T.D. 2/90
Decision rendered on February 12/90

CANADIAN HUMAN RIGHTS ACT
RSC 1985 CHAPTER H-6

HUMAN RIGHTS TRIBUNAL

BETWEEN

LOUISE COURTOIS

- and -

MARIE-JEANNE RAPHAEL

COMPLAINANTS

- and -

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

RESPONDENT

TRIBUNAL: MR MAURICE BERNATCHEZ

TRIBUNAL DECISION

APPEARANCES

Anne Trotier For the Canadian Human Rights Commission

Diane H Soroka For the complainants

Benoît Pelletier For the respondent

DATES AND LOCATION OF HEARINGS

May 8, 9 and 10, 1989 and May 24, 25 and 26, 1989 in Quebec City; June 15, 1989 and September 8, 1989 in Montreal.

TRANSLATION

APPOINTMENT OF THE TRIBUNAL

On November 2, 1988, the President of the Human Rights Tribunal Panel appointed the present Tribunal under section 39(1.1), which is now section 49.1, of the Canadian Human Rights Act (SC 1976-1977, Chapter 33 and amendments, now Chapter H-6 of the Revised Statutes of Canada, 1985), to examine the complaint of Ms Marie-Jeanne Raphaël, dated February 12, 1987, as well as those of Ms Louise Courtois, one dated February 5, 1987, and the other May 13, 1987, against the Department of Indian Affairs and Northern Development.

The joint handling of these complaints is authorized under former section 32(4), now section 40(4), of Chapter H-6 of the 1985 statutes.

Hearing of these complaints began May 8, 1989, at the Quebec City Court House. The instrument of the Tribunal's appointment was filed as Exhibit T-1. When the hearing opened, counsel for the respondent Department of Indian Affairs and Northern Development raised a preliminary objection to the jurisdiction of this Tribunal.

PRELIMINARY OBJECTION BASED ON SECTION 67 OF THE ACT

This preliminary objection is based on the provisions of former section 63(2) of the Canadian Human Rights Act, now section 67 of Chapter H-6, which reads as follows:

> 67. Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

The French version of this section reads as follows:

> La présente loi est sans effet sur la Loi sur les Indiens et sur les dispositions prises en vertu de cette loi.

This text is clear. In fact, in so far as complaints such as those filed are aimed at "discriminatory" practices prohibited by the Canadian Human Rights Act, this legislation has no effect on (does not apply to) the measures, practices and acts set out and authorized by the Indian Act. In the opinion of the undersigned, it is a matter not only of determining whether the alleged "discriminatory" acts and/or practices of which the respondent is accused arise from the Indian Act, but also of establishing that these acts and/or practices, which would otherwise (in the absence of section 67) be discriminatory, were carried out in accordance with the

provisions of the Indian Act, and not contrary to and in violation of this Act.

The respondent's preliminary objection to the jurisdiction of this Tribunal was not filed and known until the very beginning of the hearing into the complaints, that is, May 8, 1989; and considering that the witnesses of the parties were present on that date and that a three-day hearing was planned, counsel for the respondent agreed that the Tribunal should proceed with the hearing on the merits of the complaints, taking his preliminary objection under advisement.

Consequently, the hearing took place on May 8, 9 and 10, 1989, at the Quebec City Court House and continued there on May 24, 25, and 26, 1989; it moved to Montreal on June 15, 1989, and finally ended there on September 8, 1989.

Before ruling on whether or not the complaints are founded, a decision concerning the preliminary objection of the respondent must first be made.

In support of his preliminary objection, the learned counsel for the Department of Indian Affairs introduced authorities and precedents aimed at convincing the Tribunal that the scope and wording of section 67 constituted in themselves a plea in bar in the complaints of Marie-Jeanne Raphaël and Louise Courtois.

With all due respect, after a hearing lasting more than eight days, I am not satisfied that section 67 of the Canadian Human Rights Act, and the conclusion that the respondent's counsel draws from it regarding this Tribunal's lack of jurisdiction, are as clear as he claims. Moreover, counsel for the respondent implicitly acknowledged this in his argument, stating the following at pages 642 and 643 of the stenographic notes:

> The question that I asked myself at the very beginning of these proceedings was this. If one were suddenly to realize along the way that the rights, benefits and privileges claimed by the complainants did not stem from the Indian Act, then my objection would be greatly weakened. But that has not been the case ...

It should be kept in mind that the Canadian Human Rights Act has been recognized by the Supreme Court of Canada as being "almost constitutional"

in nature. The case of Robichaud v Her Majesty The Queen, (1987) 2 SCR 84, is of interest in this regard. More specifically, at page 90, La Forest J writes as follows:

> More recently still, Dickson CJ in Canadian National Railway Co v Canada (Canadian Human Rights Commission) (the Action Travail des Femmes case), (1987) 1 SCR 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statues must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

La Forest J continues at page 92:

> Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected (emphasis added).

Because of its "almost constitutional" nature, and in order to maintain its purposes and objects, the Canadian Human Rights Act "must be given such fair, large and liberal interpretation as will best ensure the attainment of [its] objects." Consequently, any exception to the application of this Act must be interpreted in a restrictive manner. In other words, the respondent Department of Indian Affairs and Northern Development cannot -

solely under cover of section 67 of the Canadian Human Rights Act - conclude that the Tribunal does not have jurisdiction in this matter because the respondent acted under the authority of the Indian Act. In fact, it is the opinion of the undersigned that in order for the respondent to take advantage of section 67, it is necessary for the discriminatory acts or practices of which the respondent is accused by the complainants to have been carried out under the authority of the Indian Act and in accordance with the provisions of this same Act. Consequently, it is clear that the respondent's preliminary objection cannot be allowed, since before making a decision on section 67, the Tribunal was obliged to examine the reasons for and origin of the discriminatory practices and/or acts of which the respondent is accused, and then, to determine whether or not these acts and practices were in accordance with the Act.

Furthermore, the only case introduced by the parties concerning interpretation of section 63(2), now section 67, that is, the Federal Court of Appeal decision in Rose Desjarlais v the Indian band of Piapot reserve number 75, strengthens my conviction that the respondent's preliminary objection must be overruled. In fact, as this case shows, it is a matter of determining not only and solely whether the acts or practices were carried out under the authority of the Indian Act, but also whether they were consistent with the dictates of the Act. It is clear that, in order to make such a decision, the Tribunal must examine the circumstances in which the alleged discriminatory acts and/or practices occurred, as well as the basis of these practices of which the Department of Indian Affairs is accused.

This therefore disposes of the preliminary objection of the respondent's counsel regarding the Tribunal's jurisdiction based on the provisions of section 67 of the Canadian Human Rights Act.

Following discussion of this preliminary objection, the hearing began with a summary of the Indian Act by counsel for the complainants, followed by comments on this same Act by counsel for the Department of Indian Affairs. Subsequently, the actual hearing of the complaints to be examined by the Tribunal began.

First, the two complaints filed by Ms Louise Courtois were introduced as Exhibits HRC 1 and HRC 2. The complaint filed as Exhibit 1 reads as follows:

> The Department of Indian Affairs
> and Northern Development
> discriminated against me and my
> underage daughter, Julie Girard,

> by not taking measures to fund on-reserve education for the children of female Indians who are Band members and who, prior to April 17, 1985, married persons who are not Band members - in contravention of section 5 of the Canadian Human Rights Act. Moreover, the Department of Indian Affairs and Northern Development funds on-reserve education for the children of male Band members who, prior to April 17, 1985, married non-members; this is the reason for my complaint of discrimination on the grounds of sex and marital status.

The complaint filed as Exhibit HRC 2 reads as follows:

> The Department of Indian Affairs and Northern Development discriminated against me and my underage daughter, Julie Girard, by not taking measures to fund on-reserve education for the children of female Indians who are Band members and who, prior to April 17, 1985, married persons who are not Band members - in contravention of section 5 of the Canadian Human Rights Act. I sent a letter to the Minister of Indian Affairs and Northern Development on September 3, 1986, but obtained no concrete results. Moreover, the Department of Indian Affairs and Northern Development funds on-reserve education for the children of male Band members who, prior to April 17, 1985, married non-members; this is the reason for my complaint of discrimination on the grounds of sex and marital status.

These two complaints were subsequently the object of an amendment application by counsel for the Commission. This amendment was authorized with the consent of counsel for the respondent, and hence the beginning of these two complaints is to read as follows:

> The Department of Indian Affairs and Northern Development discriminated against me and my underage daughter, Julie Girard, by denying her access to the Pointe-Bleue school . . . (there are no further changes to the text of the two complaints).

