes of the meeting between the Vancouver Chinatown Merchants Association and representatives of the Government of Canada (Exhibit HR-4, pps. 5, 8 and 9)); and

6. The assumptions by Mr. Riou and by the Tribunal that ethnic Chinese retailers were not at all material times importers of herbal and botanical products, when in fact, they were in most cases both retailers and importers.

For our purposes the foregoing illustrates the quality and the weight of the evidence on which the Respondent relies in support of its defence of bona fide justification.

In relying exclusively on perceptions and opinions, the Respondent in this case is advancing unsubstantiated subjective information to meet an objective test. At its best, the information in the possession of the Respondent was highly casual and unscientific, and inherently unreliable.

Fundamental misconceptions colour the Tribunal's view of the evidence and manifests itself throughout its assessment of the Respondent's defence of bona fide justification. For example, following its "apples to oranges" comparison referred to earlier, the Tribunal at p. 36 states:

"...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."

These comparisons are all the more puzzling because the Tribunal itself, when considering the Respondent's discriminatory practices, quotes the WRVS Report at p. 7 as follows:

"Importers who are used to unregulated enterprise do not want to spend the money, time and effort to bring their products into compliance . . ." (emphasis added)

And at p. 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." (emphasis added)

And finally in the postscript from Inspector Sloboda to Helen Quesnel, dated February 8th, 1989, (Exhibit HR-1, Vol. 2, Tab 120) enclosing a list of ethnic products which had been refused entry in the period between April 1988 to November 22nd, 1988, there appears the following:

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

Counsel for the Commission referred to the cross-examination of Mr. Riou at Vol. 7 commencing at pps. 1105 to 1108 inclusive, in which he agrees he was aware of the conclusions of the WRVS Report and that Mr. Bader's complaints precipitated or were one of the causes of a study such as the WRVS Report when he observed as follows:

"That the industry, the industry that was evolving, as we saw, which included the herbal foods, herbal drugs and over the counter preparations, we did see a need to address that industry."

Asked whether there was a perceived need to study ethnic pockets and the sale of herbal products, as a result of the WRVS Report, Mr. Riou's answer was:
"We had less information on those specific issues than we had in other, more accessible areas."

So counsel for the Commission questioned the lack of knowledge with regard to the nature of products sold in the Chinese community and the lack of knowledge with regard to their distribution when HPB persisted in its low risk policy for the ethnic herbal community as late as 1994.
One would have thought that a low risk assessment policy would have had to be based on some factual data afforded by studies indicating a well organized and well regulated herbal trade. There were no such studies although Inspector Sloboda supported the recommendation contained in the WRVS Report at p. 9, item j "that there be further studies".
Mr. Riou is ambiguous in his testimony as to whether or not Schedule "A" claims present a serious risk to the general public (see Vol. 7, pps. 1139 to 1142) and so compare his testimony with that of Inspector Sloboda at Vol. 12, pps. 17-18, in which he states that Schedule "A" claims are indeed a serious risk albeit with some minor exceptions.
Further, with regard to the attitude of HPB towards Schedule "A" claims, there is the letter from Mr. Elliot, Director, General Field Operations to Mr. Dugas at R-1, Vol. 1, Tab 22 in which he states as follows:
"HPB has always viewed Schedule "A" claims for products as serious violations of the Food and Drugs Act. Field staff have had an opportunity for many years requesting them to deal severely with Schedule "A" violations."

With regard to distribution the WRVS Report in referring to ethnic Chinese retail merchants states as follows:
"By far the greatest number and degree of violations are with the Chinese community."

The Report in referring to the size of the ethnic community where the studies were done says:
"They have more stores, more products and more importers than any other group."

And Mr. Riou at Vol. 8, p. 1105 says that he was not aware of that.
Dr. Armstrong in a letter dated February 24th, 1989 to Mr. Bader and to be found in HR-1, Vol. 2, Tab 22 states as follows;
"An anecdotal and testimonial report from ‘ eminent Chinese herbalists down through the centuries' cannot be fully accepted in lieu of more modern scientific data."

And Mr. Riou in his testimony at Vol. 7, pps. 1143-45 agrees that:
". . . the risk assessment of a product or product situation is made on the basis of the science evidence we would use to assess that evidence."

However, there was no scientific evidence available to HPB at any stage as to the nature and properties of Dong Quai. The only evidence on the issue was provided by Dr. Armstrong, who quotes Dr. Varro Tyler, a respected scientist and author of textbooks on pharmacology. Dr. Tyler is quoted by Dr. Armstrong with regard to Dong Quai as follows:
"However, ...large doses of Coumarins are not without undesirable effects, and the Furocoumarins, such as Psoralen and Bergapten, are prone to cause photosensitization which

may result in a type of dermatitis in persons exposed to them. Yet recently, some investigators have concluded that these so-called Psoralens present sufficient risk to humans and that all unnecessary exposure to them should be avoided. For this reason, large amounts of a Coumarin-containing drug such as Dong Quai cannot be recommended."

Dr. Tyler's opinion is the only evidence of a scientific nature presented to the Tribunal. That opinion militates against the use of Dong Quai in large amounts.

Counsel for the Commission submitted that there is an onus on the government, in the public interests, to base its perceptions and assumptions, or to base its risk analysis with regard to the public health, on something more than the casual observations of its own persons in the field, or on unsubstantiated perceptions and assumptions.

Counsel quoted from Justice McIntyre in the Etobicoke case, at p.210 where he comments on the sufficiency and quality of the evidence before the Chairperson of the Board of Inquiry:
"While these are sound reasons for allowing a firefighter to retire at the age of 60, they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe."

This Review Tribunal refers again to Etobicoke, supra, quoting Justice McIntyre on the sufficiency and quality of the evidence before the Chairperson of the Board of Inquiry as follows:
"Professor Dunlop remarked that it was largely ‘ impressionistic'. He considered that something more was required to discharge the burden of proof and noted the insufficiency of general assertions and expressions of witnesses, some with long experience in firefighting, to the effect that firefighting was a ‘ young man's game'. He remarked upon the absence of any scientific evidence to support the employer's position and concluded against the employer, saying: (emphasis added)

"While these are sound reasons for allowing a firefighter to retire at the age of 60, they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe."

Further at p. 212 he says:
"It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty-five. . ."

The Review Tribunal did have some concerns as to whether observations by Field Inspectors should be disregarded. Although the observations of experienced Inspectors in the Field deserve respect, they do not provide the kind of evidence which is needed to rebut the prima facie case made out by the complainant, either in the form of scientific or first hand empirical testimony.

On the other hand there is a great deal of evidence that many of these products contained heavy metals and other harmful substances including certain Western prescription drugs.

Complaints by Mr. Bader were made both at the local and the national level which, taken with the WRVS Report and its implications, should have alerted the officials at both levels to the problem and the dangers to the general public.

Counsel for the Commission concluded her submissions on this topic by stating where a rule concentrating enforcement at points of importation is premised upon an assessment of risk, based

on insufficient knowledge, assumptions and perceptions, the validity of the rule depends on proof of a greater danger to the public safety, than would otherwise have been the case.

The Review Tribunal is not persuaded that the evidence supporting a low risk assessment policy for ethnic Chinese importers/retailers was of sufficient quality and weight to meet the requirements of a bona fide justification relied upon by the Respondent as a defence. What evidence there is was almost entirely "impressionistic" and, in our opinion, the Tribunal manifestly erred in basing its conclusions on this kind and quality of evidence.

Ground 3: Risk Assessment Element - i.e. low risk policy

Grounds 3 and 4 relate to the objective branch of the test enunciated by Justice McIntyre in Etobicoke. The Tribunal rephrased the test at p. 30 of its Decision as follows:

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

The Tribunal then related HPB's policy or practice 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."

Before embarking on its analysis the Tribunal prefaced its comments on the objective test by adopting 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 pps. 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 manoeuver."

And continuing on p. 41, she concludes:

"Only he who is charged with such public duty can determine how to utilize his resources."

