TD 10/ 86

Decision rendered December 11/ 86

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77. C. 33 as amended

AND IN THE MATTER of a Hearing Before a Human Rights Tribunal Appointed Under Section 39 of the Canadian Human Rights Act.

BETWEEN:

GORDON HUM Complainant

and

THE ROYAL CANADIAN MOUNTED POLICE Respondent

TRIBUNAL: John P. S. McLaren

DECISION OF TRIBUNAL

APPEARANCES:

RUSSELL G. JURIANSZ Counsel for the Commission
JAMES HENDRY Counsel for the Commission

ROBERT P. HYNES Counsel for the Respondent
MARIAN MCGRATH Counsel for the Respondent

GORDON HUM Appearing for himself as Complainant

DATES OF HEARING: September 3, 4, 5, 1986.

A. The Complaint

The complaint in this case is brought by Mr. Gordon Hum who at the time of the hearing was 39 years of age. Mr Hum is a Canadian citizen of Chinese Canadian background who was born in Halifax, Nova Scotia and grew up in the Maritimes. He received his post secondary education in both the Maritimes and Alberta. At the time of the incident which is the subject of this complaint Mr. Hum was the principal of the school on the Alexis Indian Reserve west of Edmonton.

Mr. Hum's complaint names the Royal Canadian Mounted Police as the party who breached the Canadian Human Rights Act (1976- 77) S. C., c. 33, (as amended) in this instance. The complaint relates to treatment Mr. Hum alleges he received at the hands of Constable Jackson Nash who at the time of the incident was stationed with the Stoney Plain detachment of the R. C.

M. P. Mr Nash, a native of Newfoundland and a graduate of Memorial University, joined the force in June, 1980 and moved to the Alberta location immediately after basic training in Regina.

The essence of Mr Hum's complaint is set out in a Canadian Human Rights Commission complaint form signed by him on February 14, 1984 (Exhibit HRC- 1):

On October 5, 1983 I was stopped by a Royal Canadian Mounted Police constable in Spruce Grove, Alberta. The constable requested my driver's license, vehicle registration and insurance before asking, "Are you a Canadian citizen?" I replied in the affirmative and he then asked, "Were you born in Canada?" I replied that I was born in Halifax, Canada. I was asked to sit in the police car while the constable radioed the station and filled out a speeding ticket. On being informed that there was an outstanding warrant for my arrest for failure to pay a parking violation the constable said, "Good" and phoned a two [sic] truck to remove my vehicle. I was taken to the R. C. M. P. station in Spruce Grove where I was booked and placed in what appeared to be a 'drunk tank'. Shortly afterwards, I was allowed to make a phone call I called my wife and asked her to bring the cancelled cheqUe stubs which indicated that I had already paid the $219.00 parking fine. On arrival, my wife presented these documents and I was informed that I would have to pay the $219.00 before I would be released. I have reasonable grounds to believe that I received differential treatment from that accorded others in similar circumstances; specifically, the questions regarding my citizenship and place of birth and the required payment of a fine which had previously been paid. I allege that the above is discriminatory on grounds of my race (Chinese), contrary to s. 5(b) of the Canadian Human Rights Act.

Section 5(b) of the Canadian Human Rights Act reads:

5. It is a discriminatory practice in the provision of goods, services, facilities or accomodation customarily available to the general public

..... (b) To differentiate adversely in relation to any individual on a prohibited ground of discrimination.

"Prohibited ground of discrimination" is defined in the following terms in section 3(1) of the Act.

3. (1) For all purposes of this Act, race, notional or ethnic origin, colour, religion, age, sex, marital status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

The complaint was subsequently amended on May 9, 1985. In the new complaint form (Exhibit HRC- 2) the words "and s. 13.1" were inserted after "s. 5(b)" and before "of the Canadian Human Rights Commission" in the last line of the complaint.

Section 13.1 of the Canadian Human Rights Act reads:

13.1(1) It is a discriminatory practice, (a) in the provision of goods, services, facilities or accommodation customarily available to the general public, ... to harass an individual on a prohibited ground of discrimination.

In both versions of the complaint a post script was added by Mr Hum which reads:

I have reasonable grounds to believe the officer's treatment, procedure, arrest and detention were harsh, unreasonable, discriminatory and uncalled for.

B. The Preliminary Issues

At the opening of the hearing Counsel for the R. C. M. P., Mr. Robert Hynes, raised three preliminary objections.

1. He argued that that the style of cause of the complaint should have referred to Constable Nash as well as to the R. C. M. P. Accordingly the complaint should be dismissed.

2. He argued that the amended complaint form of May 9, 1985 raised a totally separate complaint and was out of time. As a result it should not be heard by the tribunal.

3. He argued that as the Commission's investigator had found only part of the facts alleged by Mr. Hum substantiated it was not appropriate for the Tribunal to hear the whole complaint.

After hearing argument for both sides I rejected the third objection and reserved on the first two. I deal with the third objection first, followed by the other two in sequence.

The Relationship of the Commission's Investigation and the Scope of the Tribunal Enquiry

It is my belief that a tribunal should not prejudge the issue of whether or not all of the allegations in a complaint to the Commission have been substantiated. The initiation of the hearing process by a tribunal set out in the Canadian Human Rights Act in sections 39 to 42 is at the discretion of the Commission by virtue of section 36(3)(a) of the Act. Section 40(2) recognizes that the Commission is entitled to appear before a tribunal which may be appointed. However in activating that process and in playing a role within it the Commission cannot be insensitive to the position of the idividual complainant. Even though the Commission's staff may have drawn certain conclusions on the basis of investigation, that should not preclude a tribunal from examining the full complaint as long as it falls within the tribunal's jurisdiction under the Act. This latitude is particularly important when there may be disagreement between the complainant and the Commission as to the framing of the issues, which seems to hove been the case here, and where as a result the complainant decides to appear on his own behalf, as Mr. Hum did in this instance. Furthermore, it is very difficult for a tribunal to prejudge the strength or relevance of the evidence in relation to a particular element of the complaint before the evidence is entered.

Mr. Jurianz, counsel for the Commission pointed out that section 390) of the Human Rights Act gives the Commission the power to request the President of the Tribunal Panel to appoint a Tribunal to inquire into "the complaint". His position was, and I agree with him, that in the

absence of limiting wording that means the whole complaint. The whole complaint here was that originally formulated by Mr. Hum. I am encouraged in this view by the wording of section 40(1) of the Act

40(1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed end shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, of appearing before the Tribunal, presenting evidence and making representations to it.

Under this provision the Tribunal has the power to inform itself fully, especially from the parties most intimately involved, including the individual complainant. Moreover, it is is the clear sense of the sub- section that the latter is entitled to present his own evidence and to make his own case unconstrained by the Commission's view of the matter. The application of the section in a hearing like this in which the Commission and the individual complainant are operating to some degree independently is, of course, subject to the Tribunal's power to prevent the process operating in an oppressive way against the respondent.

The Style of Cause and the Relationship of the Individual and Institutional Party

I see no merit in the argument of counsel for the R. C. M. P. that the absence of the name of Constable Nash from the style of cause is somehow fatal to the jurisdiction of the Tribunal in this case. Section 48(5) puts it beyond doubt that vicarious liability attaches to a person, association or organization for the acts or ommissions of an employee under the Act.