The complaint of Ms Marie-Jeanne Raphaël, filed as Exhibit HRC 23, reads as follows:

> The Department of Indian Affairs and Northern Development discriminated against me and my underage children, Lucie, Nancy, Roland, Stéphane, Stéphanie and Candide Gagnon, by refusing to pay for their school books and their lunch at school by virtue of my sex and marital status, in contravention of section 5 of the Canadian Human Rights Act. The Department's refusal was specifically indicated to me in a telephone conversation with Ms Louise Philippe, vice-president of the Association des Montagnaises du Lac-Saint-Jean, on November 17, 1986. I had asked Ms Philippe to represent me in my discussions with the Department because I do not understand French as well as Montagnais. After Ms Philippe had explained to department representative Mr Ghislain Truchon that I had been

forced by the Band Council to leave my home on the reserve, by virtue of my sex and marital status, in contravention of the Canadian Human Rights Act, the latter replied that the Department could not give me the money to which I would have been entitled if I had remained on the reserve.
I believe that the Department's refusal is based on the fact that I married, prior to April 17, 1985, a person who was not a member of my band. However, male Band members who married non-members prior to April 17, 1985, are not forced by the Band Council to leave their

homes on the reserve, and are therefore entitled to receive the money refused me by the Department of Indian Affairs and Northern Development. Whereas my status as a female Indian living off reserve is based on my illegal eviction, properly contested on grounds of discrimination on the basis of sex and marital status, and whereas the Indian Act contains no specific provision enabling the Department of Indian Affairs and Northern Development, with full knowledge of the facts, to

> consider and treat me as an Indian living off reserve, I am filing a complaint of discrimination on the grounds of sex and marital status.

This complaint was also the object of an amendment application, which was contested by counsel for the respondent Department of Indian Affairs. However, the Tribunal allowed the amendment, being of the opinion that it did not substantially modify the text of the complaint and that, in any case, the amendment was implicitly contained in the text of the complaint; thus, this amendment application did not in any way take the respondent by surprise. Consequently, as a result of this authorized amendment, the complaint of Ms Marie-Jeanne Raphaël filed as Exhibit HRC 23 is now to read as follows:

> The Department of Indian Affairs and Northern Development discriminated against me and my underage children, Lucie, Nancy, Roland, Stéphane and Candide Gagnon, by denying them access to the Pointe-Bleue school and . . . (the remainder of the complaint is unchanged).

THE EVIDENCE

a) THE COMPLAINTS OF LOUISE COURTOIS

It is evident from the testimony of Ms Louise Courtois that she was born on the Pointe-Bleue Reserve to Indian parents and that she has always lived there; she has worked on the reserve for more than fourteen years. In 1979, she married a non-Indian, but continued to live on the reserve. Her marriage produced two children, Julie Girard born in 1980 and another child born in 1983.

The events leading to the filing of these complaints (Exhibits HRC 1 and HRC 2) can be summarized as follows. In the spring of 1985, Ms Courtois took steps to enrol her little girl Julie in the reserve's

nursery school at the Amishk School, for the 1985-1986 school year. Exhibit HRC 3, dated April 24, 1985, is a list of the nursery school pupils for 1985-1986. The name of Julie Girard, the complainant's daughter, appears on the list, but unlike most of the other children listed, there is no band number indicated beside Julie Girard's name. Ms Courtois testified that, during April 1985, she took steps to ensure that her daughter Julie was enrolled for the 1985-1986 school year at the Band school located on the reserve. She also

participated, during the month of May 1985, in information sessions for the parents of children who would be attending nursery school during the 1985-1986 school year, and particularly, in information sessions regarding the "Amerindianization" program. In May 1985, Julie Girard and her mother Louise Courtois, met with the nursery school teacher for the class of children whose names appeared on the list of pupils (Exhibit HRC 3). From then on, according to the testimony of Ms Courtois, both she and her daughter were satisfied and confident that Julie Girard would enter the Amishk School in the fall of 1985.

The 1985 autumn term was delayed until October because of work on an addition to the reserve school. On September 13, 1985, the Girards received a letter (Exhibit HRC 4) from the Amishk School notifying them that Julie Girard was not eligible to attend the school "by virtue of a status quo imposed by Council". From that date on, the complainant Louise Courtois took countless steps to have this Council decision reversed, so that her daughter Julie Girard could gain access to the Band school. In fact, the evidence shows that she had letters sent and sent letters herself to anyone who might be able to help her cause. She wrote letters to the Minister of Indian Affairs, Exhibits HRC 5, HRC 6 and HRC 9, informing him of her situation and requesting that her daughter Julie be admitted to the Band school. In spite of the efforts of Ms Courtois, Julie Girard was not permitted to attend the Band school in 1985-1986.

In February 1986, the complainant again applied (Exhibit HRC 13) to the Pointe-Bleue Band Council, which administered the Amishk School, to have her daughter Julie admitted for the 1986-1987 school year. On February 24, 1986, the director of education for the Montagnais du Lac-Saint-Jean Council notified Ms Courtois that Julie had not been accepted for the 1986-1987 school year because of a moratorium passed by the Pointe-Bleue Band Council (Exhibit HRC 14).

On February 25, 1986, the complainant again wrote to the respondent Minister of Indian Affairs (Exhibit HRC 15) to complain about this second refusal of admission to the Band school, a refusal that she considered discriminatory.

In any event, in spite of the efforts of Ms Courtois, Julie Girard was unable to attend the Amishk School during the 1986-1987 school year. Finally, the evidence revealed that Julie Girard has been attending the Band school, Amishk School, since September 1987 (Exhibit HRC 21).

b) THE COMPLAINT OF MS MARIE-JEANNE RAPHAEL

According to her testimony, Ms Raphaël was born to an Indian family and spent her entire childhood on the reserve. She left the reserve for a few years after marrying a non-Indian, and later returned on various occasions. The evidence shows that Ms Raphaël did not live on the Pointe-Bleue Reserve between 1982 and 1986. Moreover, according to her testimony, in August 1986 she was invited to come and live with her son Jean-Marc Raphaël, a child that she had when she was single, before her marriage to a non-Indian. In August 1986, Ms Raphaël and her other children (from her marriage to a Mr Gagnon) moved into the home of her son Jean-Marc while he left the reserve to go trapping for a month. Ms Raphaël also testified that in August 1986 she attempted to enrol her children in the reserve school, but was systematically refused by the principal of the school, on the grounds that the "white" children were not eligible for on-reserve schooling. At the beginning of September 1986, Ms Raphaël tried to pay the rent on the house that she was occupying (that of her son) to an official of the Band Council (Ms Danielle Paul) who refused to accept the rent payment, on the grounds that non-Indians were not entitled to live in an "Indian house"; according to Ms Raphaël, the result was that she was evicted from the reserve. She left

the reserve and enrolled her children in the St-Félicien and Roberval schools. Because of an inadequate income, in November 1986 Ms Raphaël asked the Department of Indian Affairs and Northern Development to grant her financial assistance to enable her to buy the school books and materials that her children needed. Ms Louise Philippe acted as her intermediary in this matter, since Ms Raphaël had trouble speaking any language other than Montagnais. Ms Raphaël testified that this

request was refused by the respondent Department of Indian Affairs, whereupon she then filed the complaint introduced as Exhibit HRC 23.

Ms Louise Philippe was also heard for the Canadian Human Rights Commission. At the time of the hearing, Ms Philippe was president of the Association des Montagnaises du Lac-Saint-Jean, having previously been its vice-president for three years. Ms Philippe is an Indian who was born to Indian parents, but who married a non-Indian prior to April 17, 1985. Although she married a non-Indian, Ms Philippe retained her band number - unlike all the other Indian women who married non-Indians. In November 1986, Ms Philippe acted as a sort of intermediary and interpreter for Ms Marie-Jeanne Raphaël in asking the respondent department to pay the cost of school books and materials for Ms Marie-Jeanne Raphaël's children. Ms Philippe's testimony demonstrates that she is extremely involved in the Association des Montagnaises du Lac-Saint-Jean, whose objective is to assist Montagnais women and, in particular, to help with the claims of women reinstated since 1985. (See the stenographic notes, at page 192 and following). In 1987, Ms Philippe contributed to a study on the 1986 student population of Mashteuiatsh, which has been filed as Exhibit HRC 26. It notes the large number of categories of students attending the reserve school, revealing that the students in 1986 came from various family backgrounds. Ms Philippe's testimony dealt extensively with this document, Exhibit HRC 26. Numerous letters between the Association des Montagnaises du Lac-Saint-Jean and various Ministers of Indian Affairs, including the Honourable David Crombie and the Honourable Bill McKnight, were produced during her testimony. As appears in these exhibits (HRC 27 to HRC 34), the letters had a number of objectives, and discuss the numerous problems

of discrimination experienced by reinstated women, such as those of Ms Courtois in Exhibit HRC 31. But these letters also deal with other problems, particularly the reinstated woman's right to vote on band matters, membership rules (Exhibit HRC 27), or all the services to be provided to reinstated women which are the administrative responsibility of the Band Council. According to the Association des Montagnaises du Lac-Saint-Jean, these problems, or rather this discrimination against reinstated women, result from the Band Council's application of the provisions of Chapter 27 of the 1985 statutes - that is, the Indian Act. It is true that one of the letters from the Minister of Indian Affairs (Exhibit HRC 32) contained some errors, but this letter was subsequently clarified and corrected by the same Minister (Exhibit HRC 34). It emerges from all this

documentary evidence that the Association des Montagnaises du Lac-Saint-Jean, as well as one of the complainants, Ms Louise Courtois, complained to the Minister of Indian Affairs about discrimination resulting from the Band Council's application of certain provisions of the Indian Act. This discrimination arose from a moratorium declared by the Band Council under the provisions of section 11(2) of the Indian Act. In other words, on June 28, 1985, the Pointe-Bleue Band Council took advantage of the Indian Act and the provisions of section 11(2) of the Act to declare a moratorium, the effect of which was to suspend, for two years, the provision of all services to reinstated women in all areas under the administrative responsibility of the Band Council (Exhibit HRC 27).