The Tribunal then concluded that:

"It is not the function of this Tribunal to review the allocation of funds within a Department's overall budget."

With respect, this was not the issue. In our opinion the issue is the choices made within the overall "envelope of resources" available to the Respondent.

Apart from the practical difficulties in analysing the allocation of funds and the deployment of resources, an area almost exclusively and peculiarly within the knowledge and internal practices and policies of the Ministry, the only course open to a person wishing to challenge the allocation of resources is to evaluate those practices and policies from the perspective of the results achieved and in accordance with principles of fairness and equality embodied in the provisions of the Canadian Human Rights Act.

C.H.R.C. v. The Queen (1994) 22 C.H.R.R. D/40 (F.C.T.D.) is a case in which one of the issues was the paramountcy of the Canadian Human Rights Act. It was an appeal from a Tribunal for a judicial review of its decision and the Federal Court Trial Division per Cullen, J. quoted with

approval the decision of Canadian Paraplegic v. Canadian Paraplegic Association (1990) 13 C.H.R.R. D/568 in which the Federal Court of Appeal upheld the paramountcy of the Canadian Human Rights Act over all other legislation.

In the same case, i.e. C.H.R.C. v. The Queen, the Court adopts the "generous and purposive approach to the Act and combines that approach with the Supreme Court's statement in Kelso v. Canada [1981] 1 S.C.R. 199, namely:

"No one is challenging the general right of the government to allocate resources and manpower as it sees fit. But this right is not unlimited it must be exercised according to law. The government's right to allocate resources cannot override a statute such as the Canadian Human Rights Act." (emphasis added)

It is not the allocation of funds, but the choice, the selection of where a particular envelope of resources should go, which determines whether the policies and the practices are reasonably necessary in order to assure the efficient and economical enforcement of the Food and Drugs Act and regulations.

With regard to ground 4 of the appeal pertaining to the economical and efficient enforcement of the Act the initial Tribunal considered, with respect to the objective test, the following areas:

"(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."

Counsel for the Commission, as we understand her position, focussed on the unequal enforcement resulting from HPB's low risk assessment practice as between ethnic Chinese importers/retailers and Western importers at the importation level with regard to herbal and botanical products.

With regard to the risk assessment policy of HPB Commission Counsel referred to the cross-examination of Mr. Riou at Vol. 7 commencing at p. 1105 to 1108 inclusive. In his testimony he agrees that he was aware of the conclusions of the WRVS Report and that Mr. Bader's complaints precipitated or was one of the causes of a study such as the WRVS Report when he observed as follows:

"That the industry, the industry that was evolving, as we saw, which included the herbal foods, herbal drugs and over the counter preparations, we did see a need to address that industry."

She dealt with the objective test under grounds (3) and (4) of the Appeal by quoting from the Tribunal's finding at p. 36 that:

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

And she then impugned that finding in three areas which were as follows:

"(a) First, that the error would be in the finding of fact and law that there was equal enforcement between Chinese ethnic importers and Mr. Bader;

(b) That the Tribunal erred in law when it concluded that the differentiation in enforcement. . .was not as a consequence of the race or ethnic origin of the importer but rather the

differentiation between enforcement at the retail level compared to enforcement at ports of entry; and

(c) The Tribunal erred in fact and in law in finding that the use was objectively reasonable, in that it was product oriented."

The Complainant, on the other hand, disputed the limited resources of the Respondent which dictated surveillance at ports of entry rather than at the retail level. In that regard references may be had to the Tribunal's comments which are to be found at pps. 30 to 32 inclusive of its Decision.

Ground 4: Limited Resources

The Review Tribunal will deal first with the Complainant's submissions which, as we understand them, questions the alleged limited resources available to HPB in dealing with an ever increasing volume of importations and a geographical area encompassing ports of entry in British Columbia and Alberta.

This is an important subject inasmuch as according to Inspector Sloboda the "limited resources" underpins the policy of concentrating those resources at the import level.

The deployment of inspection resources at the manufacturing and importation points was supported by Mr. Riou who testified that the policy or practice of identifying non-compliant problems at the import level was more easily contained than at the retail level due to the multiplicity of retail outlets. Mr. Riou, however, as Director of Bureau Field Operations in Ottawa, must be taken to be aware of the WRVS Report and its implications. In his testimony, which on cross-examination was vague and unresponsive, he also makes the import/retail distinction which we have referred to earlier.

Mr. Riou also refers to "looking at the size of shipments" as being a factor in determining the workload of HPB. He states that it is very labour intensive to examine many, many small shipments (presumably by ethnic Chinese importers) as opposed to concentrating on larger shipments for Western importers.

The only evidence before the Tribunal as to the size of shipments is contained in the minutes of the meeting between the representatives of HPB, Canada Customs and the Vancouver Chinatown Merchants Association which took place on October 3rd, 1988. During that meeting there were frequent references by members of the Association to "container shipments" (see Exhibit HR-4).

The Tribunal described in some detail the procedures HPB followed in concentrating its resources at the import level which included reliance on the personnel of Canada Customs, who since 1979, had examined invoices voluntarily surrendered by the importer and which were marked "Health Protection Branch". These invoices so marked were forwarded to HPB's offices in Vancouver where, according to the testimony of Mr. Shelley a clerk, when available, would scrutinize and sort the documentation.

There was no evidence led as to what backup staff were employed by HPB other than the reference by Mr. Shelley. There was evidence however that on occasion, apart from the cooperation of Canada Customs, which was formalized in a memorandum dated September 7th, 1993 as Memorandum D 19-9-1 attached to Exhibit R-9, the Branch was also able to call for assistance from the Food Directorate

There is no question that the raids conducted in larger centres such as Vancouver, Winnipeg and Toronto brought immediate media attention to the problem and an angry reaction from the ethnic Chinese community. (See for example articles in the Vancouver Sun dated November 17th, 1988 entitled "Chinese Community Complains Business Hurt by Ban on Remedies" and an undated article in the same newspaper entitled "Chinatown Drug Raid" and similar articles in the Winnipeg Sun and the Toronto Star all contained in Exhibit R-1, Vol. 2, Tabs 55, 56, 57 and 58.)

With regard to surveillance at the manufacturing level, reference may be had to the testimony of Inspector Sloboda at pps. 1695-96 in Vol. 12 of the transcript in which he stated that the "good manufacturing practices" (as evidenced by DINS) and policies of HPB did not apply to Chinese herbal and botanical products. (See also his memo to Mr. Shelley of September 23rd, 1987 Exhibit R-1, Tab 36.)

As mentioned, the whole subject of limited resources is a difficult one to evaluate, since the information is not readily available to an outsider. The activity at the retail level by HPB

certainly stirred things up and may in some respects have been a more effective use of its resources than the practice of focussing its activities at the import level. It should be noted that Inspectors were seldom at points of entry and it is not clear from the evidence where intervention occurred in the distribution chain. If it occurred at all, one suspects that any intervention, vis-à-vis the ethnic Chinese imports of herbs and botanicals, would have been at the warehouse locations.

More recently, however, according to a letter dated June 25th, 1993 from Inspector Sloboda (Exhibit R-24 see item 3 at p. 2) a more effective method of surveillance has been implemented with regard to what he describes as "the real problem importers". This method makes use of computerized information transmitted to Customs at entry points.

According to the testimony of HPB officials, human resources available for inspection in the Western Region consisted of 3.5 person years. Although the number of personnel would have exceeded this figure it appears, when considering the number of ports of entry in the area which comprises both British Columbia and Alberta, that their human resources were probably stretched to the limit.

Whether or not concentrating surveillance at the import level while using the good offices of Canada Customs is the most effective deployment of HPB's resources is an open question. The Review Tribunal does not therefore take issue with the findings of the Tribunal in this respect.

The Review Tribunal is of the opinion the submissions by the Commission regarding (a) equal enforcement; (b) the differentiation of treatment; and that (c) the use was product oriented, need to be examined within the context of the alleged limited resources of HPB.