48(5) Subject to subsection (6) any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

There is no formal requirement in the Act that the officer, director, employee or agent be named. However, Mr. Hynes argued that, as this is a statutorily prescribed form of vicarious liability, it is not subject to the common law doctrine of joint liability which would have allowed the complainant to pick his "victim". In his view section 48(5) can only come into play when an act of discrimination is established against a named individual. In other words the complaint has to be directed primarily against the individual, not the person who is deemed liable. Therefore the individual party must be named in the style of cause. I find this an unduly technical argument. I agree with Mr. Hynes that where section 48(5) operates it is necessary to find the individual guilty of a discriminatory practice under the Act before the employer can be deemed liable. That does not, however, mean that the style of cause must name the individual. It is not the style of cause which signals to the individual respondent or his employer the thrust of the complaint, but the statement of complaint itself. In this case, the statement of complaint of February 14, 1984 (Exhibit HRC- 1) does not name Constable Nash. If the complaint had been the sum total of all the information Mr. Hum had been able to adduce and he had not been able to identify or was uncertain about the identity of the officer, then obviously there would be no case for either the individual or the R. C. M. P. to answer. Mr. Hum, however, did make it clear well before

February 14, 1984 that his complaint was directed against Constable Nash. In both his complaint while in custody on October 5, 1983 and in his statement on October 6, 1983 to Staff Sgt. Carver, who conducted the internal investigation, he referred specifically to the officer. Staff Sgt. Carver's report which includes a statement by Constable Nash and is dated October 13, 1983 (Exhibit R- 1, Tab 18) was directed to Officer in Charge, Administration and Personnel, Headquarters, Ottawa. From early days then the administration of Force at both the local and national level was in no doubt about the identity of the individual officer. Until the hearing there is no evidence of any objection by or on behalf of the Force of the omission of the identity of Constable Nash in the complaint form. To my mind there has been no injustice or unfairness done to the institutional respondent in this case. They have always been aware of the identity of the officer in question. Moreover, the omission of the name of the officer in the complaint form cannnot dictate a decision under section 48(5) unless the officer is found guilty of a discriminatory practice.

Even if I was persuaded that the absence of mention of the individual officer from the style of cause was fatal, it can be argued in this case that there is an alternative basis for the action which implicates the Force directly. The position taken by counsel for the Commission was that, while Constable Nash could be faulted for unwarranted zeal in asking Mr. Hum questions about citizenship and place of birth, it was the practice of the Force in encouraging this line of questioning in such circumstances which was the discriminatory practice primarily in question. Mr. Jurianz made this clear in his summation (Transcript, p. 503).

But there is some indication in the evidence that the asking of these questions is based on a practice. It's not an isolated event. Constable Nash, in his statement to the Internal Affairs investigator, answered clearly, yes, he routinely asked people of Chinese and Japanese descent these questions if they're stopped for traffic violations. He does'nt go out of his way to stop them and ask them.

He did'nt absolutely negate that when he was being crossed- examined. As well, his commanding officer in the statement to the Internal Affairs investigator clearly states that he encourages his officers to ask these questions, and there was absolutely no contradiction of that evidence.

As well, the R. C. M. P. letters to the Commission and to Mr. Hum after the internal investigation, after reviewing the entire matter and all the circumstances, are a further investigation [sic] that this practice is considered acceptable.

Superintendant Barker on the stand this morning, in response to your [the Chairman's] question, indicated that yes, the criteria for developing a suspicion that somebody may be in Canada illegally is different for visible minorities and what he termed mainstream Canadians.

Viewed in this light the issue is not one of vicarious liability but of the primary responsibility of the R. C. M. P. Accordingly, the application of section 48(5) is academic and the proper respondent is named in the style of cause. The Force having sought to justify the conduct of Constable Nash in terms of its practices in enforcing the Immigration Act (1979- 77) S. C., c. 52

(as amended) can hardly object that it his conduct which is the primary issue before this Tribunal and not its practices.

Was the Addition of the Issue of Harassment under Section 13.1 on Amendment or New Complaint?

Mr. Hynes argued that the addition of reference to a contravention of section 13.1(1) in the second complaint form of May 9, 1985 (Exhibit HRC- 2) amounted to a brand new complaint. As I understand it he considered this to do an injustice to his client because by the time the change was made, approximately nineteen months after the incident complained of, the R. C. M. P. had concluded its investigation of the original complaint. Mr. Hendry for the Commission argued that the nature of the complaint and the facts alleged were the some in both documents. All that was different was the addition of the new ground of complaint in the second. Mr. Hendry went on to note that the amended complaint with a covering letter had been sent to Commissioner Robert Simonds on July 18, 1965 well before the appointment of the present tribunal on April 29, 1986. Given the small difference in the nature of the two documents he did not see how it could be argued that there had been any surprise perpetrated on the respondent. Moreover, this was the first intimation the Commission had had of any objection by the Force. If there was any quarrel with the Commission's decisions the proper forum for challenge was the Federal Court.

The one section which deals with time limits in the Act is section 33(b)(iv). 33. Subject to section 32, the Commission shell deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

..... (b) the complaint ..... (iv) is based on acts or omissions the lost of which occurred more than one year or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

There are no provisions dealing with amendments. Section 33 (b)(iv) reflects a concern on the part of the legislator to provide a normal cut off for complaints, while giving the Commission some latitude in extending the time for complaint in extraordinary circumstances. In this case the original complaint was brought well within the one year period contemplated as the norm. The second was some six months outside it. The latter did not, however, contain any new allegations of fact and was exactly the some complaint with the single addition of the reference to section 13.1. It may also be said that the complaint as originally formulated together with the post- script effectively set out the basis for an allegation of harassment, although it was not made at that time.

I do not find the arguments of counsel for the R. C. M. P. convincing. The addition of a new ground of complaint has not put the Force at any disadvantage. The allegations of fact contained in both complaint forms were investigated by the R. C. M. P. after receipt of the first. The change in the second would not have required any further investigation by the Force. There were no new facts to look into, no new parties to interview. The change would have merely required the development of legal arguments to meet the thrust of the new ground of complaint. The gap in time between May 9, 1985 and the Tribunal's hearing surely provided enough time for that

purpose. This is dissimilar to the problem which confronted the Tribunal established under the Canadian Human Rights Act to consider Local 916, Energy and Chemical Workers v. Atomic Energy of Canada Ltd (1984) 5 Can. Human Rights Rep. D/ 2066. In that hearing the Commission endeavoured on a preliminary motion to persuade the Tribunal set up to hear a complaint to amend the complaint to add a new ground without changing its factual basis. The Tribunal rejected the motion because it had been appointed to hear the original, not the new, ground of complaint. While it recognized the desirability of allowing amendments to a complaint where all parties are given sufficient time to prepare their case on the amendment, the Tribunal was not willing to delay the hearing here for that purpose, especially in light of the fact that the Commission had had ample time to amend the complaint at an earlier point in time. In other cases where amendments to complaints have been made before the hearings the reaction of tribunals has been to accomodate the changes, as long as there is no perceived injustice to the respondent (See David C. Rodger v. Canadian National Railways (1985), 6 Can. Human Rights Rep. D/ 2899; Denis J. Bernard v. Board of Commissioners of Police, Fort Frances (1986), 7 Can. Human Rights Rep. D/ 3167). I find no such injustice in this case.

C. The Evidence

On October 5, 1983 at approximately 3.44 p. m. Constable Nash who was on highway patrol on Highway 16 in the vicinity of Spruce Grove, Alberta was travelling in a westerly direction. At a point about one kilometer west of that community the radar device in his patrol car clocked a vehicle heading east at 127 kilometers an hour in a 100 kilometer an hour zone. The evidence which was given by Constable Nash, and accepted in provincial court in a trial for speeding arising out of these facts on January 31, 1984, was that the radar equipment had been tested earlier by him and was correctly calibrated.

Constable Nash noted that the car is question was a red station wagon, travelling in the lane closest to the median. As the vehicle passed him he was able to determine that it was driven by a person of "oriental characteristics". The station wagon, a 1974 Pontiac Catalina, was being driven by Mr. Hum who was on his way home to Edmonton, where he lived, from his job on the Alexis Reserve. Constable Nash turned the patrol car across the median and went in pursuit of the red station wagon.

Highway 16 has six lanes as it passes through the community of Spruce Grove. Both Mr. Hum and the officer gave evidence that the traffic through the community was brisk, at the time as the build up to rush hour took place. Mr. Hum, who had slowed down on the approach to Spruce Grove when his car hit the speed grids which are located at the westerly limits of the town, was driving in the inside lane. He stopped for a red light at two intersections, the first close to MacDonalds and the second at Calahoo Road. After leaving the latter he noticed in his rearview mirror that a police cruiser was coming up behind him with its dome light flashing. According to Constable Nash's evidence the lights were green by the time he encountered the two junctions, and he turned the dome light on immediately after traversing the second at Calahoo Rd. The Hum vehicle did not stop immediately. Instead the driver turned left et the next intersection, turned left again and parked in a service road parallel to t he west bound lanes of Highway 17. Mr. Hum testified that he had assumed that he was the object of the patrol car driver's interest and considered the parking spot on the west side of the highway the nearest and safest stopping

place. Constable Nash said in evidence that he felt that Mr. Hum might have pulled over to the shoulder on either side of the east bound lanes. He also indicated that he was concerned when Mr. Hum pulled across west bound traffic in what in his mind was a dangerous fashion. It was during these manoeuvres that the Constable began to harbour the suspicion that the driver of the red station wagon might be trying to avoid him.