The last witness called by the Canadian Human Rights Commission was Mr Florent Cadote, an investigator for the Commission. This witness informed the Tribunal that the Department of Indian Affairs was notified by registered mail on March 2, 1987 of the complaint filed by Ms Raphaël, and was also notified by registered mail on June 29, 1987 of Ms Courtois' complaint. Mr Cadote's report was produced, over an objection by the Commission's counsel; this objection was based on the fact that investigation reports were not generally produced before the Tribunal, being only the opinion of an inspector based on facts that the Tribunal itself had to study in order to render a decision. In short, according to the Commission's counsel, the

Tribunal need not review the decision of the Canadian Human Rights Commission to lodge a complaint. The Tribunal is aware of this argument, but must overrule this objection in the present matter. In fact, it was the Commission's counsel who introduced this witness, in order to have him explain what steps he took in the complaints of Ms Raphaël and Ms Courtois. Mr Cadote was not heard as a witness to the facts developed by and deriving from the complaints, but only to the facts that were revealed to him as a result of his investigation; therefore, the opinion that he may have formed certainly does not represent an exhaustive study of all the facts deriving from these complaints.

Why object to having the report of this witness produced, when the Commission attempted to use this same witness to demonstrate that the respondent Department of Indian Affairs, through one of its officials (Mr Chamberland) gave him its interpretation of the word "reside" contained in section 4(3) of the Indian Act, and that another department official, James Allen, offered an interpretation of the

word "by-law"? The Commission attempted to use this witness to show that the respondent had a very specific definition or interpretation of certain provisions of the Indian Act. Why then - once this evidence had been given before the Tribunal - did the respondent want to have the report of Florent Cadote produced, if it was not precisely because, in spite of this interpretation by certain officials of the respondent department, Florent Cadote's report concluded by dismissing the complaint. In other words, I do not see any reason why one should be able to use a witness solely for one's own purposes, but object to the filing of his investigation report. In the opinion of the undersigned, the Canadian Human Rights Commission's decision to bring the complaints of Ms Raphaël and Ms Courtois against the respondent is based on a number of elements making up the Commission's case, and Mr Florent Cadote's report is only one of these elements.

The introduction of Exhibits R-2 and R-3 is therefore authorized. This said, in the opinion of the undersigned, the conclusions of these two reports by

Mr Florent Cadote reflect only his personal opinion and constitute but one of the elements of the Canadian Human Rights Commission's case; therefore, as I pointed out at the time of the hearing, the relevance of introducing these reports is questionable.

After the hearing of witness Florent Cadote, the Canadian Human Rights Commission declared its evidence closed.

Ms Michelle Rouleau, President of the Quebec Native Women's Association, was then heard for the complainants. The main objectives of this association are to improve the living conditions of native women and their families, as well as to defend their rights. Ms Rouleau and the Association that she represents were asked to intervene in the complaints in question, at the request of both the complainants themselves and the Association des Montagnaises du Lac-Saint-Jean. Ms Rouleau stated that her association, a non-profit organization that operates solely through grants, attempted to obtain funding from the Department of Indian Affairs in order to financially assist the Association des Montagnaises du Lac-Saint-Jean; the Department refused, on the grounds that this type of financial assistance was available only for an appeal (testimony of Ms Rouleau, p 354). In any case, Ms Rouleau testified that the Association used its general funds to pay certain bills of costs from the complainants' counsel. Exhibit C-3 was introduced in this regard.

Ms Rouleau was the only witness heard on behalf of the complainants. The respondent Department of Indian Affairs and Northern Development then called three witnesses in its defence. First, the Tribunal again heard from Ms Louise Philippe. Mr Denis Gill was then heard. At the time of the hearing, Mr Denis Gill was the director general of the Attikamek-Montagnais Council. Mr Gill is an Indian originally from Pointe-Bleue. From 1980 to 1987, he acted as director of education for the Montagnais de Pointe-Bleue Band Council. It may be said in passing that Mr Denis Gill is also the cousin of one of the complainants, Ms Louise Courtois. Mr Gill revealed that, during

the period from 1980 to 1987, he was employed by the Montagnais du Lac-Saint-Jean Council and received his pay cheque from that organization. Mr Gill explained that he had worked for the Department of Indian Affairs at Pointe-Bleue between 1973 and 1980. Beginning in 1980, as a result of the desire for autonomy developed by Indian communities, the Montagnais du Lac-Saint-Jean Band Council took over responsibility for education, thanks to the production of a document entitled "La maîtrise Indienne de l'éducation Indienne" (page 387 of the stenographic notes). Mr Gill explained that the Department of Indian Affairs transferred to the Montagnais Council the funds required to permit the Band to assume management of the school. According to Mr Gill (page 389 of the stenographic notes), since 1980, Pointe-Bleue has not had a "federal" school under the jurisdiction of Indian Affairs; instead, this takeover of education gave rise to the Band school, which is under the authority of the Band Council. I would now like to cite the following passage from Mr Gill's testimony, at page 388 of the stenographic notes:

> Now I can perhaps elaborate a little more on what is meant when one talks about taking charge of education. It must be understood that when we talk about programs within the school, we try to offer programs and have the leeway to offer programs that will meet the needs of our community; it must also be understood that when one talks about taking charge of education,

> there are still rules imposed by Indian Affairs that must be followed; that is, the Department signs an agreement with us to allocate amounts corresponding to the number of students at each level and also corresponding to the service that we are entitled to provide to these students, depending on their level. (emphasis added)

Mr Gill also testified that the Band Council had complete responsibility and sole authority to decide what students should attend the Band school. The following passage from Mr Gill's testimony, at pages 391 and 392, should also be noted:

> In my opinion, it was very clear that the Band Council had this authority. Now, it must also be understood that there was a certain commitment involved in the agreement that the Department signed with the Band Council. I mean that the Department said that it would transfer such and such an amount, but clearly the Band Council also made a commitment to provide the service to Indian students in the community. . .the Band was asked to administer these funds for a very specific clientele. In principle, this clientele is the Indian

students of Pointe-Bleue.
(emphasis added)

Mr Gill was also called upon to give his version and/or comments concerning the preparation of document HRC 26.

With regard to Exhibit HRC 26, it should be immediately pointed out that it was prepared in relation to and in terms of a number of complaints filed by several complainants against not only the respondent Department of Indian Affairs but also the Montagnais du Lac-St-Jean Council. It must be remembered that this Tribunal was appointed for the sole purpose of hearing the complaints of Ms Louise Courtois and Ms Marie-Jeanne Raphaël. That said, I must be satisfied that the evidence given specifically concerns these complaints. This decision cannot and must not serve as a basis and support for other complaints - if any - currently pending before the Canadian Human Rights Commission. I do not share the opinion of the Commission's counsel that the current complaints should be examined within a general perspective of discrimination that has prevailed on the Pointe-Bleue Reserve as a result of application of Bill C-31, since in the opinion of the undersigned, such a perspective would open the door to a multitude of complaints.

In fact, I cannot share this "general" perspective proposed by the Commission's counsel at pages 1202 and 1203 of the stenographic notes:

I understand, but I am
telling you that this must
be considered in a somewhat
more general perspective.
It is certain that Ms
Raphaël cannot make a
complaint unless she has
been refused, that is very
certain; Mr Chamberland
would certainly have no way
of knowing. However, we
are aware of the situation
. . .

She continues further down at page 1203:

> That is to say that when Ms Philippe phoned in November, the Department had known for roughly a year - going back to November 1986 - the situation of women on the Pointe-Bleue Reserve . . . (emphasis added)

In other words, it is not enough to claim that there is a general situation of alleged discrimination in order to conclude that there actually was discrimination in each of the complaints, without the provision of minimal evidence.

Mr Gill explained that, prior to the coming into force of Bill C-31 (C-27 of the 1985 statutes) - that is, before June 28, 1985 - the Montagnais du Lac-Saint-Jean Band Council accepted at its Band school, children from various backgrounds, regardless of whether or not they had Indian status; this is how he explains the existence and presence of non-Indian children at the reserve school before 1985. According to Mr Gill, in June 1985, the Montagnais du Lac-Saint-Jean Band Council passed what he describes as a moratorium,

denying access to the Band school to any child who was a new admission and did not have a Band number, beginning in September 1985. However, those who began their studies before 1985 were able to continue attending this school even if they were non-Indians or did not have a Band number, on the grounds of vested rights. Mr Gill was also asked to comment on Exhibits HRC 4 and HRC 14, addressed to Ms Courtois and notifying her that, because of the moratorium, her daughter Julie Girard could not be admitted to the Amishk School for the 1985-1986 and 1986-1987 school years. Mr Gill explained that these decisions were the direct result of the moratorium declared and imposed by the Band Council. As an employee of this Band, it was his duty to ensure compliance with this moratorium aimed at denying admission to children who did not at that time belong to the Pointe-Bleue Band, regardless of whether or not they were status Indians.

During his testimony, Mr Gill also related various incidents surrounding the application of the moratorium declared by the Band Council. In the case of Ms Cleary, who had three children, one child was eligible to attend the Band school, while her twins were denied

admission to the same school (page 406 of the stenographic notes). Mr Gill gave other examples in which implementation of the moratorium imposed by the Band Council resulted in numerous separations within families living on the Pointe-Bleue Reserve.