(a) Equal Enforcement

As previously mentioned in response to the original Tribunals findings at p. 36 that "Concentrating the deployment of its resources primarily at the manufacturing and importation points was an objectively reasonable use of the Respondent's enforcement resources", Commission Counsel does not question the deployment of those resources at the import level, per se, but instead, asserts that there was unequal enforcement at that level as between ethnic Chinese importers and Mr. Bader.

This assertion, it seems to us, implies a form of direct discrimination because the notion of equality is fundamental to the purpose of the Act. In that context, the issue is whether the unequal use or deployment of its resources by HPB at the enforcement level is reasonable.

Intent is not a governing factor in circumstances in which there is direct discrimination. See O'Malley v. Simpson Sears [1985] 2 C.R. per McIntyre J. at 549-550 which was followed in Robichaud v. Canada Treasury Board 2 [1987] 2 S.C.R. 84. But, the evidentiary burden, it would seem, shifts to the party which asserts there was unequal enforcement in this case.

The Tribunal at p. 42 of its Decision relies on the effect of a memo from Director General Elliot dated January 23rd, 1989 (Exhibit HR-1, Vol. 2, Tab 117) supported by two bound volumes of "Reports to Customs" (Exhibits R-2 and R-17) to demonstrate an ongoing policy by HPB. The memo in question reads as follows:

"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."

This memo also contains the following comment:

"In particular, the herb Dong Quai's status is under a review as a food or a drug and ensuing enforcement activity is under close scrutiny."

This herb represented a long-standing bone of contention between HPB and the Complainant.

The time frame with respect to Exhibit R-17 "Reports to Customs" with regard to ethnic Chinese imports does not commence until May 10th, 1988, approximately 10 years after the interventions by HPB in respect to importations by the Complainant, Mr. Bader.

The Tribunal described the Elliot memo as an ongoing review of the Respondent's policy with respect to herbs and botanicals. It is evident however that the "Review" which is dated January 23rd, 1989, fails to encompass that period from 1978 to May 1988, during which only the Complainant's company was subject to interventions by HPB according to Exhibit R-2, the Don Bosco Reports.

It is useful to refer to the testimony in chief of Mr. Shelley at Vol. 10, p. 1447 to p. 1448 when he was testifying with regard to the Customs Entry Form 60.10 as he was perusing Exhibit R-17 ("Reports to Customs, ' Ethnic'/Traditional"). At the bottom of p. 1447 counsel for the Respondent asked the following questions:

"And was this document, and if you could flip through the whole of the book, are these recommendations to refuse entry in relation to what we'll call Chinese or ethnic importers of ethnic products?"

And Mr. Shelley's answer is:

"Okay. The way this very last one is constructed, there was a second page attached to it which represents the list of the products that are the subject of the refusal. And as far as I can tell, strictly from looking at the names, it's a 15 item list, 13 of those 15 would be ethnic or traditional Chinese medicines." (emphasis added)

And then this question:

"And are these documents similar to the documents that are combined in R-2 . . ."

(R-2 is a Reports to Customs concerning Mr. Bader) and the question was:

". . . which appear to be Reports to Customs in relation to Mr. Bader's company, Don Bosco Agencies Ltd.?

And the answer is:

"The only comment I would make --- I mean it's the same form, Mr. Chair, but in looking at some of the Chinese ones, the lists of products are significantly larger than they are on relative documents in R-2." (emphasis added)

Therefore the only overlapping years between enforcement as it pertained to Don Bosco Agencies Ltd. and enforcement as it pertained to ethnic Chinese importers commences in 1989.

It is noteworthy also that by far the greatest number of infractions in the foreshortened period between May 1988 and May of 1994 was with respect to ethnic Chinese importations (see for example the testimony of Chief Inspector Shelley at Vol. 10, pps. 1447 to 1448).

Following Director General Elliot's memo of January 23rd, 1989 there was a lessening of refusals for so-called technical reasons such as the absence of DINS. Reference to Exhibit R-17, however, reveals many serious Schedule "A" violations such as labelling "likely to create an erroneous impression" and misleading information as to the product's curative properties. Some products refused entry contained substances such as chloroform and codeine.

Mr. Bader testified that enforcement by HPB appeared to coincide with his own pressure on officials of HPB. When he went personally to check enforcement reports he recognized increased enforcement at the import level commencing in March or April of 1988 and continuing through until November of that same year.

Incidentally what appears to have been a period of heightened activity commenced at about the same time, March 9th, 1988, Mr. Bader filed his complaint under the Canadian Human Rights

Act.

Prior to Mr. Elliot's memo of January 23rd, 1989 the policy and practice of HPB can be examined in the light of memos and correspondence obtained through the Access to Information Act and the Review Tribunal will quote from these where they are relevant and appropriate as follows:

1983, October 25th

Memo from Inspector Ansari regarding importation of Dong Quai by Don Bosco Agencies Ltd. and his concern with non-uniform enforcement of the regulations which reads as follows:
"We are also concerned with the many brands (no label claims) 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. You are likely also aware of the prospect of challenge in Federal Court of this particular importer as to the validity of [that particular regulation]. We thus must ensure that we can substantiate a new drug decision to the satisfaction of the court - given the real likelihood of this importer proceeding with his challenge." (See Exhibit HR-1, Vol. 1, Tab 4) (emphasis added)

1984, December 3rd

Memo from Inspector Sloboda to Mr. Krause re "complaints by David Bader, see p. 2 of HR-1, Vol. 1, Tab 19 as follows:
"My concerns are that Mr. Bader can argue quite persuasively and cite specific examples where HPB enforcement actions are not broadly uniform. The most persuasive argument Mr. Bader advances is that HPB devotes more attention to his group of importers while more serious violations are evident in Chinatown. 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." (emphasis added)

1988, October

There are the minutes of the meeting between HPB and the Vancouver Chinese Merchants Association (HR-4 at p. 38) where in answer to questions from members of the Association, Mr. Sloboda commented as follows:

"I don't think you could show me any instance where we have taken action at Customs to interfere with any of these products."

1989, February

In a postscript to his letter to Ms. Helen Quesnel, Inspector Sloboda comments as follows:
"At present we have completely ‘ backed off' import surveillance over Chinese importations further to J.R. Elliot's policy statement of January 23rd/89." (emphasis added)

1991, February 13th

Project DDAB "Surveillance of Drugs for Self-Medication" (see R-10 at p. 8). In the "Background" of this Report there appears this comment:
"The inspection portion of this project has two main aims. The first is the Surveillance of

Manufacturers, Importers, and Distributors of Herb/Botanical/Natural Source/Fringe Drug Products regarding hazardous ingredients . . ."

It further states at p. 8 as follows:
"Historically, the Branch has maintained a hands-off approach to ethnic stores, addressing compliance action predominately toward the 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. A strategy based upon the gradual introduction of a uniform national approach is required to ensure that:

- the same type of drug is subject to the same compliance approach no matter where it is sold. . .; and

- priority for action is based on health hazard."

In the last paragraph of that page the following appears:
"Because of the sensitivity of the issues involved with this module, compliance and enforcement activity in the ethnic sector were minimal in 1988-90."
(The emphasis in the foregoing excerpts is added.)
It is nonetheless evident that this concern did not manifest itself in any willingness to treat ethnic Chinese herbal products in the same way as the products which Don Bosco Agencies Ltd attempted to import. In other words, there did not exist appropriate and equal treatment of ethnic Chinese products as compared to Don Bosco Agencies Ltd. There is also the list Mr. Bader compiled of visits to ethnic Chinese retail stores for example Kiu Shun Trading Co. which is shown on Exhibit HR-1, Tab. 21 at Appendix "I" as being a major Chinese importer.
We do not think it necessary to refer to Commission Counsel's references to the concept of equality as that concept has been defined by philosophers and by the Courts. We simply point out that Mr. Bader through Don Bosco Agencies Ltd., was a small business in Inspector Sloboda's view and that the size of its importations were much less significant than the container size shipments of the ethnic Chinese importers. Yet he was subject to a much greater degree of surveillance and interventions by the officials of HPB than his ethnic Chinese counterparts prior to 1988.
Mr. Bader testified that increased enforcement by HPB with regard to ethnic Chinese importers appears to coincide with his own complaints to its officials about the absence of a "level playing field" and with the lodging of his complaint under the Canadian Human Rights Act in March of 1988.
In regard to a "level playing field" we refer to the Report of the Expert Advisory Committee on Herbs and Botanicals dated January 19th, 1986 (Exhibit R-7, Tab 2) which comments under the Title "Enforcement and Compliance" as follows:
"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."