Mr. Hum parked his vehicle on the service road outside a sporting goods store and Constable Nash pulled in behind him at a ninety degree angle. At this point and thereafter there are divergencies in the testimony of the two men. Mr. Hum claims that he remained in his car and that Constable Nash came over to ask him for his driver's license, registration and insurance. Constable Nash remembers that while he was giving the registration number of Mr. Hum's car over the intercom and requesting a CPIC (Canadian Police Information Centre) check, Hum got out of his car and seemed to be heading to the store. This action, the Constable claimed, increased his suspicion that the driver was trying to elude him. At this point Constable Nash said he got out of his car, approached Mr. Hum and asked him for his license registration and insurance. Both men agree that in response to this request Mr. Hum asked what was going on. Mr. Hum claims that he received no reply, while Constable Nash says that he informed the driver that he had been clocked at 127 kilometers and hour in a 100 kilometer an hour zone, to which the driver responded "there was no fucking way I was speeding". Mr. Hum then gave his documentation to the officer who examined it, noting that Mr. Hum's name and picture were on the driver's license. Constable Nash admits that there was nothing in either Mr. Hum's accent or dress which might have suggested that he was not a Canadian citizen.

The evidence of both men concurs that Constable Nash next asked Mr. Hum whether he was a Canadian citizen, and then where he was born. Constable Nash indicated that he posed these questions because he wanted to check to see whether Mr. Hum might be an illegal alien. While Mr. Hum claims that his answer to the first question was a simple yes and to the second "Halifax, Nova Scotia", Constable Nash's recollection was that the response to the first question was "Of course I'm a Canadian citizen. What the fuck do you think?" Mr. Hum remembers, and Constable Nash seemed willing to concede, that a request was made by the officer for a birth certificate. Both men also have a recollection that Constable Nash asked Mr. Hum his occupation. It is also agreed that Mr. Hum showed Constable Nash a flier announcing his candidacy for the Edmonton School Board. Mr. Hum indicated that he did this to leave no doubt about his Canadian citizenship and place of birth. Both facts were mentioned in the flier.

Mr. Hum, who claimed that he was still in his car at this point in time, testified that Constable Nash only looked at the flier cursorily and gave it back peremptorily. He volunteered that at this juncture he called the Constable "a racist pig", at which he claims that he was told to get out of the car and informed that he was arrested and would be accompanying the officer to the Stoney Plain R. C. M. P. station. Moreover, he indicated that there ensued a harsh verbal encounter in which he suggested that the police in uniform felt they could do anything to which the Constable replied that Hum was fortunate that he, Nash, was in uniform. Constable Nash remembers neither of these verbal outbursts taking place at that point in time, but merely that he asked Hum to get into the police cruiser. He recollects that he was still writing up the traffic ticket and Mr. Hum's movements again caused him concern that he might be reedy to take off. Both men agree that as Constable Nash opened the door of the cruiser he touched Mr. Hum's elbow. In Mr.

Hum's view this was a "nudge", in the Constable's to "guide" Mr. Hum into the vehicle. In the officer's recollection Mr. Hum reacted negatively to this touching and said "get your fucking hands off me" followed by words to the effect that the police felt smart in uniforms and wondering if the police had not got their quote of aliens or immigrants.

Mr. Hum claimed that it was not until he was settled in the back seat of the cruiser that he was told why he was being arrested, for speeding. Both men agree that word came through the intercom that there were two outstanding warrants from the Calgary police for Mr. Hum's arrest for unpaid fines amounting to $29.00 on parking offences. This information was in response to the earlier request for a CPIC check by Constable Nash. Constable Nash's reaction on receiving this news was to say "good" which Mr. Hum read as meaning that the officer was happy to have a reason for detaining him, but which Constable Nash claimed was the equivalent of "allright" or "O. K." and was addressed to the intercom operator. The officer gave evidence that he then informed Mr. Hum that he was being detained because of the warrants and would be taken to the Stoney Plain detachment headquarters. According to the officer this was standard procedure in outstanding warrant cases. Constable Nash also gave evidence that Mr. Hum was advised of his rights at this point, including his right to contact a lawyer. Mr. Hum indicated to the Constable that the parking tickets had been paid. Constable Nash gave evidence that Mr. Hum asked him for his name and badge number. He replied that both were on the speeding ticket and that it was open to Hum to lodge a complaint, if he wished, with Nash's superior. It is agreed that the officer ordered a tow truck to come and haul away Mr. Hum's station wagon.

The tow truck arrived soon thereafter. There is some confusion es to whether the officer was awaiting confirmation of the warrants at this stage, which Mr. Hum claims, or that Mr. Hum indicated that he might have enough money to pay off the fines, which is Constable Nash's recollection. In any event the towing was delayed. Ultimately after inspecting the exterior of the station wagon Constable Nash gave orders for the vehicle to be towed away. His evidence was that Mr. Hum did not have enough money to pay off the fines. Constable Nash then drove the police cruiser to the detachment headquarters at Stoney Plain, a journey of approximately three miles which took ten to fifteen minutes because of rush hour traffic. Again there are divergencies in the evidence as to whet transpired during this journey. Mr. Hum remembers that he raised the issue of perhaps having enough money to deal with the fines at this stage, and when he discovered that he did not, asked to be allowed to go to the bank, to which he received no reply. The recollection of Constable Nash is that no conversation took place, but that Mr. Hum was uttering profanities in the back seat.

On the arrival of the police cruiser at the Stoney Plain headquarters, Constable Nash parked the cruiser in the security bay. He then took Mr. Hum to the area accomodating prisoners, where he was frisked by the officer, relieved of his shoes, belt, coat and the contents of his pockets which were listed and for which he signed. When Mr. Hum requested that he make a phone call Constable Nash suggested that he make it after he, Nash, had retrieved the CPIC print out. Prior to doing this he placed Mr. Hum in a cell. The latter, which was commonly referred to in the evidence by Mr. Hum as the "drunk tank," and by the Constable as the "holding cell", was in Mr. Hum's recollection cold, dark, lacking furniture except a urinal in the centre. Constable Nash's evidence was that he assumed that all the other cells were full because of remands on their way to Edmonton, although he also conceded that he did not check whether this assumption was

correct. He also indicated that it was normal practice to place prisoners in Mr. Hum's circumstances in the holding cell. Constable Nash went to recover the print out. While doing so he talked to Sgt. Bennett one of his superiors about his difficulties with Mr. Hum and the latter's negative attitude towards him and suggested that someone else should deal with the prisoner. Constable Nash had nothing further to do with Mr. Hum.

Sgt. Bennett went to the cell in which Mr. Hum was being held and informed him that he could make a phone call. Mr. Hum phoned his wife explaining the situation. She advised him that fines had been paid and that she had the cancelled cheques to prove it. It was agreed that she would come to the station with the evidence and get her husband out. Mr. Hum complained to Sgt. Bennett about his treatment by Constable Nash. The letter advised him that he could lodge an official complaint. He was then moved to an open cell which had bed and blankets and other furnishings. He requested that he phone his lawyer, which he was allowed to do. His lawyer advised him that he could make a complaint, but that he might want to wait if he felt under stress. The lawyer suggested that he write up and sign a letter of intent to complain. This he did and gave it to the police.

Mrs. Hum arrived together with the cancelled cheques. She paid the $29.00 said to be still outstanding on the parking tickets and Mr. Hum was released. After a number of phone calls he discovered the whereabouts of his car and retrieved it after paying $57.00 for towing and storage fees. He then drove home.

The next day, October 6, Mr. Hum was called at his school by a Staff Sgt. Carver and asked whether he wanted to make a formal complaint as a prelude to an internal investigation. Although Mr Hum suggests that he was not entirely happy about doing so because of what he described as a "climate of mistrust" between himself and the police, he ultimately agreed to do so.