Asked by counsel for the respondent whether or not the Department of Indian Affairs had been able to intervene to force the Band Council to accept Indian students living on the reserve, but not having a band number, Mr Gill stated at page 415 of the notes:

> That is a good question. In all honesty, Indian Affairs generally avoids interfering in the communities as much as possible, particularly a community that has assumed control . . . clearly, in the specific case that we are talking about, there was recognition that Bill C-31 gave status to these children and native women; the Band Council did not recognize this because of its moratorium. Thus, this was clearly a situation in which the Department had a certain commitment to fulfil with respect to the Act, a commitment that the Band Council refused to act upon, since it did not recognize the Act as long as it had not established its membership code. Thus, the Department clearly had a responsibility to provide service to these children and native women who were not officially recognized by the Band but who were

officially recognized as
Indians. (emphasis added)

Mr Gill stated that although he was personally against the moratorium declared by the Band Council, it was his duty as an employee of the Band to ensure compliance with it. Mr Gill testified that he encouraged the women reinstated by Bill C-31, whose children were denied access to the Band school, to contact the Department. In particular, he remembers advising Ms Courtois to contact the Department of Indian Affairs. Moreover, Mr Gill revealed that the Band Council had tried in vain to obtain ratification of its membership code by the entire Montagnais community of Pointe-Bleue Reserve before the end of June 1987; this membership code saw to it that women reinstated by Chapter C-27 and their children were excluded from Band membership. Also produced during Mr Gill's testimony were Exhibits HRC 38 to HRC 42, which are the contribution agreements between the respondent Department of Indian Affairs and the Montagnais du Lac-Saint-Jean Band Council. It is very

interesting to read the following passages from Mr Gill's testimony (page 439 of the stenographic notes):

Q: Does the Department have
the right to examine or
approve the content of
school programs?

A: That is a good question, because I will tell
you honestly that we have never acted as
though the Department had the right. I do
not know whether or not it actually does. To
my knowledge, as I said this morning, when an
agreement is signed with Indian Affairs, some
kind of commitment is clearly made to provide
the children with the education that they
should receive. Now is . . .

Q: And to whom is this commitment made?

A: Well, the commitment is made to Indian Affairs,
since it is with that Department that the agreement
is signed; the Department decentralizes the funds

so that we do the work in its place.

And further along, at page 450 and 451, Mr Gill continues:

> Moreover, at that time, I had already had a telephone conversation with Mr Claude Chamberland, because we often discussed our obligation to provide certain services under the agreement... I said that, if we assumed responsibility for education, we had some leeway and should not necessarily be forced to provide a specific service to students if, for example, the community agrees that there are other more important things to give the students. At that time, he replied that according to the Act, there was an obligation to provide the service. If you do not provide it and people in the community complain to us about not having it, nothing will be done about it, unless an individual from the community comes to see us and tells us that they do not have the service and the Band should be providing it; at that time, he told me, either the service is provided or you will be asked to provide it because you have a commitment to do so. (emphasis added)

Finally, it emerges from Mr Gill's testimony that the only effect of the 1985 moratorium was to victimize women reinstated by the 1985 legislation,
Bill C-31, as stated at page 419 of the stenographic notes:

> Q: Now, is it really accurate to say that only the rights of reinstated women were denied by the 1985 moratorium?

R: I would say that that may be what actually happened, because all of the cases involved were cases of this type, except that I must add that, as an employee of the Band Council, I had to apply this in all situations, and for me, all situations included both children of Indian women who had regained their status but who were not members, who were not on the Band List, and any non-Indians who might have been in the community at the time and who had wanted to send their child to the school - they too had been refused because the Band did not have to provide this service to non-Indians or any other person not recognized as a status Indian.

The last witness heard for the defence was Mr Claude Chamberland, Regional Director of the Department of Indian Affairs' education program in 1985, 1986 and 1987. He was involved in Ms Louise Courtois' case in September 1986. Moreover, in September 1986, he sent the letter filed as Exhibit HRC 18. Mr Chamberland explained that he received Ms Courtois' request to admit her child to the school of the Pointe-Bleue Band Council. He then communicated with Mr Denis Gill, the school principal, who informed him of the situation and the Band Council's decision with respect to the moratorium applying to reinstated women. Mr Chamberland states that, following these discussions, it was agreed that the decision of the Pointe-Bleue Band Council would be respected and that the Department would ensure the provision of educational

services for Julie Girard outside the Pointe-Bleue Band school. The Department thus made various arrangements with the Roberval school board, in order to make available to the children of reinstated women, such as Julie Girard, the schooling that was offered on the reserve to the children of Band members. However, Ms Courtois refused the Department's offer. Mr Chamberland also said that an official of the Department of Indian Affairs, Ms Marthe Dufour-Gill, herself a member of the Quebec Native Women's Association who was aware of the situation on the Pointe-Bleue Reserve, had contacted him to request that the possibility of establishing a parallel or alternative school be studied. This school had been proposed by a group of reinstated women, including Ms Courtois and Ms Philippe. Exhibit HRC 18 is the Department's reply regarding this parallel or alternative school. Mr Chamberland also explained that, since the Department had given the Band Council the autonomy that it wanted - the "taking charge" of its

education - the Department did not want to interfere or intervene in the Council's decisions in any way. According to Mr Chamberland, the Department left the content of the courses given on the reserve entirely up to the Band Council. Mr Chamberland's testimony in this regard can be found at page 533 of the stenographic notes:

> . . . It was, for all practical purposes, like an independent school board that must see to all aspects of its education, including the content, whether or not to teach more or less native language, more or less native tradition, more or less geography or French. These were decisions that, beginning in 1980, were made by the Band . . .

Mr Chamberland was also questioned about the mechanisms developed by the Department to ensure that the services outlined in the agreements were actually provided. He states at page 545 of the notes:

> In addition to the visits by administrators, which I mentioned to you, the Band - having decided to administer its programs - must show the community that the services are being provided.
>
> The transfer having been carried out, it is in the end a government in which the electors and the elected have a connection with the service that was to be provided and requested and which was provided more or less to

> the satisfaction of the population. It is more at this level. It is a decision between the elected representatives and the electors that this should occur at the community level. The mechanisms are, as you were saying, more official and refer to transfers of funds, which are studied by a committee. You say to rely solely on the word of the Band Council. I think that the mechanism is still very reliable; it consists of financial statements that are checked by an external auditor and certified: this is what is studied by the Department.

Mr Chamberland acknowledges at page 568 of the stenographic notes that the respondent Department of Indian Affairs made no specific request to the Montagnais du Lac-Saint-Jean Band Council that the children of reinstated women be allowed to attend the Band school for the 1985-1986 and 1986-1987 school years. And he concludes on the same page:

> . . . As I told you, the Band's decision was respected. All the more so because it was consistent with the two years that the Act accorded the Band Council to establish rules for Band membership.

It may be said in passing that I believe this interpretation of section 11(2) of the Indian Act to be erroneous. This section stipulates that any person described in paragraphs (a) and (b) of subsection (2) of section 11 is automatically entitled to have his or her name entered in the Band List, unless the Band established its

membership code within two years of the date that the Act received assent.

It is inaccurate to maintain that the Band had only two years to establish its membership code. On the contrary, a reading of the Act demonstrates that the membership code of any band whatsoever may be established at any time, even after two years, except that in this case, the persons provided for in paragraphs (a) and (b) cannot under any circumstances be removed from the Band List.

Mr Chamberland's testimony dealt extensively with how the Department of Indian Affairs and Northern Development interpreted the moratorium described in section 11 of the Act.

THE LAW

First of all, we must remember the purpose of the Canadian Human Rights Act, under which the Tribunal has been called upon to examine the complaints of Ms Raphaël and Ms Courtois. The purpose of the Act is stated in section 2:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction

for an offence for which a pardon has been granted.

I think that it is important to keep the Act's purpose in mind when considering the objection lodged by the respondent's counsel regarding the jurisdiction of this Tribunal.

Section 3 of the Act lists the grounds of discrimination proscribed by the Act, including marital status and sex, which are the grounds of discrimination alleged by the complainants against the respondent in their complaints, Exhibits HRC 1, HRC 2 and HRC 23. More accurately and specifically, the respondent is accused in these complaints of contravening section 5 of the Act, which reads as follows:

> 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.

This section sets out four elements or conditions for its application. In order to be discriminatory, the practice must, firstly, deny or deny access to a good, service, facility or accommodation to any individual or differentiate adversely in relation to any individual; secondly, involve a service customarily available to the general public; thirdly, be carried out by a supplier of goods or services; and, fourthly, be based on prohibited grounds of discrimination, which are described more fully in section 3. Clearly, both counsel for the Commission and counsel for the complainants maintain that these four conditions are met in the complainants' cases, while the respondent's

counsel claims the opposite.

Therefore, it is clear that I must first determine whether or not the different complaints made by Ms Raphaël and Ms Courtois respect the framework of section 5. In other words, with regard to the complaints filed, I must determine whether or not the respondent (as a supplier of services) denied or denied access to a good, service, facility or accommodation and/or differentiated adversely in relation to the complainants (the individuals), in the provision of a service customarily available to the general public (school), on a prohibited ground of discrimination (the marital status and sex of the complainants). It is therefore necessary to determine whether or not these conditions are met in the present case.

1 -To deny or deny access to any individual or to differentiate adversely in relation to any individual

Counsel for the respondent maintained (at page 1015 and following of the stenographic notes) that the child Julie Girard was not entitled to attend the Band school, since she was not a member of the Band, and that the respondent's sole obligation, if any (because of Julie's young age), was to provide her with off-reserve education, which the respondent claims to have offered her.