". . . while recognizing these factors, the Committee concluded that equality of enforcement must exist in the marketplace and that competitive advantage of this nature must be eliminated over a period of time." (emphasis added)

Since the date of that Report approximately 10 years have passed and, according to Mr. Bader's Affidavit of November 12th, 1996, admitted as new evidence, many violative products are still available at ethnic Chinese retail outlets in major Canadian cities. Some of these products contain arsenic, codeine and other violative substances.

Counsel for the Commission submitted that concentrating the deployment of HPB's resources primarily at importation points was not a reasonable use of its enforcement resources in the sense that it was not applied equally to all importers. By way of illustration it should be noted that an attempt by Don Bosco Agencies Ltd. to import Dong Quai was questioned in Inspector's Ansari's letter of October 25th, 1983, previously referred to, and subsequently refused entry into Canada. The same substance, an ingredient in 70% of ethnic Chinese herbal products, was eventually reclassified as a "food" in June of 1989. In the meantime no enforcement actions were taken against the ethnic Chinese importers. The Review Tribunal agrees with counsel's submission and concludes that there was unequal deployment of HPB's resources at the importation level and that this was not a reasonable use of its resources.

(b) Differentiation in Enforcement - not a consequence of race or ethnic origin but rather due to enforcement at retail level compared to enforcement at ports of entry

Commission Counsel submitted that the original Tribunal erred in law when it concluded at p. 37 of its Decision that:

". . . the differentiation of enforcement . . . was not as a consequence of the race or ethnic origin of the importer but rather the differentiation between enforcement at the retail level compared to enforcement at ports of entry . . ."

We have canvassed in some detail what, in our opinion, was a basic misconception by the initial Tribunal as to a distinction made between ethnic Chinese importers and ethnic Chinese retailers which was not supported by the evidence.

In addition to that misconception there is evidence that ethnic Chinese importers were viewed and treated by officials of HPB as a separate category from their Western counterparts. That treatment included the herbal and botanical products which were imported by them.

We refer to Mr. Forbes' Project DEHA dated January 24th, 1985 and entitled "Regulation of Traditional Chinese Herbal ‘ Medicines'". In his memo under the heading "Phase 1 Fact Finding" there was to be:

"Implementation of a national project to survey import distribution and/or retail outlets to determine . . ."

In Annex "I" to his project Mr. Forbes at p. 3 under the title "DEHA - Investigation of ‘ Chinese Medicinal Products'" announces the purpose of his project as:

"To improve complaints of non-prescription drugs imported for sale in the Chinese ethnic community." (emphasis added)

Annex "I" then describes how this goal is to be achieved.

There is attached to Mr. Forbes' Project, Appendix "I", listing major ethnic Chinese importers which can be cross-referenced to Exhibit HR-5. This is the exhibit with the list of "Chinese importers" introduced by Commission Counsel because the names of those importers had been blanked out on the list attached to the WRVS Report, so that Exhibit HR-5 provides the

information as to the identity of those importers not available in Exhibit C-1, Tab 10 or in Exhibit HR-1, Vol. 1, Tab 42. Both of those exhibits, minus the lists, are copied from the WRVS Report.

If one compares Exhibit HR-5, the list identifying "Chinese importers" with Appendix "I" of the Forbes' project, we find 15 ethnic Chinese importers listed in Exhibit HR-5 which are also listed in Appendix "I" of Mr. Forbes' Project DEHA.

If one then refers to HR-1, Vol. 1, Tab 6, p. 2, which is a list of Chinese retail outlets visited by Mr. Bader in February of 1984, it becomes apparent that his list bears all the same names as the list of importers on Mr. Forbes' list and on the list attached to the WRVS Report. Three examples of firms which appear on the Bader list and on the Forbes list are: Chung Wah Trading Co., Man Hing (King) Trading Co. and Kiu Shun Trading Co.

On November 20th, 1984, Mr. Bader again visited Chinese retail outlets and compiled a list, Exhibit HR-1, Vol. 1, Tab 14 and on that list there again appears importers which are on Mr. Forbes' list including Trans Nation Emporium.

On October 26th and 27th, 1985, Mr. Bader visited and purchased from two major importers, namely Man King Co. and Chung Shun Trading Co.. Their products which contained curative Schedule "A" claims related to gall bladder, rheumatoid arthritis and menstrual problems. In a letter to Mr. Forbes dated December 21st, 1987 (Exhibit HR-7, Vol. 1, Tab 52) Mr. Bader indicates retail outlets he visited and appends a list including Awai Yuen Tung Trading Co., Dai Chong Ltd. and Yuen Fong Co., which firms are also on Mr. Forbes' list of major importers.

In a letter from Mr. Forbes to Mr. Riou dated October 7th, 1987 (Exhibit R-1, Vol. 1, Tab 39) in which Mr. Forbes, apparently referring to the WRVS Report, speaks of it as a "fact finding survey at the retail level * . . .". But in the postscript to the letter Mr. Forbes writes:

"*Note that all retailers visited are product importers."

There is the testimony of Inspector Sloboda in cross-examination p. 1709 to 1717, where he was referred to Mr. Forbes' project and asked to compare it with Exhibit HR-5, the list in which major ethnic Chinese importers were identified, and in which he agreed that some 11 of the firms listed appear both on Mr. Forbes' list and on the list identified as major Chinese importers in the WRVS Report.

From the Forbes' list, the Appendix "I" to the WRVS Report, the Bader list, the postscript to Mr. Forbes' letter to Mr. Riou, the testimony of Inspector Sloboda and the grid attached to the Custom reports, it is demonstrably evident that there is identification of Chinese importers who are also operating retail outlets in Vancouver.

In the final analysis the identification of appropriate comparators is a question of law and it is not for the Respondent to select the comparators and, for example, comparing "apples to oranges"

Finally, reference may be had to Custom forms attached to Exhibit C-1, Tab 10 containing a grid which classifies the subject as to whether that organization or individual is, inter alia, an importer. Cursory examination of these forms, where decipherable, reveals a number of organizations or individuals classified as "importer/distributor".

The Review Tribunal, therefore, is of the opinion that differentiation in enforcement is not a consequence of enforcement at the retail level as opposed to enforcement at ports of entry, but rather was based on the race or ethnic origin of the importer.

The last point to which counsel for the Commission referred was the conclusion at p. 36 of the

Tribunal's Decision in which it is stated that:
"Concentrating the deployment of its resources primarily at the manufacturing and importation points was an objectively reasonable use of the Respondent's enforcement resources."

Before reaching that conclusion the Tribunal stated that there was no direct evidence before it 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. The evidence simply does not support that statement since there is ample evidence that in many cases imported products were sold by the same merchants who imported them.
In any case, as to the enforcement being held out to be product oriented, reference should be had to Exhibits C-30 and R-15. R-15 is the "Quick Distinction Profile" in which there is a comparison between ethnic Chinese importers of herbs and botanical products on the one hand and health food (Western) importers of herbs and botanical products on the other.
There is also the list in R-15, which is the refusal criteria for products seeking entry into Canada, drawn up by Mr. Shelley as a guide for the Inspectors in the field. Note that item 8 on the list classifies the products by the ethnicity of the importers and/or consumers.
The written policy under the Food and Drugs Act and regulations provides that it must be product oriented. See for example, "Operational Policy Directive, A6-0-1".
Mr. Shelley, Mr. Sloboda and Mr. Riou each testified that the policy under the Food and Drugs Act and its regulations are enforced with regard to the product, i.e. product oriented, but the evidence does not support their contentions. If it were truly product oriented then it must follow that enforcement would have been equal vis-à-vis the same product. Taking Dong Quai for example, Mr. Bader was refused entry of his Dong Quai shipment in 1983 and was advised that if he attempted to import it, it would be considered illegal and that he would not be permitted to do so.
On the other hand there is overwhelming evidence that for the Chinese importers, the Food and Drugs Act and the policy directives were not enforced. If HPB's policies were truly product oriented all products would be enforced in the same way but the evidence reveals a low priority policy put in place for the ethnic Chinese retail/importers and consumers.
As mentioned previously many of the herbal products of ethnic Chinese importers/retailers are proved to have contained injurious substances such as lead, arsenic, codeine, etc. - see for example the list attached to the Letter to Trade of May 1st, 1996, new Exhibit C-1.