Mr. Hum, who had been charged with speeding by Constable Nash, pleaded not guilty to the charge but was convicted of the offence in Provincial Court on January 31, 1984. The internal investigation, which was conducted by Sgt. Carver and involved interviews with and statements by Mr. Hum, Constable Nash, Sgt. Bennett and two other officers present at detachment headquarters during Mr. Hum's detention there, concluded that that there was "no evidence to indicate that Cst. Nash acted improperly, was harsh or displayed conduct which would reflect Racism of any kind toward Mr. Hum". The report is dated October 13, 1983 (Exhibit R- 11, Tab 18).

A complaint was subsequently laid with the Commission by Mr. Hum. An investigator for the Commission concluded in a case analysis dated November 2, 1984 (Exhibit R- 1, Tab 7) that the complaint was substantiated in part in that the questions posed by Constable Nash as to Mr. Hum's citizenship and place of birth amounted to adverse differential treatment under section 5(b) of the Canadian Human Rights Act. An unsuccessful attempt was made at conciliation during 1985. With the failure of that initiative the Commission announced its intention by a letter of February 18, 1986 to refer the matter to a tribunal pursuant to section 39 of the Act (Exhibit R- 1, Tab 15).

D. Assessment of the Evidence

Inconsistencies were revealed on the cross examination of both Mr. Hum and Constable Nash. However, having seen and considered the evidence of both individuals I am satisfied that where their evidence conflicts that of Constable Nash is to be preferred. There is absolutely no doubt that Mr. Hum was distressed and agitated in being pulled over for speeding. This left him in a confused, angry and edgy state and unsure of how to react. I find that he did get out of his car when it came to a halt, was informed of the reason for his being stopped when he asked and that his initial reaction was the intemperate one described by Constable Nash. His concern and agitation was clearly aggravated by the questions put to him by Constable Nash on his citizenship and place of birth which added to his feeling of distress and embarassment. This, I believe induced him to utter several other profanities and insults to the officer. In his own evidence in chief, Mr. Hum admitted to characterizing Constable Nash as a "racist pig". Moreover, I am of the opinion that Mr. Hum's negative frame of mind left him hazy as to the exact sequence of events after the questions were posed, and caused him unjustifiably to interpret the officer's subsequent actions as prompted by an animus towards him and his racial origins. Despite the fact that Mr. Hum found it difficult to accept that Constable Nash was bound by law to execute the outstanding warrants for Mr. Hum's arrest for the unpaid parking fines in Calgary, the officer was acting entirely in accord with the law and his duties under it. Moreover, I do not interpret the temporary confinement of Mr. Hum in the "holding cell" or "drunk tank" as indicative of a intention on the part of the officer to 'get back at' or to humiliate Mr. Hum. I accept that this was normal practice in such circumstances, and that in any event Constable Nash was genuinely of the opinion that it was the only cell available.

Although, as I shall point out later in this decision, Constable Nash's belief that Mr. Hum was attempting to elude him and that he might be an illegal alien betrays excessive zeal, I have no reason to believe that he "lost his cool" at any time during this incident or that he was motivated by anything more than a desire to do his job to the best of his ability. I find no basis for branding Constable Nash as a racist or as impelled by any hostility towards Mr. Hum as a person of oriental background. Evidence led before the Tribunal suggests that to the contrary Constable Nash has worked with, lived with and interacted well both at university and in the police service with colleagues of oriental background. The attempts of Mr. Hum to characterize Constable Nash as an unwordly neophyte from a remote corner of Canada with little sensitivity to racial diversity and sensibilities brought him close to applying the sort of stereotypes of which he himself was complaining. I note that it was the position of counsel for the Commission that it was not the intention of that body in pressing this complaint to suggest that Constable Nash is a racist or betrayed racist tendencies in his dealings with Mr. Hum. These findings do not, however, dispose of the issue of whether Constable Nash's treatment of Mr. Hum in directing questions to him about his citizenship and his place of birth amounted to a breach of section 5(b) of the Canadian Human Rights Act.

E. The Policies and Practices of the R. C. M. P. in Enforcing the Immigration Act

In his statement to Staff Sgt. Carver during the internal investigation following the incident on October 5, 1983 (Exhibit R- 1, Tab 18) Constable Nash revealed that it was his practice to ask members of visible ethnic minorities, such as Chinese and Japanese, whether they were

Canadians and where they were born when he stopped them for speeding. In his evidence before the Tribunal he qualified that answer by suggesting that he would ask such a question if his suspicions were aroused by the conduct of the individual whom he had stopped. He also conceded in cross examination by Mr. Jurianz that the fact that citizens were abusive when pulled over for speeding did not induce him to ask all of them about their citizenship. When asked by counsel for the Commission what his reaction would have been to similar conduct by a white Caucasian in the circumstances, Constable Nash gave the following revealing answer (Transcript, pp. 235- 6)

Q. If in this incident, Constable Nash, the driver had not been a Chinese- Canadian but had been a white Caucasian person who spoke English in the same way and was dressed the some way, drove the some car, had the same manners, made the same responses, would you have asked that driver whether he were a Canadian citizen?

A. If I had detected some sort of action or that he was'nt, did'nt speak, the proper English or did'nt sound like a Canadian, an American or whatever, I would probably have asked him where he was from.

Q. If you detected an accent or something of that nature?

A. That's correct.

Q. In this case did you detect any accent on the part of Mr. Hum?

A. No, I did not.

Evidence was led by Constable Nash that he was sensitive to infringements of the Immigration Act because he personally had arrested an illegal alien at an earlier point in time when he had stopped a car for speeding. The car had six people of Portuguese origin in it. Liquor was open in the vehicle and no one would admit to its ownership. He also discovered on inquiry that one individual lacked identification and further investigation showed that he was illegally in Canada. Several of the occupants of the car did not speak English. The rest spoke with Portuguese accents.

There was no suggestion during the hearing that Constable Nash in his actions was acting in any way contrary to the practices and policies of the Force. Indeed, his superior officer, Sgt. Bennett, in his statement to Staff Sgt. Carver approved of the practice of asking the members of visible minorities these types of questions in these circumstances. Sgt. Carver in his report found nothing untoward in the behaviour of Constable Nash in making such inquiries of persons of "foreign ethnic background", although he did suggest that the practice of asking questions on citizenship and place of birth applied to both white and non- white violators. Evidence led before the Tribunal by senior officers in the Force did not deviate significantly from the position of the officers at the local level.

Inspector Jean Philion, currently Assistant Training Officer at the R. C. M. P. Academy in Regina and previously in charge of the Canadian Human Rights Unit of the Force in Ottawa,

testified that he provided the background information for the initial response of the R. C. M. P. to the Commission which had inquired about the policies and practices of the Force in enforcing the Immigration Act. A letter dated May 29, 1984 from Ms. D. Gottenberg of the Commission written after Mr. Hum had laid a complaint (Exhibit R- 1, Tab 3) had requested that the Force forward a copy of the policy or procedure "whereby R. C. M. P. officers are instructed during performance of their duties to ask persons with 'foreign ethnic backgrounds' or persons who have difficulty speaking the English language the following questions: a) Are you a Canadian citizen? b) Were you born in Canada." Moreover, four questions were posed to which the Commission sought answers. They were as follows:

1) How ore persons of 'foreign ethnic backgrounds' identified?

2) What is the criteria used in identifying persons who have difficulty with the English language?

3) What is the purpose of asking these questions?

4) Are R. C. M. P. officers required to identify aliens who are Caucasian and have good command of the English language? If so, what are the criteria of procedures used in making this type of identification?

He indicated that his investigations both at a national and regional level resealed that there were no formal policies or guidelines applicable to the enforcement of the Act, still less as to how to deal with members of "foreign ethnic backgrounds". His discussions with members of the Policy Unit in Ottawa and member of "K" Division in Alberta, however, provided a basis for articulating criteria which were applied in practice and which formed the answers to the questions specifically posed by the Commission. In a letter of August 14, 1984 under the signature of Inspector Bergman (Exhibit R- 1, Tab 6) the initial point made was that the Force has no policy on instructions to its members when asking persons whether or not they are Canadian. Such questions, the letter continued, were justified in view of the Force's responsibility to enforce the immigration Act, a responsibility which was impressed on all its members. The following answers were given to the questions posed by Ms. Gottenberg.

1. Persons of 'foreign ethnic background' are identified by the use of approporiate questions and by means of physical evidence such as dress, speeech, customs and appearance.