I will not immediately deliver a judgment regarding entitlement to attend the Band school; however, the respondent's obligations in the area of education are set forth in sections 114 and following of the Indian Act. Section 116 stipulates that every Indian child who has attained the age of seven years shall attend school; section 116(2) adds that the Minister may require an Indian who has attained the age of six years to attend school.

In this case, it is true that, because of Julie Girard's age (five years) in 1985-1986 or 1986-1987, the respondent had no obligation toward her with regard to education. However, Julie Girard was not entitled to the same treatment given to other Indian children who were Band members and who were the same age, and for whom the respondent paid the Band Council the necessary amounts. At the very least, the respondent differentiated adversely in relation to her, since, in order to attend nursery school, she would have had

to accept the Department's proposal of an off-reserve school, even though this same service was available on the reserve. This could be an application and example of the well-known adage that there is "one law for the rich and another for the poor." In fact, for the Indian children provided for in sections 114 and following of the Act, there were two categories: Indian children who are Band members, who were entitled to attend and were accepted at the reserve school; and other Indian children who are not Band members, and who had to or were supposed to go off the reserve to obtain the same service, even though the Act (sections 114 and following) makes no distinction between Indian children who are Band members and those who are not. I think it is important to keep in mind Mr Gill's testimony that, in actual fact, the moratorium declared by the Band Council affected only women who were reinstated by Bill C-31, now Chapter C-27 of the 1985 statutes. Being aware of this situation, I find it appropriate to recall and consider the two Supreme Court decisions in the O'Malley and Bhinder cases, which put forward the principle that a measure that disproportionately affects a protected group is a discriminatory measure. This is the theory of adverse effect. In this regard, the case of Ontario Human Rights Commission and Theresa O'Malley v Simpsons-Sears Limited, (1985) 2 SCR 536, may be consulted, particularly at page 551, where McIntyre J writes the following:

> An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

2 -Suppliers of services

The respondent's counsel maintained that the supplier of services in the two complaints under consideration was not the Department of Indian Affairs, but rather the Montagnais du Lac-St-Jean Band Council, and that consequently one of the conditions of section 5 was not met. In his opinion, the fact that the Band Council assumed responsibility for reserve education, and the fact that this same Council pays the staff of the Band school and decides the content of

the education program demonstrated that the Band Council was the sole supplier of services; consequently, if the complainants claimed to be victims of any kind of discrimination, their complaints could be directed only to the Band Council. In support of his position, counsel for the respondent cited the case of Mintuck v Valley River Band No 63A et al, 75 DLR (3rd Edition) 589, as well as the Supreme Court decision in the St-Régis case, (1982) 2 SCR 72. With all due respect for the opposite opinion, I do not believe that these decisions can be applied to the present case. It is true that these decisions recognized the Band Council as a distinct legal entity, with the result that it could be the object of direct legal action. However, in these proceedings, the Band Council had acted within the limits of the powers conferred upon it by the Indian Act. But in the case at bar, it is not the Band Council that has obligations with regard to education. In fact, the only powers and obligations relating to education in the Indian Act are solely and expressly vested in and conferred upon the Department of Indian Affairs. The result is that under the express provisions of the Act, the supplier of educational services is, in actual fact, the Department and not the respondent Band Council.

3 -Services customarily available to the general public

Counsel for the respondent submitted that a Band school is not a service customarily available "to the public at large" (page 1022 of the stenographic notes). Such an argument is not serious and cannot be accepted. It is clear that a school is a service available to the general public; the judgment in Re Schmilt and the Calgary Board of Education, 57 DLR (3d) 746, provides proof in this regard. One may also refer to the Federal Court of Appeal decision in Attorney General of Canada v Carla Druken et al (Federal Court of Appeal A-638-87) in which Mahoney J writes the following at page 3:

> As to the former, the Applicant appears to have found persuasive the dictum expressed in Re Subhaschan Singh, file A-7-87, unreported decision rendered May 9, 1988, in

> which it was said by Hugessen J, delivering the judgment of this Court, at p 12:
>
> It is indeed arguable that the qualifying words of section 5,
>
> "provision of . . . services . . . customarily available to the general public",
>
> can only serve a limiting role in the context of services rendered by private persons or bodies; that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of section 5.

An additional reference is the decision of the Human Rights Tribunal in the Anvary case (TD 18-88, decision rendered December 14, 1988) where it is written at page 13:

> The fact that the people subject to the Ranqui program, who should have recourse to the services of Immigration personnel, form a distinct and special group does not take away their status as members of the general public. Otherwise, we would be

> saying that all persons who belong to a special group are no longer members of the community as a whole, which would open the door to all kinds of discriminatory practices. (emphasis added) [TRANSLATION FROM FRENCH]

Thus, if this jurisprudence is applied to the present case, it cannot in any way be alleged and maintained that the reserve school does not constitute a service customarily available to the general public simply because this reserve school is limited primarily to Indians. In fact, although it is a so-called Band school, the costs of these schools are nevertheless paid primarily by public funds. To claim that these schools are not a public service because they are intended solely for Indians would be to say, as in the Anvary case, that all persons who belong to a special group (that is, Indians) are no longer members of the community as a whole, which would open the door to all kinds of discriminatory practices.

4 -On a prohibited ground of discrimination

At page 1025 of the stenographic notes, the respondent's counsel argues the following:

> Here the prohibited ground of discrimination is sex or marital status. This is rather troublesome, however, because cases of discrimination on the basis of sex or marital status have ordinarily been interpreted in a very restrictive manner by the courts. The discrimination must truly pertain to sex or marital status.

In support of these claims, he made reference to Air Canada v Nancy Bain, (1982) 2 FC 341, particularly at page 346, where the Federal Court states:

> Miss Bain's complaint, which the Tribunal found substantiated, was that Air Canada had, in the provision of services available to the general public, been guilty of discrimination on the ground of marital status. In my view, it cannot be said, in the circumstances, that Miss Bain was the victim of discrimination by reason of her marital status or, to put it more generally, that the Air Canada Family Fare Plan discriminated between travellers on the basis of their marital status. Miss Bain was single and intended to travel with a friend. The reason why she could not take advantage of the family fare was that she was not related to her

> travel companion so that the two of them could be said to form a family; that reason was not that she was single. Married or not, a person who travels with a friend is not entitled to the family fare. The denial of an advantage to a single person cannot constitute discrimination based on marital status

> if that same benefit is equally denied in identical circumstances to married persons (emphasis added).

The respondent also introduced the case of Yvon Blanchette v The Canada Life Assurance Company, (1984) SC, to illustrate the same point.

The respondent's counsel states the following at page 1028 and 1029 of the stenographic notes:

> We reply madame that, even women who, even Indian men who may have wanted to send their children to the school in 1985. . . no, excuse me, even Indian women, even non-Indian women and white women who may have wanted to send their children to the reserve school in 1985, were not entitled to do so, because the discrimination was by reason of membership, Band membership, and not whether or not someone was reinstated or not; and once again, that is why I again quoted Denis Gill a few minutes ago, once again, even Africans, white children and Haitian children had no more right than Julie Girard in 1985. The true discrimination - if there was discrimination - related not to the fact that Ms Girard was reinstated, but to the fact that her daughter was not a Band member.

I cannot share this opinion. And I am supported in this by Denis Gill's previously cited testimony, in which he acknowledges that the only effect of the 1985 moratorium was to victimize women reinstated by the 1985 legislation, Bill C-31. Furthermore, former section 12(1)(b) of the Indian Act resulted in a loss of Indian status for Indian women who married non-Indians. The purpose of Bill C-31 was to

restore their status and correct this discrimination. Sections 114 and following of the Act deal with the Minister's responsibility regarding education for Indians. Thus, it is not at all relevant to say that "even Africans, white children and Haitian children had no more right than Julie Girard in 1985."

In other words, non-Indians have no right to the education that must be provided by the Minister, and the latter has no obligation to non-Indians. However, the Minister does have obligations to the children of the complainants, who, through the coming into force of Bill C-31, automatically obtained Indian status.

Furthermore, the restrictive interpretation of marital status, as raised in Air Canada v Bain, was set aside in Commission des droits de la personne du Québec v the Town of Brossard and Line Laurin, (1988) 2 SCR 279, in which the Supreme Court adopted a more broad and liberal interpretation of what is meant by marital status. Moreover, in this judgment confirming the principle put forward in Cashin v the Canadian Broadcasting Corporation, (1989) 3 FC 494, Beetz J writes the following at page 286:

> The town of Brossard, in a good faith effort to combat nepotism within the local public service, has adopted a hiring policy which disqualifies members of the immediate families of full-time employees and town councillors from taking up employment with the town...

And at page 294, Beetz J writes:

> What about marital status in relative terms? Is the

> identity of a person's spouse relevant to discrimination under s 10?
>
> The respondent argues that a narrow interpretation should be given to "civil status" in this respect. But as I have observed, to understand the civil status of one person one must often refer to the civil status of another. Being a widow or a widower is just one such example. Filiation, fraternity and sorority, of course, are others. It is difficult to imagine a hiring policy which

> excludes "all sons and daughters" without specifying whose sons and daughters. (emphasis added)

At page 298, Beetz J cites the following passage by MacGuigan J in the Cashin case:

> In fine, what the Act discourages is discrimination against an individual, not in his/her individuality, but as a group cypher, identified by a group characteristic.