(c) Conclusions

We are satisfied therefore that the Tribunal manifestly erred in the following respects:
1. In finding there was equal enforcement between Chinese ethnic importers and Mr. Bader at the import level, based on alleged ongoing uniform policy by HPB, when in fact the evidence demonstrated the opposite to be true;
2. In finding both in law and in fact the use was objectively reasonable in that it was product oriented when there was overwhelming evidence that the enforcement activities of HPB at the import level demonstrated preferential treatment of ethnic Chinese importers; and
3. Finally, the Tribunal erred in concluding that any differentiating was between enforcement at ports of entry versus enforcement at the retail level, when in fact the differentiation was, according to the evidence, based on ethnicity.

THE SUBJECTIVE TEST

At p. 44 of its Decision the Tribunal restates its analysis of the subjective test based on the three elements from Large v. City of Stratford [1995] S.C.J., No. 80 (S.C.C.).

The Tribunal refers to the comments of Sopinka, J. in the Large case, supra, and restates them in the following form:

"(a) ...imposed honestly, and in good faith;

(b) ...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

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

In Large there was an employment contract and the issue was whether item (b), above, namely a sincerely held belief that a limitation - such as mandatory retirement at age 60 - was imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy.

The issue in the Large case was whether the employer's "state of mind" formed an indispensable element of the subjective test.

In rejecting that proposition the Supreme Court in the Large case per Sopinka at p. 746 stated as follows:

"In my view, however, the Board and the Courts below applied the subjective test too rigidly against the Appellant employer in the circumstances of this case. 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 reasons and the purpose of the subjective element of the test is otherwise accomplished." (emphasis added)

It is not the principles enunciated in the Etobicoke case, supra, and applied in Large that the Appellant is challenging but rather the application of the test in reference to the evidence.

The Tribunal at p. 45 appears to conclude that if the objective test has been met it must follow that the subjective test has also been met "on a balance of probabilities".

The Review Tribunal has examined and commented in some detail on the practices and policies of HPB and on those areas where, in its view, the original Tribunal erred in its findings on the evidence and on the application of the law. It is unnecessary therefore to revisit those areas previously discussed in relation to the objective test.

The Review Tribunal will, however, examine in some detail those evidentiary matters which lead to a different conclusion with regard to the subjective arm of the test from those conclusions that the original Tribunal arrived at.

Commission Counsel submitted the low risk assessment policy with regard to ethnic Chinese retail merchants, most of whom were also importers, was neither an open nor a generally known policy or practice of HPB.

She argued the so-called low risk policy of HPB was not truly product oriented as asserted by the Respondent. Rather, the policy or practice which masqueraded as a bona fide formula for product risk assessment was, in fact, a "covert" policy of HPB which provided special treatment

for the ethnic Chinese importers/retailers.

The attack on the bona fides of HPB was two-pronged and can be described as follows:

1) The low risk assessment policy was not, to begin with, truly product oriented; and

2) There was political pressure and interference brought to bear with respect to Dong Quai in particular.

It will become evident in the review of the evidence which follows that the Review Tribunal accepts both of these contentions. The present case raises an important question of "good faith", the first of the three elements of the subjective test that was applied by the original Tribunal. In her submissions to the review panel, counsel for the Commission stated:

"The first thing I want to talk about then is good faith, and the fact that – the fact that the policies and practices are not enforced – are not product oriented, indicates that there is a lack of good faith, of real, of genuine – of an honest application of the policy. If the policy is being applied to groups that are grouped by ethnicity, it's not being applied just with regard to the product." (See Vol. 5 of the Review Hearing, p. 477)

In dealing with this submission, it may be helpful to observe that the words "good faith" have been constructed in a variety of ways. One of the prominent topics in the case law is whether a party who has acted honestly but negligently, in the popular sense of the word, can be said to have acted in good faith.

Although the decision of the B.C. Court of Appeal in G.(A.) v. Superintendent of Family Child Service (1989) 61 D.L.R. 136 and MacAlpine v. H.(T.) (1991) 82 D.L.R. (4th) 609 concern themselves with the question of civil liability, they give some sense of the discussion in the area. Without discussing the matter at length, it seems adequate, for the purposes of the present case, to say that the concept of good faith requires that a statutory body exercise its discretion in some appropriate and meaningful way, with reasonable concern for the objectives of the relevant legislation. This must include a reasonable appreciation of the objectives of the Canadian Human Rights Act.

The failure of a body like the HPB to exercise its statutory authority in such a manner will constitute a lack of good faith under the subjective test for bona fide justification. This is important, in the present context, because the Review Tribunal does not wish to question the integrity of Mr. Sloboda or the other inspectors in the field, who deserve a good deal of credit for their sincerity and patience in carrying out their responsibilities. As it turns out, their hands were apparently forced by the directives of their superiors in HPB and their roles are not a decisive factor in this cases.

The other difficulty is that the origins of the low risk policy are unclear and the actions of HPB became more partial, more arbitrary as time progressed. One of the striking features of the present case is the nature of HPB's response to the issues raised by Mr. Bader, which can only be described as recalcitrant and defensive. It might be argued that the stance taken by HPB was more understandable at the beginning of the process, but once the low risk policy had been questioned, the Branch had a fundamental obligation to address the substantive issues raised by the complainant.

In this context, it might be noted that Madam Justice L'Heureux-Dubé rejected the majority's reasoning on the subjective test in Large on the basis that the absence of improper motives on the part of an employer would not be sufficient to meet the subjective test. This is important, in her view, because an employer who "blindly" adopted a discriminatory requirement is not entitled to

claim a bona fide justification under the Act. If this kind of concern seems to raise itself in the immediate case, however, it is only at the inception of the low risk policy, and it is sufficient to say that the policy must be considered over its entire lifetime and in the context of the whole case.

In any event, the facts in the present case are substantially different than the facts which presented themselves in Large. This is evident in the comments of Sopinka J., for the majority, at D/18, para. [20]:

" The Board and the courts below, therefore, proceeded on the basis that the state of mind of the employer was an indispensable element of the subjective test. Notwithstanding that the employer in the case acted in good faith without any ulterior motive in adopting a policy that was in the interests of the safe and efficient performance of the work, the subjective test required evidence that the employer had a sincerely held belief that the policy was necessary for this purpose at the time it was adopted." (emphasis added)

Sopinka J. again endorses this view of the facts, with considerable emphasis, at D/19, para. [23]: "I do not understand how it advances the cause of human rights to invalidate a sensible, work-related rule supported by the employees and adopted in good faith by the employer because the latter had mental reservations about its desirability." (emphasis added)

It is apparent from these and other references in that case that the Supreme Court was not considering a situation like the present, where the good faith of a respondent has been seriously questioned.

Other issues aside, the Review Tribunal does not accept that the majority in Large intended to permit a defence of bona fide justification where a policy which was obviously discriminatory was adopted casually or carelessly, without a sincere consideration of the possibility of discrimination. Whatever the provenance of the original low risk policy, it seems clear that the policy was infected by ulterior motives as events unfolded. This was continually compounded by HPB's stubborn refusal to entertain the complaints raised by Mr. Bader. There is little question that the policy was seriously tainted by bad faith by the time Dong Quai was reclassified as a food and could not be justified under any sensible criteria for good faith.