2. The criteria used to identify persons who have difficulty with the English language is through communication, speech and general conversation. Difficulty speaking the English language does not apply in many instances where the status of an individual is being checked.

3. The purpose of asking the questions mentioned at (a) and (b) of your letter is to determine the person's status in Canada. The Royal Canadian Mounted Police have a responsibility to enforce the Immigration Act. In addition, when a person is a visitor to Canada, and is arrested, under the Geneva Convention they are entitled to have their embassy notified for purposes of assistance. It is therefore necessary to determine the nationality.

4. Under the Immigration Act, RCMP officers are required to identify all aliens whether they are Caucasian and have a good command of the English language or they are non- Caucasian. Americans are the number one offenders of the Immigration Act.

Although Inspector Philion denied that these answers reflected formal policy or guidelines he did concede, in answer to a question from me, that they were reflective of day- to- day practice. During cross- examination by Mr. Jurianz, the Inspector indicated that he interpreted "a person of foreign ethnic background" to be "someone who does'nt come from Canada" including a person born in Canada of Chinese descent. (Transcript, p. 368) He underlined this on rexamination in chief by suggesting that the term included members of visible minorities. (Transcript, p. 377) By contrast he felt that a person would not be of "foreign, ethnic background" who is white and does not have an accent.

Staff Sgt. James Potts is with the Training and Development Unit of the R. C. M. P. at headquarters in Ottawa, with responsibility for courses in both enforcement of the Immigration Act and Cross Culturalism. He testified that the term "foreign ethnic background" was nowhere defined in the materials for either course. When asked in chief what definition he would give to the term he supposed that "it would be anyone that could be perceived to be of foreign ethnic background, either by ... language, or by ... appearance .." (Transcript, p. 403) Questioned further he suggested that it would include members of visible minorities such as persons of Chinese descent, although on cross examination he conceded that he had doubts about the utility of the term in the Canadian context. Sgt. Potts, while indicating that no specific guidance was provided to members of the force on whether to ask questions of such people about citizenship and place of birth, his advice would be "if you are in doubt, ask" (Transcript, p. 404). He did suggest, however, that the circumstances should be such as to give rise to suspicion.

The most assertive in his evidence was Superintendent Barker, Officer in Charge, Contract Policing Branch at headquarters in Ottawa. In his view it is essential to police work that officers act on the basis of suspicion, and ask questions on the basis of those suspicions. Indeed, he argued, this is the way in which an officer can determine whether there are "reasonable and probable" grounds for proceeding further. He felt that it would be particularly detrimental to the work of the Force in enforcing the Immigration Act if members were not able to ask pertinent questions about citizenship and birth where the conduct of an individual gave rise to suspicion. To the Superintendent's mind the combination of a suspicious act and membership in a visible minority might well trigger concern in the mind of an officer about a breach of the Immigration Act. In response to a question from me, Superintendent Barker suggested that whereas the facial appearance of a member of a visible minority would be the criterion for questioning that person, in the case of a member of the "visible majority" one would have to look for an accent suggesting a foreign place of origin or perhaps a peculiar mode of dress. (Transcript, pp. 492- 4) He admitted that these amounted to different methods of testing a suspicion that an individual might be an illegal immigrant.

F. Were the R. C. M. P. in Breach of Section 5(b) of the Canadian Human Rights Act in the Circumstances?

One matter can be disposed of quickly. Section 5 of the Canadian Human Rights Act relates the concept of "discriminatory practice" to "the provision of goods, services, facilities or accommodation customarily available to the general public". In this case the complaint relates to the provision of services. Although some might question whether the activities of a police force in investigating an offence can be characterized as a service, the term has been given a broad interpretation which would cover the activities of the police in carrying out the whole range of their duties and functions. In two decisions of Boards of Inquiry set up under the Alberta Individual Rights Protection Act, Gomez v. City of Edmonton (1982) 3 Can. Human Rights Rep, D/ 882 and Akena v. City of Edmonton (1982) 3 Can. Human Rights Rep, D/ 1096, the Boards concluded that the function of the police in stopping and questioning an individual under the provincial Highway Traffic Act fell within the designation "services" in section 3(b) of the former statute. Mr. Hynes for the R. C. M. P. in this case made no attempt to challenge this interpretation. I am satisfied, then, that in these circumstances Constable Nash, in stopping and questioning Mr. Hum, was engaged in the "provision of a service" under section 5(b) of the Canadian Human Rights Act.

The term "to differentiate adversely" in section 5 (b) has not received interpretation in the courts or by tribunals, unlike the term "to discriminate". However, from the wording of the section, "to differentiate adversely" is a form of "discriminatory practice", which in my mind means that it is a species of "discrimination" and that its interpretation is necessarily coloured by that association. Like the verb "to discriminate", the connection of the verb "to differentiate" with the adverb "adversely" connotes a process of treating someone differently from the way in which others would be treated in the some circumstances, and with a detrimental result to the individual so treated. As with the term "to discriminate" there is no requirement that the actor intend to harm the victim of the action. The adverse impact of the differentiation will in some cases be a tangible detriment to the victim, for example the lack of shelter or goods. However, it may also be an adverse psychological impact. The hurt caused may be to the spirit or to dignity rather than to the actual physical welfare of the individual. Although he was dealing with the term "discrimination" Professor Ian Hunter captures the essence of the term "to differentiate adversely" when he writes

Discrimination means treating people differently because of their race, colour, sex, etc., as a result of which the complainant suffers adverse consequences or a serious affront to dignity: the motive for the discriminatory treatment, whether occasioned by economic or social considerations, and whether those considerations are soundly or fallaciously based, is irrelevant, except possibly in mitigation of the penalty. (I. Hunter, "Human Rights Legislation in Canada - Its Origin, Development and Interpretation" (1976), 15 Univ. West. Ont. Law Rev. 21, at pp. 33-4)

Piecing together the practice of the R. C. M. P. in enforcing the Immigration Act in circumstances such as those in this case from the various witnesses, provides the following picture. The members of the R. C. M. P. do not normally stop individuals at random to ask questions relating to citizenship and place of birth as a means of enforcing the Immigration Act. Furthermore they do not make it a practice to ask such questions merely because an individual has violated highway traffic legislation by speeding. It is typically only if the conduct of the individual raises suspicion that the questions will be asked. However, it is not suspicion by itself

which triggers the questions but certain characteristics of the person under suspicion. If the individual is a member of a visible ethnic minority then the physical characteristics are the crucial factor. If not, then it will be an alternative characteristic, usually a foreign accent, which triggers the questions. As Superintendent Barker said in evidence the test is different. The consequence of this differentiation is that of two individuals both of whom are otherwise actingly suspiciously in the mind of investigating police officers in the same factual circumstances, the one who is of a visible ethnic minority will be questioned based on his membership of that minority, even if every other characteristic would be entirely consistent with Canadian citizenship, while the one who is of the visible ethnic majority will only be questioned if he exhibits a further characteristic or characteristics which suggest a foreign origin. The process is one, then, which clearly differentiates between suspects on the basis of racial origin.

Was Mr. Hum a victim of adverse differentiation under section 5(b) of the Canadian Human Rights Act.? Ostensibly the posing of questions of the sort put to Mr. Hum by Constable Nash on citizenship and place of birth may not seem exceptional, and many perhaps would ask why he reacted so unfavourably to them. The feeling of some Canadians would be that the police have a tough job to do and should be entitled to ask questions to resolve their suspicions. If the individual questioned is innocent he has nothing to fear by answering readily and assisting the police in their enquiries. From the evidence led before the Tribunal this is the view which the R. C. M. P. feels is warranted. Clearly, cooperation with the police in their investigation or prevention of crime is a sensible policy. However, none of these opinions can justify the differential treatment of Canadian citizens who are members of visible minorities where crimes or infringements of the law are being investigated. If Canadians who are of racial backgrounds other then those of the Caucasian mainstream are subjected to a different investigation practices because they are members of visible minorities, then they will naturally and justifiably feel that they are not full citizens because they are required to explain themselves and their status where their white neighbours are not. Mr. Jurianz put this most eloquently in his summation (Transcript p. 507).

These people, no matter what they do, no matter how much they move into the mainstream of Canadian life, play hockey, and swear like Canadians in the some terms at work, play and at home will always be haunted by the suspicion that somehow they do not belong simply because of their immutable characteristics, no matter how many generations pass.