And later, at page 298, Beetz J writes the following:

> To paraphrase MacGuigan J for the purposes of the case at bar, a general no-relative, no-spouse

> employment rule, precisely because in its generality it may have the effect of imposing a general or group category, does fall into civil status.

And finally, Beetz J concludes at page 300:

> While in some circumstances the mother-daughter relationship can be viewed separately from the position occupied by the mother, for the purposes of determining the cause of Line Laurin's exclusion these two factors operate together to form a single, indivisible cause. It is the civil status of Line Laurin, an appreciation of which requires an examination of the situation of her mother, which is the cause of her exclusion.

Application of these principles to the present case clearly shows that the moratorium was aimed at women reinstated by Bill C-31. These reinstated women are women who married non-Indians, producing children, such as Julie Girard and the Raphaël children, who were denied access to the Amishk School, unlike all the other young Indians on the reserve, even though these women and children had become Indians pursuant to Bill C-31.

Consequently, given the passages of testimony already cited, and in light of the law, as well as the case law on interpretation and scope of sections 3 and 5 of the Canadian Human Rights Act, I have reached the conclusion that the complainants were, prima facie, victims of discrimination, as stated in complaints HRC 1, HRC 2 and HRC 23.

Since the complainants have established a prima facie case of discrimination, it is now necessary to apply the principles established by the Supreme Court judgment in Ontario Human Rights Commission et al v the Borough of Etobicoke, (1982) 1 SCR 202, and specifically, in the following passage at page 208, where McIntyre J writes:

> Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

And further down on the same page:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests

> of the adequate performance
> of the work involved with
> all reasonable dispatch,
> safety and economy, and not
> for ulterior or extraneous
> reasons aimed at objectives
> which could defeat the
> purpose of the Code.
> (emphasis added)

As I have pointed out, the complainants were victims of discrimination, and are therefore entitled to relief in the absence of justification by the respondent. And the only justification that can avail the respondent is a limitation based on good faith, and the sincerely held belief that such limitation (which would otherwise be discrimination) is entirely reasonable, in view of attaining a valid objective.

It is true that the Etobicoke judgment was rendered with regard to a bona fide occupational requirement (section 15(a) of the Act). However, in my opinion, this same test must be applied to the provision of a service, and consequently, the justification must be a "bona fide justification"
(section 15(g)).

Before examining the defence put forward by the respondent, we should keep in mind the decision rendered by the Supreme Court in Bonnie Robichaud v Her Majesty The Queen, already cited at the beginning of the present decision, in which the "almost constitutional" nature of the Canadian Human Rights Act was recognized and it was asserted that the Act must be given such large and liberal interpretation as will best ensure the attainment of its objects. We must also remember that, under the Indian Act, only the Department of Indian Affairs has responsibilities and obligations regarding the education of Indians.

Defence put forward by the respondent

Except for the preliminary objection to the jurisdiction of the present Tribunal, under section 67 of the Canadian Human Rights Act, the respondent's defence is fundamentally and mainly drawn from section 11(2) of the Indian Act, which reads as follows:

(2) Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his

name entered in the
Band List.

This brings us to the moratorium that has been at issue throughout the proceedings. A moratorium described as "a phantom" by counsels for the Commission and the complainants, given the lack of any official document attesting its existence. What is more, according to Ms Soroka for the complainants, this moratorium cannot and could not exist in view of the provisions of section 82(2) of the Indian Act, which stipulates the following:

A by-law made under section 81 comes into force forty days after a copy thereof is forwarded to the Minister pursuant to subsection (1), . . .

According to Exhibit HRC 32, the Minister stated that he had not received any moratorium, and I quote an excerpt from this letter:

I believe that the Band moratorium to which you are referring is regulation 35-85 passed by the Band Council in February 1986. To date, my department has not received this regulation from the Montagnais du Lac-Saint-Jean Council.

And later in this letter, the Minister adds that this regulation, which could be seen as a kind of by-law, must conform to the provisions of section 81 of the Indian Act, and that, after it is forwarded to the Department of Indian Affairs, it is subject to a forty-day period during which it may be disallowed. It is true that there is actually no "written" moratorium. This said, sections 10 and 11 of the Indian Act deal with a band's power to establish its own membership rules, and the procedures to be followed in order to do this. Section 11(2) serves notice that, unless the Band Council has established its own membership code in accordance with the Act during the two years following assent to the Act the children of women

reinstated under Bill C-31 are automatically entitled to have their names entered in the Band List.

There is reason to reproduce section 114 of the Indian Act, which reads as follows:

> (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with
>
> a) the government of a province;
>
> b) the Commissioner of the Yukon Territory;
>
> c) the Commissioner of the Northwest Territories;
>
> d) a public or separate school board; and
>
> e) a religious or charitable organization.
>
> (2) The Minister may, in accordance with this Act,

> establish, operate and maintain schools for Indian children.

Section 116(1) and (2) stipulates that:

(1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

(2) The Minister may

a) require an Indian who has attained the age of six years to attend school; . . .

It emerges from sections 114 and 116 that the Minister has obligations and the responsibility to assume the education of "Indian" children. There is no provision in Bill C-31, now Chapter 27 of the 1985 statutes, giving the Band Council any power whatsoever over education. It cannot be maintained that there was no discrimination against the complainants and their children because they were treated in the same manner as any children who are not Band members. Whether or not non-Indian children were admitted before 1985 does not change the rights and obligations of the respondent with regard to Indian children. The Minister has no obligation to non-Indians and, consequently, these non-Indians are not entitled to education funded by the Minister. With respect to "Indians", however, in spite of the existence of sections 10 and 11 of the Act, enabling the Band Council to assume control of its membership, the fact remains that only the children of women who were re-registered and reinstated became entitled to Indian status, pursuant to section 6(2), which stipulates:

Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Let us recall the testimony of Mr Denis Gill, witness for the respondent, who states the following at page 392:

> . . . the Department cannot give in two places: it transfers funds to the Band and asks the Band to administer these funds for a very specific clientele. In principle, this clientele is the Indian students of Pointe-Bleue. (emphasis added)

We should also keep in mind Mr Denis Gill's previously cited testimony that, in fact, only reinstated women had been affected by the moratorium declared by the Band Council.

Although the Band has no statutory power in the area of education, the respondent Department maintains that there are three types of schools, as stated by witness Chamberland at page 598 of the stenographic notes:

> There are three types of schools. It is the one that you just mentioned. There are Indian students who attend provincial schools, school boards that are part of the Quebec Department of Education (MEQ) system. There are schools administered by the Department. There are still some of these left; there will still be three next September. The employees of these schools are my employees; they are public servants, government employees. The third category is made up of Band schools, schools that have been turned over to local authorities, to elected governments on reserves.

Because of the growing desire of various band councils to obtain autonomy, in particular by taking charge of their education, the

Minister has reached the conclusion that he cannot intervene and so does not, in order to avoid being accused by the band councils of interference. Certainly, this is a politically commendable motive.

But I cannot subscribe to such reasoning, since the Indian Act does not confer any responsibilities or power relating to education on the Band Council.

Therefore, the privilege of attending the so-called Band school can in no way be legally connected to the fact of being a Band member. The education that must be provided by the Department in accordance with the Indian Act is fundamentally related to Indian status and the rights and privileges of Indians, regardless of whether or not they have membership in a Band Council. In my opinion, Band Councils are creatures of the Indian Act, and have only the powers expressly vested in them by this Act. The Tribunal does however share the opinion of the respondent's counsel when he states the following at page 1146 of the stenographic notes:

> From the moment in the Act that the notion of Band Council member is accepted and the Band Council is given the right to establish its own membership code, by this very fact, it is accepted that the Band Council will limit its services to those who are Band members.

Even if it is true that the Band Council can limit its services to its members, this Band Council must still be empowered to provide those services. For example, the Band Council has power and authority relating to the allotment of reserve lands (section 20), roads and bridges on the reserve (section 34) and the adjustment of contracts (section 59). In fact, the Band Council has only those powers vested in it by the Act; and nothing in the Indian Act gives the Band Council power over education.

The respondent's counsel also maintained that the Minister's sole obligation in the area of Indian education was to provide this educational service, whether off or on the reserve; he said that it

was not important where, as long as it was provided. I cannot share this opinion, since the educational service sought by the complainants - that is, admission to the Amishk School -

was available on the Pointe-Bleue Reserve and, because of their Indian status, the children of the complainants were entitled to this service. On-reserve education should be offered and provided to them, since to do otherwise would be to use a double standard, which would constitute discrimination. In this regard, I concur with the remarks made in Druken v Canada Employment and Immigration Commission (TD 7-87), at page 11:

> Where a service otherwise available to the general public is being denied, the justification for such denial must be based on the strongest possible evidence. The justification must be a question of fact in each situation and not merely a blanket application to a particular group of individuals.

In the complaints under consideration, it emerges from the evidence given that only the children of reinstated women were denied access to the Band school, that is, the Amishk School. In addition, these were the only children to whom the respondent offered school services, but off the reserve.