A chronological review of the treatment by HPB of Dong Quai will, we believe, illustrate the strangely inconsistent and confusing activities of the Branch vis-à-vis this herbal product.

1983, August 9th

HPB refused entry of certain herbal products which Don Bosco Agencies Ltd. was attempting to import. That decision was appealed to the Federal Court for review and in the result the refusal of entry was quashed (see Exhibit R-8 dated December 21st, 1983 see below, December 21, 1983).

1983, October 25th

The Complainant's shipment of Dong Quai was refused entry even though it made no curative Schedule "A" claims. Reference may be had to the handwritten notes on the reverse side of a letter from Inspector Ansari re Dong Quai extract which reads "Sample refuse entry this item", a notation from Inspector Sloboda.

1983, December 12th

Letter from Drug Inspector Mulherin (see Exhibit HR-1, Vol. 1, Tab 4) in which he states as follows:

"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."

Inspector Mulherin's letter was in response to an attempted importation by the Complainant of Dong Quai. In order to comply with the regulations (Division 8, Regulation C.08.002) it would have been necessary for Mr. Bader to embark on a costly and time consuming process.

1983, December 21st

In or about August of 1983 HPB purported to seize certain imports of Don Bosco Agencies Ltd. (see above, August 9, 1983). Mr. Bader applied and succeeded in having the Federal Court of Appeal quash the process initiated by HPB on December 21st (see Exhibit R-8). Mr. Bader and his company were successful in their legal scrimmage with HPB and it is likely therefore that he became persona non grata with that organization.

1984, February and March

A series of letters from Drug Inspector McKenzie and from Dr. Armstrong, the Chief of Drug Evaluation Division of HPB, in which a number of Chinese herbal products containing Dong Quai were reviewed and evaluated. However there was no determination by the authors as to their status as "New Drugs". (Exhibit HR-1, Vol. 1, Tabs 10, 11 and 12).

1984, November 27th

In a letter from Inspector Sloboda to Albi Imports Ltd., a Western importer, the company was advised that Dong Quai was classified as a "new drug". (See Exhibit C-1, Tab 6).

1986, November 24th

In a letter of that date Dr. Armstrong reviewed Tang Kwe Gin and Cinabar sedative pills, which were samples purchased by the Complainant in Ottawa. He found the principal ingredient was Dong Quai and commented ". . . this is clearly a drug" but made no mention of "new drug" status.

1987, on June 30th and August 26th

Inspector Wozny wrote to Mr. Bader regarding his shipment of Paul D'Arco (Soloray), Dong Quai (Soloray) advising that these substances met the definition of "new drug" requiring a Notice of Compliance which could only be issued subject to a new drug submission and then cleared by HPB (see Exhibit HR-1, Vol. 1, Tabs 37 and 40).

In the meantime the low priority enforcement practice vis-à-vis ethnic Chinese importers, retailers and consumers had been established because it was assumed these sectors of the ethnic Chinese community understood and knew herbal products. In that case it would be reasonable to expect that HPB itself had some understanding and knowledge of ethnic herbs and botanicals on which to base those assumptions. However the reality was that HPB had no such understanding and knowledge of ethnic herbs and botanicals. For example, Inspector Sloboda, a graduate Pharmacologist, acknowledged that he had no prior understanding of the substance Dong Quai before 1983. (See pps. 1725-1726, Vol. 12 of the transcript.)

According to Mr. Bader's testimony he was told by a member of the ethnic Chinese community that they had a special arrangement with HPB. This perception is reinforced by a letter from Inspector Sloboda to Mr. Wong Wai dated September 6th, 1988 (Exhibit HR-6) in which he attempts to refute the perception "that there has been an exemption for Oriental medicinal preparations in the past".

1987, September 22nd

The WRVS Report is published and the authors observed what was happening in the ethnic

Chinese community with regard to importers and retailers. They concluded that many violative products were being sold in Vancouver's Chinatown and that the absence of DINS was pandemic.

1987, October 1st

Mr. Shelley wrote to Director Forbes as follows:

"4. The political waters on labelling and packaging requirements of herbs and botanicals should be tested by floating trial balloon to test for degree of reaction either through an IL (Information Letter) or other means."

That letter was written in regard to the WRVS Report of September 22nd, 1987 which was enclosed with Mr. Shelley's letter.

1987, November 18th

Assistant Deputy Minister Liston of Health and Welfare wrote Mr. Bader following publication of the Expert Advisory Report of January 1986 in which there was a suggestion by the Advisory Committee that Dong Quai be reclassified from a new drug and be admitted as a spice or flavouring agent pursuant to either Division 7 or 10 of the Act.

In his letter Deputy Minister Liston advised Mr. Bader that this suggestion or recommendation by the Expert Advisory Committee did not remove Dong Quai from "new drug" status (see Exhibit HR-1, Vol. 1, Tab 49).

1988, March

Prior to March 1988 there was little or no enforcement action with regard to ethnic Chinese importers. Starting on May 9 of the same year there were 9 refusals in respect to importations by ethnic Chinese importers which continued in increasing numbers until the end of that calendar year (see Exhibit R-17).

In the meantime Mr. Bader was advised in a letter dated March 31st, 1988, prior to the enforcement by HPB of the Act and regulations as they affected ethnic Chinese importers, from Mr. Forbes, Director of the Western Region, which reads as follows:

". . . legal sanctions will be applied to shipments of Dong Quai consigned to your company that are encountered at Customs."

This was in response to another attempt by Mr. Bader, on behalf of his company, to import Dong Quai (see Exhibit HR-1, Vol. 1, Tab 60).

1988, August

At this time a protest meeting by the Chinese community in Vancouver occurred and that meeting was aimed against increased surveillance and raids conducted by HPB of products imported and sold by Chinese merchants in that city.

1988, October 3rd

A meeting between representatives of HPB and Customs and the Vancouver Chinese Merchants Association took place in Vancouver. During that meeting HPB and Customs officials attempted to justify their surveillance and enforcement activities for the first time (see Exhibit HR-4). The minutes of that meeting are quite revealing in that it is apparent Chinese importers were protesting economic loss as a result of HPB's first attempt at enforcement. It also points out that large container shipments were involved and that the merchants had previously been under the impression that they enjoyed an exemption for their products.

1988, December 14th

In Toronto a public hearing involving representatives of HPB and the ethnic Chinese community and others took place (see Exhibit R-1, Vol. 2, Tab 58).

On the same date, there occurred in Ottawa at the Embassy of the People's Republic of China, a meeting between the Director General Field Operations, Mr. Elliot, Ms. Quesnel of HPB and certain Chinese officials. During that meeting the "history of trade relations and commercial relations" between the two countries was discussed. The complaints of citizens of Chinese descent and the history of herbs in the Chinese culture including the importance of Dong Quai were canvassed by those present (see Exhibit C-2, new evidence, obtained under the Access to Information Act).

This meeting was followed by a letter from the Director, Mr. Elliot, to Mr. Tony Chung, President of the Chamber of Chinese Herbal Medicine in Toronto. Reference was made to their meeting of December 15th, 1988 and assurances given by Mr. Elliot that officials of the HPB ". . . would revisit in the near future the issue of Dong Quai's sale in Canada", followed by a request for more information from Mr. Chung's Association and from the Embassy officials in Ottawa concerning the herb, Dong Quai.

Mr. Riou in his testimony at Vol. 7, pps. 11-12 of the Transcript, makes oblique reference to the dealings between HPB and the people at the Chinese Embassy in the early 1980's.

1989, January 23rd

A directive from the Director, Mr. Elliot, stated in part as follows:

"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." (emphasis added)

1989, February 5th

Inspector Sloboda in his memo of this date to Ms. Quesnel entitled "Ethnic Drugs Refused Entry in Western Region - April 1988 through November 22nd, 1988", commented on the list of ethnic drug products - mostly Chinese preparations - attached to his memo (see Exhibit HR-1, Vol. 2, Tab 120) and which were refused entry, as follows:

"I don't know if this will be useful in your response on the Human Rights Act complaint by D. Bader."