Not only do Canadian citizens who are members of visible minorities feel strongly and sometimes passionately the need to be recognized as full members of Canadian society, subject to the some consideration, respect and rules as their neighbours, but they are also aware of the fact that official policy towards citizens and immigrants of non- white races in this country was in the post, highly discriminatory. A hint of the injustice suffered by earlier generations of Chinese immigrants arose during the hearing when Mr. Hum mentioned his grandfather who had had to pay the "head tax" in order to enter Canada. I am not suggesting here that the blame for the insensitive end often racist policies of Canadian governments and officials at earlier periods in our history should somehow be visited on their more enlightened successors. What I am suggesting is that official action today in enforcing the Immigration Act cannot take place in a vacuum, but must be responsive to the legitimate claim of Canadian citizens of diverse racial origins to be treated equally in the some circumstances.

Although Mr. Hum was quite legitimately pulled over and asked for his license, registration end insurance slip, there was no warrant for asking him questions about his citizenship and place of birth in circumstances in which a Caucasian exhibiting the some conduct and speaking and dressed in the some way would not have been so challenged. It is entirely understandable that he would feel concern, hurt and resentment in the circumstances. The fact that Mr. Hum answered the questions does not change their quality or legitimate them. In a different context, that of the stopping of citizens by the police at check stops, the Supreme Court of Canada in R. v. Dedman (1985), 20 C. C. C. (3d) 97 (S. C. C.) has recently made it clear that compliance by a citizen with a directive from a police officer cannot be characterized as a voluntary act. As Le Dain J. speaking for the majority of the Court said (at p. 116) "the reason for this is the authoritative and coercive character of police action". The same considerations apply to a demand for information of the type being sought in this case by Constable Nash.

I find that Mr Hum was the subject of adverse differentiation under section 5(b) of the Canadian Human Rights Act.

The position of the Force, as we have seen, is that the imperatives of enforcing the Immigration Act as well as the Criminal Code require officers to act on their instincts and to resolve their suspicions, however formed. In the absence of any clear direction the dominant impulse seems to be "If in doubt ask". The implication is that there is a higher duty which outweighs the duty to treat citizens equally in all respects. Mr. Hynes in his closing argument suggested that there is need for caution in unnecessarily curtailing the ability of the police to investigate breaches of the law. Moreover, he suggested that where there is a conflict between the responsibilities of the police under the RCMP Act, Criminal Code and the Immigration Act on the one hand and the Canadian Human Rights Act on the other, we should be careful not to assume that it was Parliament's intention to limit the powers of policemen in the ordinary course of their duties. The further question, then, must be addressed of whether there is some legal sanction for Constable Nash's action in asking these questions which would override the infringement of the Human Rights Act. Mr. Jurianz in his argument for the Commission was of the view that the police power to question in relation to a person's identity has to be based on reasonable suspicion that the individual questioned is or has been engaged in a breach of the criminal or immigration laws.

What is the state of the law with regard to the power of the police to ask questions about the identity of a citizen, including questions on citizenship and place of birth? The Criminal Code where it deals with powers of arrest, as it does in sections 25, 28, 30, 31, 449 and 450, requires that the police officer have reasonable and probable grounds for exercising that power. The Immigration Act has one section which deals with powers of arrest, section 104(2). It reads

104(2) Every peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, an order or a direction for arrest or detention, arrest and detain or arrest and make an order to detain

(a) for an inquiry, any person who on reasonable and probable grounds is suspected of being a person referred to in paragraph 27(2)(b), (e), (f), (g), (h), (i) or (j) or (b) for removal from Canada, any person against whom a removal order has been made that is to be executed where,

in his opinion, the person poses a danger to the public or would not otherwise appear for the inquiry or for removal from Canada.

Section 27(2) of the Act classifies certain people who by their status are illegal immigrants. Section 104(2) clearly ties the power of arrest to the presence of reasonable and probable grounds for suspecting an infringement of the Act of the sort contemplated by the section, except where a removal order has already issued.

Neither the Code nor the Immigration Act give any guidance on criteria relating to mere questioning. This issue has, however, been dealt with or touched upon by the courts in both criminal cases, and in civil actions for false arrest. In Koechlin v. Waugh and Hamilton (1957) 118 C. C. C. 25 (Ont C. A.) the defendants, two plainclothes police officers on patrol, stopped the plaintiff and a friend and asked them for their identification. The plaintiff refused to comply, challenging the officers to provide their identity. After the plaintiff rebuffed a second request to identify himself a scuffle ensued and the plaintiff was arrested. An assault charge against the plaintiff was subsequently dismissed. The plaintiff then sued for false arrest. The trial judge concluded that the officers were acting on the suspicion that the plaintiff might have been involved in a series of break ins which had occurred in the neighbourhood a few nights before and were confirmed in their suspicions by the plaintiff's uncooperative attitude The Ontario Court of Appeal reversed the decision finding that the officers had no reasonable and probable grounds for suspecting the plaintiff. Laidlaw J. A. described the limits on a police officer's powers of arrest in these words (at p. 27):

A police officer has not in law an unlimited power to arrest a law- abiding citizen. The power given expressly to him by the Criminal Code to arrest without warrant is contained in s. 435 [now s. 450], but we direct careful attention of the public to the fact that the law empowers a police officer in many cases and under certain circumstances to require a person to account for his presence and to identify himself and to furnish other information, and any person who wrongfully fails to comply with such lawful requirements does so at the risk of arrest and imprisonment. None of these circumstances exist in this case. No unnecessary restrictions on his power which results in increased difficulty to a police officer to perform his duties of office should be imposed by this Court. At the some time, the rights and freedoms under law from unlawful arrest and imprisonment of an innocent citizen must be fully guarded by the courts.

In addressing the questioning of the plaintiff by the officers Laidlaw J. A. indicated that he could not fault them for asking him to identify himself, and suggested that if the plaintiff had been cooperative he would have avoided the difficulties which beset him. However, the officers were not entitled, on his refusal to answer, to use force against or to arrest him.

This decision is authority for the proposition that the police do not have a general right to seek the identity of whom they please. Any right they possess must flow from a recognized power such as that inferred from section 450 of the Code where there are reasonable and probable grounds for suspicion of the individual questioned. Where they lack such specific legal authority, for example where they act on mere suspicion, they can ask the questions of an individual but will not be protected from liability for infringing that person's right if he or she refuses to answer

and is arrested. It is implicit in this latter position that the suspect is entitled to refuse to answer questions concerning his identity.

In the criminal case of Moore v. The Queen (1979), 43 C. C. C. (2d) 83 (S. C. C.) the accused was charged with with wilfully obstructing a peace officer in the execution of his duties contrary to section 118 of the Criminal Code. He had ridden a bicycle through a red light contrary to the provincial Motor Vehicles Act in full view of a police officer. After the officer had with some difficulty induced the accused to stop he refused to give his identity. At trial the judge concluded that as the accused was not operating a motor vehicle he was not guilty of the offence of refusing to stop when signalled to do so by a police officer. Accordingly, he ordered the jury to acquit. The British Columbia Court of Appeal allowed the appeal by the Crown and ordered a new trial. On appeal by the accused to the Supreme Court of Canada a majority of the Court dismissed the appeal. Spence J. for the majority concluded that the constable in this case was carrying out his duties under the provincial Police Act. Although he had no inherent power to stop and arrest a person whom he found committing a summary conviction offence, he acquired that power under section 450 of the Criminal Code where, as here, the arrest was necessary to "establish the identity of the person" in order to issue a ticket under the provincial Summary Convictions Act. In terms of balancing the interests of the police in enforcing the law effectively and of the citizen in being protected from infringement of his freedom to move about without restraint, Spence J. made the following remarks:

I add that in coming to this conclusion I have not forgotten the provisions of the Canadian Bill of Rights nor the topic of individual freedom generally but I am of the opinion that there is not even minimal interference with any freedom of a citizen who is seen committing an infraction by a police constable in the police constable simply requesting his name and address without any attempt to obtain from that person any admission of fault or any comment whatsoever. On the other hand, the refusal of a citizen to indentify himself under such circumstances causes a major inconvenience and obstruction to the police in carrying out their proper duties. So that if any one were engaged in any balancing of interest, there could be no doubt that the conclusion to which I have come would be that supported by the overwhelming public interest. The import of this decision is that the police in carrying out their statutory policing duties are entitled to ask questions of an individual about his or her identity when he is observed committing an offence, and to charge him with obstruction for failure to answer, even though the offence he has committed carries it with no inherent power of arrest. In such circumstances the facilitating of police activity is to be given greater weight then protection of the sensibilities of the offender. For the minority Dickson J. (as he then was) took the position that a person cannot be guilty of the offence of obstruction for failing to act unless there is a legal duty to act. A duty to identify oneself must be rooted in either statute or the common law. Here there was no statutory duty on the accused to identify himself. In the view of this judge there is no common law duty on a citizen to identify himself. He was not willing to imply a duty reciprocal to that of the police officer to investigate crime and to enforce provincial laws. The duties, he stated, are independent and the citizen's duty only arises "where the police have a lawful claim to demand that a person identify himself" (per Dickson J. at p. 96).