Finally, I believe that in the specific case of Louise Courtois and her child Julie Girard, the Department of Indian Affairs, because of the obligations and responsibilities vested in it by sections 114 and following of the Indian Act, should have intervened when the contribution agreement for the 1986-1987 school year was made (Exhibit HRC 38), particularly, under the terms of paragraph 8 of this agreement which reads as follows:

> If the Band Council fails in its obligation to provide the agreed

> services, the Minister may terminate the agreement... .

Since the Minister was aware of the situation of Louise Courtois and her daughter Julie during the 1985-1986 school year, the Minister, in accordance with his obligations, should have taken action in 1986-1987 to ensure that

the Pointe-Bleue Band Council provided this school service to the children of reinstated women, and in particular to Julie Girard.

OBJECTION BASED ON SECTION 67 OF THE CANADIAN HUMAN RIGHTS ACT

As previously mentioned, the preliminary objection to the jurisdiction of this Tribunal could not be allowed, since before determining whether section 67 of the Canadian Human Rights Act was applicable, it was necessary to first establish whether the acts and practices alleged against the Minister were in accordance with the Indian Act. Counsel for the respondent asserted on several occasions that the "text" of the Act could not be dissociated from "its application" and/or its effect. At page 650 of the stenographic notes, counsel makes the following statement:

> Because one cannot say to someone, your practice is legal, your practice is legal, I cannot do anything against the section under which you carried it out, but your practice is discriminatory and must be curbed.

I am unable to agree with this argument after reading the Druken case (opere citatur), particularly the following passage:

> Where a service otherwise available to the general public is being denied, the justification for such denial must be based on the strongest possible evidence. The

> justification must be a question of fact in each situation and not merely a blanket application to a particular group of individuals. (emphasis added)

The service sought by the complainants was offered and available on the Pointe-Bleue Reserve. But the complainants alone, as reinstated women, were denied this service. It is not "dissociating the text from its application" to note that a similar group (of Indians) with the same rights (school)

received different treatment and service, depending upon whether or not it was composed of Band members, even though the law does not permit any distinction.

We should keep in mind that the Federal Court of Appeal in the Piapot case (opere citatur) wrote in its May 8, 1989 decision, at page 6:

> "In the case at bar, the motion of the Piapot Band Council on June 11, 1984, described as a "non-confidence vote against... Rose Desjarlais" is nowhere authorized by the Indian Act, whether explicitly or implicitly; consequently, this motion does not constitute a "provision made under or pursuant to that Act," and is therefore not covered by the excepting provisions of section 63(2) of the Canadian Human Rights Act. [TRANSLATION FROM FRENCH]

Applying this principal to the case under study leads us to the conclusion that the moratorium declared in June 1985 and aimed at denying the children of reinstated women admission to the Pointe-Bleue

Band school is in no way authorized by the Indian Act, since the Band Council has no rights regarding education.

Whereas the complainant, Ms Louise Courtois, is an Indian woman reinstated under Bill C-31, Chapter 27 of the 1985 statutes;

whereas Julie Girard is the child of Louise Courtois, and whereas Julie Girard obtained Indian status through the application of section 6(2) of this same Act;

whereas, in addition, according to the evidence, Louise Courtois and Julie Girard ordinarily resided on the Pointe-Bleue Reserve between 1985 and 1987, in accordance with section 4(3) of this same Act;

considering the obligations of the Minister of Indian Affairs with regard to education, ensuing from the provisions of sections 114 and following of the Indian Act;

whereas the existence of a school on the Pointe-Bleue Reserve is the result of the Minister's obligations regarding education, and its existence is made possible only through funding from the Department of Indian Affairs;

and, whereas the Minister acted in a discriminatory manner by refusing access to the service of the Pointe-Bleue Reserve school, a service to which the complainant Louise Courtois and her daughter Julie Girard were entitled, I conclude that complaints HRC 1 and HRC 2, as initially filed and subsequently amended during the hearing, are substantiated in fact and in law, pursuant to the provisions of the Canadian Human Rights Act.

Complaint of Marie-Jeanne Raphaël

With regard to the complaint (initial or amended) of Marie-Jeanne Raphaël (Exhibit HRC 23), the respondent Department of Indian Affairs, while putting forward the same defence as in the case of the complaints of Louise Courtois, mainly pleaded the provisions of section 4(3) of the Indian Act. For reasons already fully justified, it is necessary to study only the defence that is based on section 4(3) of the Act, which reads as follows:

> Sections 114 to 123* and,
> unless the Minister

> otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to her Majesty in right of Canada or a province. (emphasis added)

In the case of Ms Marie-Jeanne Raphaël, the respondent claims that it did not have to provide her with the reserve's school service or pay the cost of her children's books, since Ms Raphaël and her children did not ordinarily reside on the Pointe-Bleue Reserve in 1986.

It is worthwhile to read the following passages from the argument of the respondent's counsel, at page 669:

> Therefore, if that had been taken completely the wrong way, and one had assumed powers that one did not have, action is not "in accordance with the Indian Act", but as long as we act in accordance with the Indian Act and respect the Indian Act, and I further maintain that this is what we did, we applied the Indian Act.
>
> In the case of Ms Raphaël, for example, through section 4(3), which prevented us from giving her the benefit of section 114, because she did not ordinarily reside on the reserve. . .

As I already mentioned in the case of Ms Louise Courtois and her daughter Julie Girard, these complaints must be allowed, since in this

particular case, the Minister treated the children living on the reserve differently in terms of education; treatment (service) differed among the Indian children, depending on whether or not they were the children of reinstated women, even though the Act does not authorize or permit any distinction in the provision of educational services.

In the case of Ms Marie-Jeanne Raphaël, the respondent maintains that it did not have to provide the service sought, because Ms Raphaël did not ordinarily reside on the reserve. We must then - as acknowledged elsewhere by the Commission's counsel at pages 1194 and following of the stenographic notes - first determine, in light of the facts, whether Ms Raphaël ordinarily resided on the reserve. In the Tribunal's opinion, this is a fundamental and

essential issue to be decided in Ms Raphaël's complaint, since if she does not ordinarily reside on the reserve, Ms Raphaël cannot and could not have the option of sending her children to the reserve school or be entitled to have the cost of school books and noon meals paid by the Department.

In the light of Ms Raphaël's testimony, as well as that of Mr Denis Gill and Mr Claude Chamberland, I am not satisfied that, during the period to which Ms Raphaël's complaint applies, the latter "ordinarily resided on the reserve." The complainant, Ms Raphaël, argues that her intention to live on the reserve persisted, in spite of her actual eviction. She also adds that the issue of ordinary residence on the reserve raised by the respondent is only a pretext to hide the real discrimination of which she was a victim, because she was a women reinstated by Bill C-31. Does the evidence given in the case demonstrate that Ms Raphaël really intended, in August 1986, to ordinarily reside on the Pointe-Bleue Reserve?

In my opinion, this is not demonstrated by the evidence. One notes the following passages from Ms Raphaël's testimony at pages 160 and 161 of the stenographic notes:

> Q: Did you receive an invitation to return to live on the reserve?

A: My son handed over
his house to me.

Q: And you then
decided to return
to the reserve,
having access to
your son's house?

A: I returned because
my son rented me
his house.

Q: Did you return at
that time with your
children?

A: Yes, I was with my
children.

Q: Why did you decide
to go back and live
on the reserve?

A: The house that I
was living in was
being repaired.

And further along, at page 165:

Q: Did you meet
someone by the name
of Denis Paul. . .
Danièle Paul, at
that time?

A: That is the person
whom I went to see
to pay the rent on
the house that I
was occupying, my
son's rent and it
is she who refused

to accept the money
that I took her.

And later, at page 174, she states the following:

Q: Ms Raphaël, when
your son invited
you to come and
live in his house
in the summer of
86, was he there at
that time?

A: My son was married
to an Ouiatchouan
women, he had gone
to Ouiatchouan.

Q: Had he left to go
work in Ouiatchouan?

A: To do some trapping.

Q: For how long was he
supposed to be gone?

A: One month.

(emphasis added)

It emerges from these excerpts of testimony that Ms Raphaël went to live in her son's house, while he left to go trapping in Ouiatchouan for a month. The reason she decided to live there was that the house that she was living in was being repaired. This statement certainly does not indicate that Ms Raphaël intended to ordinarily reside on the reserve. But there is more. In fact, if Ms Raphaël had really intended to ordinarily reside on the reserve, she would not have left the reserve without reacting more strongly and more quickly. She complained about her alleged illegal eviction for the first time, through Ms Philippe, only at the end of November 1986. Between her eviction and the request made to the respondent at the end of November 1986, Ms Raphaël took no action to oppose or dispute this "eviction".

It was maintained that moving and all that it entails is not exactly a rest cure, and consequently, the fact that she accepted her son's invitation and went with her children to live in her son's house demonstrated this intent.

But the evidence reveals that Ms Raphaël has lived on the reserve on several occasions in her life, but has also left this same reserve several times. It must be remembered that the house that she was living in before accepting her son's invitation was being repaired. That does not necessarily mean that she did not intend to return there once the repairs were completed. It must also be kept in mind that her son had gone trapping with his wife. This demonstrates a temporary situation, since it is clear that her son and his wife would come back when his trapping had been completed. Could her son's house physically hold at least nine people (the complainant, her six children, her son Jean-Marc and his wife)? These facts and questions leave the Tribunal perplexed regarding Ms Raphaël's intention to ordinarily reside on the reserve in August 1986.