He then adds a postscript, it would seem, after being apprised of Director Elliot's policy statement of January 23rd (see above) which reads as follows:

"At present we have completely ' backed off' import surveillance over Chinese importations further to J.R. Elliot's policy statement of January 3rd, 1989."

This postscript suggests Inspector Sloboda's frustration with the apparent volte-face by higher level officials of HPB in regard to the practice initiated earlier in the spring of 1988 - in part due to complaints by Mr. Bader - of increased surveillance of Chinese importations.

This front line officer, whose dedication and professionalism are apparent from his conduct throughout, was not privy to the political pressures being exerted in regard to the importance of Dong Quai from the perspective of trade and commerce.

That officials of HPB were quite sensitive to the possibility of a strong reaction from the ethnic Chinese community is evidenced by the following notation in Mr. Shelley's handwriting at p. 8 of the WRVS Report (C-1, Tab 10):

"Focussing on the Chinese would be useful (biggest bang for the buck!) but we must be on guard against charges of racism." (emphasis added)

In Mr. Forbes's Project DEHA which was some years earlier in January of 1985 there is this comment at p. 1:
"There is no doubt that any attempt by HPB, Vancouver, to increase the regulation of these traditional Chinese imports even a little will invoke a reaction from the Chinese community."

While these internal memoranda were being exchanged between HPB officials, Mr. Bader continued to receive correspondence from HPB requesting that he comply with the regulations governing his applications for DINs. In contrast Mr. Shelley, Chief, Drug and Environmental Health Inspection Division, testified at pps. 1456 to 1461, Vol. 10 to the effect that Exhibit R-17 - which is a compilation of refusals by HPB of Chinese importers - were treated as mere technical violations. This treatment of DINs, as a mere technical violation, was, according to Mr. Shelley, the result of the policy directive from Director General Elliot's policy paper of January 23rd, 1989.
1989, March 23rd
A letter from Dr. R.A. Armstrong to Mr. R.T. Ferrier, Director, Bureau of Non-Prescription Drugs, which stated Dong Quai (Angelica Sinensis) formerly treated as a "new drug" by officials of HPB was now to be treated in the absence of drug claims as a "food".
Dr. Armstrong's letter is interesting because of its equivocality. The letter is to be found at Tab 125 of Exhibit HR-1, Vol. 2 and reads in part as follows:
"Dong Quai (Angelica Sinensis) is an extremely popular ingredient in Chinese herbal medication and is said to be an ingredient in about 70% of Chinese drugs imported into Canada.

Determining the appropriate regulatory status of Dong Quai involves several problem areas.

1. The numerous Schedule "A" claims which are put forward in Chinese literature, product labels and package inserts for which there is literally no supportive scientific literature.

2. Varro E. Tyler, Ph.D., a respected scientist and author of textbooks on pharmacognosy, including the popular The New Honest Herbal has this to say about Dong Quai ' however, large doses of coumarins are not without undesirable effects, and the furocoumarins, such as Psoralen and Bergapten, are prone to cause photosensitization which may result in a type of dermatitis in persons exposed to them. Simply some investigators have concluded that these so-called Psoralens presents sufficient risk to humans and that all unnecessary exposure to them should be avoided. For this reason, large amounts of a coumarin-containing drugs such as Dong Quai cannot be recommended'."

"The material being collected by the Field Operations Directorate from the Canadian Chinese commercial community has been reviewed in the Drug Evaluation Division and has proven to be of little value since it is essentially similar to the promotional literature referred to in point 1 above. Material from Mainland China, which hopefully might be more scientific, has not yet materialized."

Dr. Armstrong then refers to Dr. D.V.C. Awang of the Bureau of Drug Research, who expresses the opinion that "temperate consumption of Dong Quai would not be expected to pose any likely appreciable threat to human health".
Dr. Armstrong concludes as mentioned, that in the absence of drug claims, Dong Quai not be

regulated as a drug. It is interesting that this conclusion avoids the necessity of complying with the regulations governing the issuance of a Notice of Compliance, which is a lengthy and costly process.

1989, June 16th

In a Letter to Trade under the signature of Director General Elliot on the subject of Dong Quai, he states as follows:

"I am pleased to advise that based on the lack of substantiating data indicating a significant health hazard and in the absence of all therapeutic claims, DONG QUAI need not be regulated as a drug and may be sold as a food."

1991, February 13th

Project DDAB entitled "Surveillance Of Drugs For Self-Medication" was published (Exhibit R-10, Tab 4) at p. 8 where it states as follows:

"Historically, the Branch has maintained a hands-off approach to ethnic stores, addressing compliance action predominately toward the 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." (emphasis added)

"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 industry and differing levels of compliance."

Incidentally in the "Background" section of the project this comment appears:

"During the last year or so, several instances of poisoning from heavy metals in ethnic drug products have occurred in Canada." (emphasis added)

Counsel for the Commission posed the question, if HPB did indeed rely on a "low risk policy," would it have made sense then to embark on Mr. Forbes' Project DDAB which was the precursor to the WRVS Report, both of which focussed on the ethnic Chinese community?

While these events were taking place Don Bosco Agencies Ltd. was refused entry of herbal and botanicals and denied DINs from 1978 onwards. Mr. Bader's company, Don Bosco Agencies Ltd., was put on the so-called "National Watch List". Inspector Sloboda himself testified to the effect that the importation of Dong Quai was illegal based on Director Forbes' letter of March 31st, 1988, to Mr. Bader (see Exhibit HR-1, Vol. 1, Tab 60).

Although HPB and its officials, including Inspector Sloboda and Director Forbes denied that there was an exemption vis-à-vis the ethnic Chinese community in regard to importation of herbal and botanical products, there was a process which HPB could have followed if it had wished to formally exempt those products from the provisions of the Act and its regulations. HPB had the ability to do so under Section 30(j) of the Food and Drugs Act by obtaining an Order-in-Council which would exempt:

". . . any food, drug, cosmetic or device from all or any of the provisions of this Act and prescribing the conditions of that exemption."

Counsel for the Commission suggested that what amounts to an unwritten low risk policy was advanced by HPB after the fact to explain the lack of enforcement activity in a particular sector of the community.

The Review Tribunal has referred to the protest meetings in Vancouver and Toronto, the Vancouver Chinese Merchants Association meeting with officials of HPB in which the enforcement activities of HPB were questioned, the high level meeting on the premises of the Embassy of the People's Republic of China and the subsequent reversal by HPB of its position on Dong Quai, as evidence of pressures exerted which had little or nothing to do with the quality, benefits or safety of the product itself.

Finally, the reclassification of Dong Quai as a food as evidenced by the Letter to Trade from Director General Elliot in June of 1989, compels us to question the bona fides of the Health Protection Branch.

In respect to the safety of Chinese herbal products in general, reference should be made to the Letter to Trade of May 1st, 1996, new Exhibit C-1, dealing with requirements for DINs and dangers to health of products listed therein which "were found to contain high levels of harmful heavy metals such as arsenic and mercury that can cause very serious health problems". (emphasis added)

The list of Chinese herbal products is a long one and it was found that some contained prescription drugs and others contained herbal ingredients known to cause serious heart and kidney problems. It is difficult, therefore, to ascribe to the policies and practices of HPB, a sincerely held belief that those policies and practices were imposed in the interests of the adequate enforcement of the Act and regulations. The evidence runs counter to the proposition that HPB acted in good faith and to any suggestion that its policies and practices were not imposed for ulterior or extraneous reasons which, when implemented, could defeat the purpose of the Canadian Human Rights Act and/or the Food and Drugs Act itself.

The Review Tribunal therefore is of the opinion there was palpable and manifest error on the part of the original Tribunal in its failure to address evidence of lack of good faith by HPB in its treatment of ethnic Chinese herbal products in general and in particular to the herb Dong Quai.