This conflict in judicial positions on the extent of police powers was rehearsed in the more recent Supreme Court of Canada decision in the criminal case of Regina v. Dedman (1985), 20 C. C. C.

(3d) 97 (S. C. C.). The accused in this case had been stopped randomly by a police officer carrying out check stops to detect impaired drivers in areas where the police believed there was a high incidence of impaired driving or alcohol related offences (the R. I. D. E. program). Before the accused was stopped the officer had no reason to believe that he was or might be impaired. It was only when he was stopped that the police constable, after asking for his license, concluded from the smell of his breath that he might be impaired. The officer made a demand under section 234.1 of the Criminal Code that the accused provide breath samples. After four unsuccessful attempts Dedman was charged with failing to comply with a roadside demand contrary to section 234.1(2) of the Code. The accused was acquitted at trial and an appeal by the Crown by way of stated case was dismissed. An appeal to the Ontario Court of Appeal by the Crown was allowed, and a further appeal to the Supreme Court dismissed.

Le Dain J. speaking for a majority of the Court was of the opinion that police officers, in acting as agents of the State only act lawfully if they act in the exercise of authority conferred by statute or derived as a matter of common law from their duties. This limited ambit of action is explained by the "authoritative and coercive character of police action". The police in this case could not appeal to statutory authority to justify the process of random stopping of motor vehicles. Le Dain J. was not willing to extend section 14 of the Ontario Highway Traffic Act which gives a police officer the right to demand to see a motorist's licence to provide a basis for a statutory right to stop on the facts of this case. Furthermore he was unwilling to follow the rationale of the Ontario Court of Appeal that lawful authority could be established if the accused complied with a direction to stop, as he had in this instance.

Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense. The possible criminal liability for failure to comply constitutes effective compulsion or coercion. (Le Dain J. at p. 117)

The stopping of the accused in these circumstances was justified, however, within the common law powers of the police officer. Under the common low, although a police officer's conduct may appear to be an unlawful interference with a person's liberty or property, the conduct is lawful if it falls within the general scope of a duty imposed by statute or recognized at common low, and if the conduct does not involve an unjustifiable use of powers associated with the duty, but is reasonably necessary to carry out the duty. Here the act of stopping vehicles in a check stop fell within the general scope of a police officer's duties to prevent crime and to protect life and property by the control of traffic. The objects of the program were to deter and detect impaired driving, a notorious cause of injury and death on the highways. Moreover, the interference was a justifiable use of power associated with a police duty, given the seriousness of the problem of impaired driving.

Although the right to travel the highways is an important one, it is already an activity licensed and subject to regulation and control in the interests of safety. Finally, the objectionable nature of a random stop was reduced by the well publicized nature of this particular program and the short duration and slight inconvenience of the stop.

The Supreme Court in this case committed itself to a clear statement that the police have no inherent right to stop and question citizens. Such a right can only flow from a power granted by statute or derived from the common law. That there is still room for disagreement as to the implications of this statement is demonstrated by the fact that the minority of three judges in this case, led by Dickson C. J., agreed with the majority's statement of principle and its rejection of the Court of Appeal's rationale but concluded that there was no common law basis for the power claimed here. The Chief Justice, proceeding from his position in Moore, was of the view that, short of arrest, there is no common law right in the police to detain a person for questioning or for purposes of investigation, even on suspicion. Accordingly, there was no lawful basis for stopping and arresting a motorist in the circumstance of this case and the accused could not be charged and convicted under section 234.1 of the Code.

I conclude that, without validly enacted legislation to support them, the random steps by the police under the R. I. D. E. program ere unlawful. In striving to achieve one desirable objective, the reduction of death and injury that occurs each year from impaired driving, we must ensure that other, equally important, social values are not sacrificed. Individual freedom from interference by the State, no matter how laudable the motive of the police, must be guarded zealously against intrusion. Ultimately, this freedom is the measure of everone's liberty and one of the cornerstones of the quality of life in our democratic society. (Dickson C. J. at p. 109)

The present state of the law is, then, that the police do not have a unlimited right to ask citizens to identify themselves, let alone answer questions on their citizenship and place of birth. Their power is limited to the authority which is provided by statute or derived from the common law. The decision in Moore v. The Queen illustrates a circumstance in which the statutory authority was found to flow from the Criminal Code, in particular section 450.

Examples of powers granted to police officers by provincial statutes to seek the identity of citizens are those contained in sections 119 and 165 of the Alberta Highway Traffic Act, R. S. A. 1960, c. H- 7.

119 A driver shall, immediately on being signalled or requested to to stop by a peace officer in uniform, bring his vehicle to a stop and furnish any information respecting the driver of the vehicle that the peace oficer requires and shall not start his vehicle until he is permitted to do so by the peace officer.

165 Any person crossing or walking on a highway in a manner contrary to this Act or any municipal by- law regulating pedestrian traffic shall, on request, give his name and address to any police officer.

It was the wording of section 1 19 which gave Constable Nash in this case the power to signal Mr. Hum to stop and to produce his driver's license, registration and insurance slip.

Outside clear statutory authorization of a power to stop and question, the power claimed must be justified under the common law. As the decision in Dedman shows, a common law power may be derived from, the general duty of the police to investigate and prevent crime and to arrest its perpetrators as long as the exercise of the power is "reasonably necessary" for the carrying out of

the duty. The decision in the Dedman case indicates that well publicized programs of crime prevention and investigation may also warrant stopping and questioning. Among other situations, in which the exercise of the power to stop and question has been recognized, are those in which the officer has reasonable and probable grounds for believing that the individual encountered is guilty of an offence, and may be arrested without a warrant. Stopping and questioning may be seen as a necessary prelude to a decision on arrest under the Code. By analogy, the power of arrest granted by section 104(2)(a) of the Immigration Act would seem to justify the peace officer or immigration officer seeking to establish the identity of an individual and his citizenship and place of birth in order to determine whether or not he falls within the classes enumerated in section 27(2) if the officer has reasonable and probable grounds for suspecting that he is an illegal immigrant.

This statement of the law of police powers leaves at least one loose end hanging, and that is the status of questions asked by the police where they have no recognized statutory or common law power to demand an answer. It is obvious from what has been said above that the suspect or individual questioned is not required to reply to such questions, and cannot be arrested for failure to answer. Moreover, if he does answer, that compliance is not to be considered as voluntary. Do these limitations, however, mean that the police are barred from asking the questions? It is evident from several of the statements made in the cases analysed above that the Courts recognize the importance to the police of some freedom in asking questions to tease out information on the basis of which they can make judgements as to the need for further investigation or arrest. This acceptance of the notion that "there is no harm in asking" has, on occasion, being characterized as a "legal liberty", which creates no reciprocal obligation on the part of the person questioned, in contradistinction to a "legal right" which does. In R. v. Dedman (1981), 59 C. C. C. (2d) 97 Martin J. A. speaking for the Ontario Court of Appeal put the dichotomy as follows

[W] hen a police officer is trying to discover whether or by whom an offence has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks useful information can be obtained. Although a police officer is entitled to question any person in order to to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by low, and this principle applies as much to police officers as to anyone else. Although a police officer may approach a person on the street to answer and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless of course, the officer arrests him on a specific charge or arrests him pursuant to s. 450 of the Code where the officer has reasonable and probable grounds to believe that he is about to commit an indictable offence.