Moreover, it is worthwhile to point out the following passage from the testimony of Mr Denis Gill, who was acting as principal of the Pointe-Bleue school in 1986; this is the principal who allegedly denied Ms Raphaël and her children admission to the school (page 425 of the stenographic notes):

Q: Are you aware of the specific circumstances that led to the eviction of Ms Raphaël in September 1986?

A: I can tell you practically nothing about that, because to my knowledge, I remember that Ms Raphaël lived in a house, I think that it was a house that belonged to Mr Réal Philippe for some years. I

do not even know if it is this house that you are talking about when you say she was evicted.

All I know is that, at that time, as director of education, I knew that she no longer had a residence at Pointe-Bleue and that she lived off the reserve and, therefore, I did not have to provide her with services.

And later, at page 471, the same witness, Mr Gill, replied as follows during cross-examination:

Q: Was there any way of verifying the question of residence - that is, when was someone deemed to have returned to the reserve? Did it take six months of residence? Did it take three months? In your opinion, what were the criteria of ordinary residence?

A: What were the criteria. . . I can tell you that the criteria were less,

probably less
strict than they
would have been
with Indian Affairs
in the sense that
they might have
established -
moreover, they just
did so, very
recently - they
have actually
established very
strict criteria to
the effect that an
individual must
sleep there
regularly in order
for it to be his or
her residence. At
the time, it was
not as strict as
that, and we were
even less so, in
the sense that we
still identified
the individuals who
were from the
community, but who
lived off the
reserve, often
because of a lack
of housing at
Pointe-Bleue, and
at that time we
said, we told
ourselves that it
was not necessary
to deprive them of
the service because
they are not living
in the community.
We did our best to
provide them with
the service anyway,
and clearly, in a
way, we claimed

that they were living in the community when that was not necessarily true. (emphasis added)

We should keep in mind that Denis Gill was an employee of the Band Council at that time. It is also useful to read the following passages from Mr Claude Chamberland's testimony, at page 510:

Q: Now, what information did you have concerning her residence on the reserve?

A: The decision that was made on the residence of Ms Raphaël was based on the fact that, since 1982, thus four years before the request, Ms Raphaël had resided on a Pointe-Bleue Reserve for only a few weeks, which did not make her a person who ordinarily resides on a reserve.

And later, at page 560:

Q: Now, you referred in your testimony to the fact that you used the residence criterion in refusing to pay for certain educational services for Ms Raphaël. Now, who gave you the information concerning the residence or

the conditions of residence of Ms Raphaël, in August or September. . . or should I say November 1986?

A: The information must have come first from the Band Council, but I imagine that it was verified by the Department adviser who was dealing with these cases, these children.

And a little later, at page 561:

A: No. I do not personally see every application. The Department's decision was made on the basis of the information that we had. It is only very, very recently, as I told you, six weeks perhaps, since I learned that there had been a period of a few weeks in the past six years during which she had resided on the reserve, but the decision remains the same. A few weeks out of several years does not mean that a person permanently or ordinarily

resides on the
reserve. (emphasis
added)

It emerges from all of this evidence that, on the one hand, according to Denis Gill, who denied the children of complainant Raphaël admission to the school, Ms Raphaël did not ordinarily reside on the reserve in August 1986 and that is why he refused her children. In addition, Mr Chamberland testified that he was informed only a few weeks before the hearing of the complaints that Ms Raphaël had resided on the reserve for a few weeks in August 1986. This once again demonstrates that, if it is true that the complainant was evicted against her will in August 1986, this eviction did not lead the complainant to take any special action. In my opinion, the evidence given is unable to establish any intent on the part of Ms Raphaël to ordinarily reside on the Pointe-Bleue Reserve in August 1986. Consequently, in the light of this evidence, the Minister's decision not to pay for lunch or school books (as well as the refusal to admit her children to the reserve school, according to the amended complaint), based on the fact that Ms Raphaël did not ordinarily reside on the reserve, is justified. The respondent's decision in the case of Ms Raphaël was made in accordance with the provisions of section 4(3) of the Indian Act. Under the circumstances, since this decision was made in accordance with the Act, section 67 of the Canadian Human Rights Act is also applicable. I would also like to add that section 4(3) of the Indian Act is somewhat "discriminatory" in that it makes a distinction between Indians living on reserves and Indians living off reserves (those living off reserves are excluded from service.) But considering that the

respondent's decision in the case of Ms Marie-Jeanne Raphaël's complaint (Exhibit HRC 23) was in accordance with section 4(3) of the Indian Act, and that section 67 of the Canadian Human Rights Act is applicable, this Tribunal cannot allow the complaint.

Remedy

Whereas the Tribunal deems the two complaints filed by Ms Louise Courtois, Exhibits HRC 1 and HRC 2, to be substantiated, it is now necessary to rule on the orders that the Tribunal is authorized to make under section 53(2) of the Canadian Human Rights Act, which reads as follows:

> If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:
>
> a) . . .
>
> b) . . .
>
> c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; (emphasis added)

(subsections (a) and (b) are not applicable to this case).

The Expenses of Ms Courtois

The Tribunal disallows Ms Louise Courtois's claim for expenses. With regard to the sum of $210.00 claimed for three days work lost by Ms Courtois so that she could look after her sick daughter Julie Girard, there is no "scientific" evidence linking the illness of Julie Girard and the respondent's discrimination against her.

The application for reimbursement of daycare fees, Exhibits HRC 12 and HRC 19, is also denied. The complainant Ms Courtois was unable to establish how much less she would have paid for daycare if Julie

Girard had not been the victim of discrimination by the Department. The complainant still had to pay these daycare fees for her other child.

As for the other fees claimed, more particularly, lawyers fees (bills of costs) presented in Exhibit C-3, as well as another document - the result of a study carried out by counsel for the complainants - forwarded to the Tribunal in a letter dated August 22, 1989, and indicating that a total of $16,687.37 was due for fees and disbursements incurred in the complaints of Ms Courtois and Ms Raphaël, these claims are also rejected because, on the one hand, for the reasons put forward above, the complaint of Ms Raphaël is dismissed. Consequently, the Tribunal is not in a position to undertake a breakdown of this account. On the other hand, there is reason to point out the testimony of Ms Michèle Rouleau, President of the Quebec Native Women's Association, a non-profit organization which payed and commissioned the lawyers, not only for the complaints of Ms Courtois and Ms Raphaël, but for several other people as well. It is useful to read the following passage from Ms Rouleau's testimony (page 354 of the stenographic notes):

> Q: Was there any kind of agreement with the complainants on that?
>
> A: No contract was signed with them. It was agreed that we would assume the legal fees for a certain time and that, when the cases were settled and these people were in a position to do so, they might perhaps reimburse us for these costs. (emphasis added)

Therefore, in actual fact, the lawyer's fees were paid by the Quebec Native Women's Association, and not by the complainant Louise Courtois.

In the opinion of the undersigned, the powers vested in this Tribunal under the provisions of section 53 are aimed at compensating the victim, in this case Louise Courtois and her daughter Julie Girard, for the expenses incurred as a result of the respondent's discriminatory practice. I do not believe that this Tribunal, appointed under the Canadian Human Rights Act, has the jurisdiction to grant costs to an organization which is not a party to the complaint and is not a victim of discrimination. Furthermore, I am unable to justify the granting of costs to a victim (Ms Courtois) who did not in fact assume them.

Such an application for reimbursement of legal fees has previously been denied by the Human Rights Tribunal in Morell v Canada Employment and Immigration Commission. Without making a definite ruling on this point, I doubt that a Tribunal appointed under the Canadian Human Rights Act is empowered to award costs. I therefore conclude by dismissing this claim for damages for legal fees.

As for moral damage, which can be awarded by the Tribunal under section 53(3), considering the decision in Butterhill v Via Rail Canada Inc (ATD 1-80), and also that the complainant Louise Courtois and her daughter Julie Girard, because of the respondent's discriminatory practice, suffered feelings of frustration and disillusionment as a result of the respondent's refusal to intervene and allow Julie Girard, an Indian, access to the Pointe-Bleue Reserve school, the Tribunal concludes that the sum of $1,500.00 shall be paid to Louise Courtois for injury to feelings and self respect, as well as the sum of $500.00 to Julie Girard, also for injury to feelings and self-respect.

CONCLUSION

The complaint of Marie-Jeane Raphaël, as filed and subsequently amended as Exhibit HRC 23, is dismissed;

The two complaints of Louise Courtois, filed as Exhibit HRC 1 and HRC 2, are found to be substantiated.

Consequently, I declare that the respondent Department of Indian Affairs and Northern Development contravened the obligations vested in the Department in the area of education by denying access to the

Pointe-Bleue school and by not providing funding for on-reserve schooling for Julie Girard, the child of an Indian, Louise Courtois, a Band member who, prior to April 17, 1985, married a person who was not a Band member. The respondent thus engaged in a discriminatory practice based on the marital status and sex of the complainant, prohibited grounds of discrimination under the provisions of sections 3 and 5 of the Canadian Human Rights Act.

The Tribunal orders the respondent to pay the complainant Louise Courtois the sum of $1,500.00 for injury to feelings and self-respect.

The Tribunal further orders the respondent to pay the complainant, for her child Julie Girard, the sum of $500.00 for injury to the feelings and self-respect of the latter.

SIGNED THIS 8TH DAY OF JANUARY, 1990, IN QUEBEC CITY

Maurice Bernatchez, Solicitor
Tribunal Chairman