The Review Tribunal has fully explored the evidence relating to the bona fides of the Respondent's conduct with regard to Dong Quai in particular because of its importance as an ingredient in 70% of ethnic Chinese herbal and botanical products.

The original Tribunal failed to consider much of this evidence, relying instead on a restatement of a test which it adapted from Large v. City of Stratford, supra, and the testimony of Mr. Riou.

With regard to the evidence related to this subjective branch of the test, the Review Tribunal has attempted to analyze it from two points of view. Firstly, was the provision of services by HPB to the stakeholders, including the general public, under its mandate, carried out honestly, in good faith and in the sincerely held belief that its policies or practices were adopted in the interests of the adequate enforcement of the Act or regulations? Secondly, was HPB in providing services, acting in the interest of the general public, or was it, on the other hand, acting from ulterior or extraneous motives which could defeat the purposes of the Canadian Human Rights Act and its governing legislation?

In our opinion the original Tribunal manifestly erred in law and in fact insofar as it treated the subjective test as relatively less important than the objective test as evidenced by the sequence in which the two tests were addressed, its failure to consider evidence critical to this issue and its somewhat cursory analysis of the entire subject. In any case, the Review Tribunal is of the opinion, when considering the evidence as a whole, and the new evidence, that the Respondent

has failed to meet the requirements of the subjective test as set forth in the reasons of McIntyre, J. in the Etobicoke case supra. So that the answer to the first question posed in the preceding paragraph is, no; and the answer to the second question is, it was not acting in the interests of the general public, including the ethnic Chinese community, in adopting its so-called low risk policy which in effect is contrary to its mandate under the legislation and to the provisions of the Canadian Human Rights Act.

SUMMARY OF CONCLUSIONS

The Review Tribunal is of the opinion the original Tribunal made manifest and palpable errors in respect to the facts and the law and with respect to mixed law and facts in regard to the following matters:

(a) placing the onus of proof on the complainant after a prima facie case of discrimination has been established;

(b) misconstruing the quality and weight of the evidence required in order to establish bona fide justification;

(c) holding that the risk assessment element of bona fide justification has been met;

(d) holding that the efficient enforcement element of bona fide justification has been met; and

(e) holding that the good faith and valid reason elements of the subjective test for bona fide justification has been met.

The Review Tribunal accordingly allows this Appeal on all of the five grounds of appeal filed by the Commission for the reasons it has given.

REMEDIES

The Commission has proposed a broad range of remedies and the members expressed some concerns as to the far reaching effects of those proposals.

Before we address the question of remedies it is helpful we believe, to put into a broader context the relatively narrow issue of discrimination against the Complainant and his company, Don Bosco Agencies Ltd.

In this case discrimination as found by the original Tribunal and confirmed by the Review Tribunal has occurred in an agency of government which has a mandate to protect the health of the general public.

Moreover our findings indicate that the mandate of the HPB was subject to and was influenced by pressure groups. There is also evidence of political pressure at higher levels and we have accepted that these pressures caused HPB to adopt policies and practices inconsistent with its mandate.

For those reasons we are inclined to accept the broad remedies proposed by counsel for the Commission in the hope that they will provide guidance to the Department of Health and Welfare and HPB leading to uniform enforcement of the Act and thereby achieving a level playing field and also for the protection and welfare of the general public.

Counsel for the Commission describes in some detail the reasons for the remedies being sought at pps. 1216 to 1238 of Vol. 11 of the transcript (March 7th, 1997). It is not necessary for the Review Tribunal to repeat the submissions by Commission Counsel in support of those remedies.

The Review Tribunal ORDERS that the Department of National Health and Welfare and more particularly, the Health Protection Branch, adopt, subscribe to and put in place the following policies, practices and measures, namely:

1.(a) Cease differentiating on the basis of prohibited grounds, that is to say, that it cease treating herb and botanical dealers, whether importer, distributor, wholesaler, merchant or retailer or all or any of the foregoing, differently according to their race, national or ethnic origin when enforcing compliance with the Food and Drug Act and Regulations;

(b) That it cease the unequal enforcement of the Food and Drug Act based on the ethnicity of importers and retailers in the herb and botanical health food industry;

(c) That it cease the unequal enforcement of the Food and Drug Act based on the so-called ethnicity of the product as between ethnic and non-ethnic or Western products; and

(d) That it cease unequal enforcement based on ethnicity of user or consumer of the product.

2. That the Minister cause to be carried out on a national scale a system of review of its enforcement policies, practices and compliance strategies relating to herbs and botanicals in order to identify and eliminate unsound distinctions previously relied upon or which are based upon ethnicity of dealer, ethnicity of product, ethnicity of user/consumer, with particular emphasis upon eliminating differential treatment between groups which have in the past been defined by Health Canada and HPB as Chinese, ethnic Chinese, traditional, Western herbal, Western health food and non-ethnic sectors of the herbal botanical industry.

3.(a) That Health Canada devise a racially neutral compliance enforcement strategy in order that prevailing distinctions by racial sector in the herbal and botanical industry be eliminated so as to achieve a level playing field for all participants in the industry.

(b) That Health Canada devise compliance strategies which are truly product oriented in as much as enforcement is related to the magnitude of the risk to human health, inherent in the product itself, regardless of its origin or the ethnicity of the dealer or consumer;

(c) That the compliance strategy of Health Canada as above noted, shall be national in scope and uniform in its application.
3. That Health Canada formulate and disseminate by Letter to Trade and by other means (following a review on a national scale as described in paragraph 2 above) within 90 days of this decision a clear cut written policy statement containing a commitment to a uniform national approach to the regulation and enforcement of the Act and the regulations with regard to herbal and botanical products, irrespective of where sold or by whom imported (more particularly described in Project DDAB where these objectives are outlined).

With regard to compensation for hurt feelings we understand that Mr. Bader has spent a great deal of his time, energy and money in his crusade against the discriminatory policies of HPB. We recognize his efforts and applaud them and we expect that he will take some satisfaction in his accomplishments.
We quote with approval from p. 13 of the Tribunal's decision as follows:
"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."

It seems to us that there is no grounds here for awarding damages for hurt feelings and there is no claim as such for financial loss or compensation.
There will be no Order for costs.
Dated at Kamloops, Province of British Columbia, this day of January, 1998.

_____
Norman Fetterly, Chairperson

_____
Jane S. Shackell, Member

_____
Paul Groarke, Member

Glossary of Acronyms, Abbreviations and References

BFJ Bona fide justification (See Subsection (g) of Section 15 of the Canadian Human Rights Act)

DINs See Food & Drug Regulations c.01.005 and c.01.014 (1), (1) The main panel of both the inner and outer labels of a drug sold in dosage form shall show in a clear manner the drug identification number as signed by the Director to the manufacturer or importer for the drug

pursuant to Subsection c.01.014. 2(1)."Dong Quai a.k.a. Tang Kwe, Tang Kwe Gin, Angelicae, Sinensis and Tang Kwei Pien

HPB Health Protection Branch of the Department of National Health and Welfare Letter to Trade Advisories published by the Health Protection Branch and circulated from time to time amongst importers and retailers of traditional herbal medicines.

Letter to Trade Advisories published by the Health Protection Branch and circulated from time to time amongst importers and retailers of traditional herbal medicines.

New Drug Division 8 of the Regulations c.08.001 which provides, inter alia,

(a) A drug that contains or consists of a substance, whether as an active or inactive ingredient, carrier, coating, excipient, menstruun or other component, 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 the substance for use as a drug.

Project DDAB Project Western Region Visibility Strategy (WRVS Report) dated September 22nd,1987

Project DDAL Analytical Surveillance of Ethical Drugs dated February 15th, 1994

Project DDXQ Import Surveillance of Drugs dated May 8th, 1991

Project DEHA Regulation of Traditional Herbal "Medicines" dated January 24th, 1985

Schedule"A" Under the Food & Drug Act Section 3(1), inter alia, as follows,

"3(1) No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventive or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule "A"."

WRVS Report Western Region Visibility Strategy Report dated September 22nd, 1987. C-1 with insert at Tab 10

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