This "legal liberty" to ask questions extends to both the case contemplated by Martin J. A, and situations, such as this, where the police officer has already stopped the individual for another offence.

What are the implications of the recognition of such a concept for this case? I am of the view that even if it is accepted that there is a legal liberty on the part of a police officer to ask questions

that does not mean that he is free to ask whatever questions he likes and in whatever way he chooses. His freedom to ask has to be viewed in the context not only of the effectiveness of police investigation, but also in the light such considerations as the freedom of the citizen from unnecessary intrusion into his affairs, his right to be advised of his right to remain silent and not to answer the questions and, most importantly for present purposes, his legal right to be treated in the same way as other citizens. The "liberty" is subject to the limitations on individual and corporate action contained in the Canadian Human Rights Act, especially those set out in section 5(b)

On the facts of this case there is no doubt that Constable Nash had statutory authority to stop Mr. Hum, having found that he was speeding, and on having stopped him to demand his driving license, vehicle registration and insurance slip. Indeed Mr. Hum would have been guilty of an offence under the provincial Highway Traffic Act if he had refused to comply and under the Criminal Code if he had proved obdurate or had taken off. Moreover, there seems little doubt that, if Constable Nash had reasonable and probable grounds for believing that Mr. Hum had committed another criminal offence or infringement of a federal statute, he could have questioned him further. The exercise of this power would include a suspected infringement of the Immigration Act and have entitled the officer to question the suspect on his citizenship and place of birth.

On the facts as I have found them I have concluded that Constable Nash had no reasonable and probable grounds for suspecting that Mr. Hum was in breach of the Immigration Act. The officer certainly developed a suspicion that Mr. Hum was trying to avoid him. However, conduct suggesting that an individual stopped for a totally different violation of the law may take off does not, as Constable Nash admitted, lead to the conclusion that he may be an illegal alien. It is true that until Mr. Hum pulled over onto the service road Constable Nash may have thought that what he took to be evasive conduct and Hum's apparent oriental origin suggested the possibility of a breach of the immigration laws. This suspicion may have been strengthened in his mind when Mr. Hum got out of his car. However, after Mr. Hum complied with the officer's demand for documentation and the latter noted the information on the driver's license and could see from Mr. Hum's manner of dress and hear from his speech that he had none of the characteristics normally associated with an illegal immigrant, it is difficult to see how the merest suspicion could have remained. The only possible explanation is that Constable Nash, acting in accord with Force practice, and naturally anxious to do his job properly, concluded that Mr. Hum's membership in a visible minority was an adequate basis for questioning him further.

Much was made in the evidence on behalf of the Force of Constable Nash's previous arrest of an illegal immigrant of Portuguese origin. The circumstances of that event were markedly different from this. The occupants of the car were not only in possession of opened liquor, but also they either spoke with accents or could not speak English at all. Moreover, one of the number hod no identification of any sort on him. It was perfectly natural that Constable Nash would have harboured reasonable suspicions that there might have been a breach of the Immigration Act on those facts. Here similar suspicious factual elements were lacking.

Although, as I have suggested above, some courts and judges have countenanced a "legal liberty" on the part of police to stop citizens and ask questions, even where curious or acting on surmise,

the liberty is subject to contraints imposed by statute and the common law. In particular it is subject to the terms of the Canadian Human Rights Act and to section 5(b). I have found that the latter section was infringed in this case, in that Mr. Hum was the victim of adverse differentiation on grounds of race. As a consequence I am of the view that the liberty, if it existed, was abused and therefor loses any claim to legal recognition that it might otherwise have had.

G. Were the R. C. M. P. in Contravention of Section 13.1 of the Canadian Human Rights Act?

An infringement of section 13.1 of the Act requires conduct which amounts to harassment of the complainant. The standard dictionary definitions of the verb to "harass" invariably point to the need for some ongoing or repeated act or course of conduct. The verb to "harass" is defined variously as "to vex, trouble or annoy continually or chronically" (Webster's Third New International Dictionary, 1971, at p. 1013) and "to disturb persistently, torment, bother continually, pester, or to persecute" (Random House Dictionary of the English Language, 1973 at p. 645). I have already concluded that the evidence does not support the claim of Mr. Hum that he was subjected to an extended course of differential or discriminatory treatment here. The focus of attention, then, is the series of questions put to Mr Hum by Constable Nash about his citizenship and place of birth and a request for further identification. Mr. Jurianz for the Commission argued that after asking the first question "Are you a Canadian citizen?", which in the circumstances amounted to adverse differentiation, the further question. in the face of a positive response to the first question constituted a pattern of harassment. While it is obvious that a series of questions can amount to harassment, especially when pressed with vigour and insensitivity, I am not convinced that the pattern of questioning here could be characterized as harassment. Unwelcome and embarassing though it may have been to Mr. Hum, I am of the view that it fell short of conduct amounting to annoying or bothering continually, or pestering.

H. The Order Granted

Having found that the R. C. M. P. engaged in a discriminatory practice against Mr. Hum under section 5(b) of the Canadian Human Rights Act it remains for me to determine what order should be granted. The power to do so exists by virtue of section 41(2) of the Act. In his argument Mr. Jurianz, for the Commission requested that I do the following:

1. Order the R. C. M. P. to cease the discriminatory practice identified in this case;

2. Order the R. C. M. P to issue a directive to its officers and employees publicizing this case and the order so that the offending practice will not continue in the future.

3. Recommend that the Force augment their current training program to include instruction on the limits to the power to ask questions relating to citizenship end place of birth, and in particular to emphasize that inquiries under the Immigration Act cannot be based only on a person's race, colour or ethnic origin.

No claim was made for damages in this case. It is important that the respondent in this complaint act quickly to remedy a practice which is clearly discriminatory. By virtue of section 41(2)(a) it is open to me to make and order "against the person found to be engaging or to have engaged in

the discriminatory practice" including the term 'that such person cease such discriminatory practice". Accordingly I order that the R. C. M. P. cease the practice of questioning members of visible minorities as to their citizenship and place of birth in investigations under the Immigration Act, whether out of curiosity or a desire to confirm a bare suspicion, solely on the ground of race, colour or ethnic origin. This order is not designed to extend to cases where the police have reasonable and probable grounds for believing that a particular individual has or is about to infringe the provisions of the Immigration Act. Nor does it prevent questioning which is not discriminatory in character, but nevertheless designed to elicit information about a possible breach of the immigration laws.

As this order, to be effective, must be communicated to all members of the Force immediately, I further order that the Commissioner of the R. C. M. P. issue a directive to all members of the Force that the practice identified has been found to be discriminatory, and that members desist from it forthwith.

The evidence of both Inspector Jean Philion and Sgt. James Potts suggest that the R. C. M. P. has made considerable strides in sensitizing the members of the Force to the realities of the multi-racial and cultural society which Canada now is. The Force is to be commended for the cross cultural programs which it has devised and the instruction it gives in these matters. It seems, however, that there are still areas of possible conflict between the perceived imperatives of enforcement and the rights of Canadian citizens, in which the impulse is to give greater weight to the former over the latter. The only satisfactory way of working change in police attitudes in these matters in the long term is through education and the challenging of officers to think through carefully the undesirable implications both to society and to the individual of infringing the rights of a citizen from a visible minority on grounds of race, colour or ethnic origin. Consequently I recommend that the R. C. M. P, in its educational and training programs, provide instruction to its recruits and members in the importance of not sacrificing the right of citizens from visible minorities to equal treatment when investigating infringements of the Immigration Act and emphasize that inquiries under the Act as to a person's legal status must not be based only on race, colour or ethnic origin.

As I have indicated there was no claim made for damages, and no evidence led of actual losses that might hove been sustained by Mr. Hum. It is open to me under section 41(3)(b) of the Canadian Human Rights Act to award compensation where I find that "the victim of the discriminatory practice has suffered in respect of feelings or self respect as a result of the practice". I have indicated above that the questions on citizenship and place of birth were calculated to cause hurt and an affront to the dignity of a person in the shoes of Mr. Hum. However, I recognize that that the hurt here was of a relatively transitory nature. Accordingly, I award Mr. Hum an amount of $250.00 by way of compensation for injury to his feelings and self respect.

Signed in Calgary, Alberta, this 3rd day of December, 1986.

John P. S. McLaren