T.D. 15/90
Decision rendered on November 2, 1990

THE CANADIAN HUMAN RIGHTS ACT

R.S.C. (1985), c. H-6 as amended

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DAN PHILIP FOR THE NATIONAL BLACK COALITION

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MARITIME EMPLOYERS' ASSOCIATION

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: Niquette Delage - Chairman
Daniel H. Tingley - Member
Antonio De Joseph - Member

APPEARANCES:

Anne Trotier Counsel for the Canadian Human Rights Commission

Daniel Dortelus Counsel for the National Black Coalition, represented by Dan Philip

Gérard Rochon Counsel for the Maritime Employer's Association

DATES AND LOCATION May 30, November 6 and 7 and
OF HEARING: December 21 and 22, 1989
Montreal, Quebec

1: The complaint

«The Maritime Employers' Association has entered into an agreement with an Employment and Immigration Centre concerning the recruitment of 150 candidates for jobs in the port of Montreal. The Maritime Employers' Association had specified that it did not want any black person to be referred for these jobs. That practice tends to deprive a class of individuals of black race and colour of any employment opportunities. This is discriminatory and in contravention of section 10 of the Canadian Human Rights Act.»

2: The facts

N.B. The parties to this proceeding are:

The National Black Coalition, hereafter designated as NBC.
The Human Rights Commission, hereafter designated as HRC.
The Maritime Employers' Association, hereafter designated as MEA.
Also mentioned frequently in the proceedings: The Employment and Immigration Centre, hereafter designated as EIC.
The International Longshoremen Association, hereafter designated as ILA.

On November 17, 1986, the MEA distributed «Flash», (HRC-3) to its employees. This issue of «Flash» was entitled «L'embauche devient compliqué (sic). In this document, the MEA invoked rapid changes in technology. It also discussed the hiring process as much more complicated than it used to be. It talked about Bill C-12, the Employment Equity Act. «Flash» also alluded to a long time hiring practice in the Port of Montreal favouring the sons of union members. This practice had been declared illegal by the Canada Labour Relations Board seized of a complaint by a group of union members following a resolution voted by the union which stated:
[by members following a resolution voted by the union:]

[translation] "However, on September 30, 1981, at a special meeting of its members, Local 375 of the International Longshoremen's Association adopted, by a majority of votes, a resolution proposed by its executive that amended its by-laws on admission criteria for new members. While Local 375's regulations had previously contained only two admission criteria, those of (1) being at least eighteen years of age and (2) payment of an initiation

fee, the amendment adopted added new criteria, some of which gave preference to children, brothers (sisters) and sons-in-law (daughters-in-law) of active members based on seniority of the fathers, brothers and fathers-in-law." (Memorandum submitted by the MEA to Mr Marc Gravel, Montreal, June 2, 1987). (At that time, the ILA was faced with a demand by the MEA, and the ILA had intended to maintain a tradition which banned any outsider from getting employment in the Port of Montréal).
The MEA went on to announce in «Flash» that it had entered into an agreement with EIC in order to find the best candidates possible to meet the needs of an increasing demand: regular jobs were, thus, to be opened to new recruits. Also, an increase in its reserve pool became necessary. Interested parties were invited to report to EIC for pre-selection purposes.

On November 26, 1986, the Gazette, Montreal's English daily, published an article by David Whimhurst, entitled: «Manpower boss gave no blacks order - union»: The union mentioned in said article is that of Employment and Immigration Canada employees. (HRC-2)

On November 27, 1986, what seems to be an editorial without any byline and entitled «Make ban on discrimination clear to all» was published in the

Gazette. (HRC-2)

Based on these two articles, Mr Dan Philip, President of the NBC testified that he wrote on December 1st, 1986 to the Minister in charge of Employment and Immigration, Mr Benoît Bouchard. (R3 -pp. 14 and 210, Transcript 1). Mr Philip received an answer dated December 16, 1986. Mr Philip also testified that he had called the MEA but failed to get any kind of reaction. He also met a Mr Lachapelle of EIC (pp. 14, 212). Then, he wrote to HRC. (pp. 14, 213). As a result, an inquiry was conducted by Mr Michel Bibeau, and a decision was eventually made to recommend a formal complaint which Mr Philip signed on May 27, 1987. (HRC-1) (pp. 14, 15, 214, 215), Transcript 1). Did Mr Philip get in touch with the Longshoremen's union? No. (p. 39 Transcript 1). In his testimony, Mr Philip alluded to an internal investigation conducted at EIC (p. 24).
Also part of the facts in this case, are the reactions of some longshoremen to the November 17, 1986 issue of «Flash»: «repeated visits and some threats of physical violence from members of the International Longshoremen's Association (ILA) claiming jurisdiction over hiring of new port workers.» (The Gazette, «Man power boss gave no blacks order-union», November 26, 1986). The Tribunal chose that description of events because

it confirms the testimony of the EIC employee Mr Denis Duquette, who was a witness to these events.

After the longshoremen denounced the agreement between the MEA and EIC, the EIC office closed for four days «six employees refusing to handled the Port of Montreal assignment.» (HRC-2-The Gazette article quoted above). Following a meeting between its representatives and the longshoremen's union president, Mr Théo Beaudin, the EIC decided to put on hold the agreement with the MEA, (letter of November 25, 1986, R-2), said decision being strongly contested by the MEA as worded in a series of letters respectively dated: November 27, 1986, (R-16), December 9, 1986, (R-17), and December 16, 1986, (R-18).

The longshoremen's union president had convinced the EIC representatives that the agreement was indeed, -as claimed by the longshoremen who had visited the St. Denis office of the EIC-, contrary to the collective agreement in force at the time. In a memorandum dated November 21, 1986, the EIC, under the signature of Mr Roger Tardif, informed its personnel that it did not «subscribe» to the proposed agreement to recruit workers for the Port of Montreal:

[translation] "As you are probably aware, a document published by the Maritime Employers Association is currently in circulation.

Contrary to the information contained therein, the Montreal Centre Canada Employment Centre does not subscribe to the proposed hiring agreement, and as a result, no pre-selection or selection activity is to be carried out by our services on behalf of the Association for the occupations in question.

I ask that you pass this information on to all candidates who present themselves at the Casual Placement Office or any other operational centre.

Thank you for your co-operation." (R-1)

The climate at the Port of Montreal was unsteady: talks at the bargaining table to discuss the contents of the coming collective agreement were getting underway.

As a result of these events, there was no pre-selection of port

workers and no hiring took place pursuant to the 1986 agreement between EIC and MEA, said agreement never coming to fruition.

The proof

The complaint stated that the «Maritime Employers' Association had specified that it did not want any black persons to be referred for the jobs in the Port of Montreal». (HRC-1)

The Tribunal was told by Mr Denis Duquette - an employee at the Casual Placement Office of the EIC - that on November 12, 1986, his boss, Mr Lucien Therrien, came into his working area with an MEA application; in the course of the conversation, Mr Therrien would have made a statement to the effect that Black people were not to be sent to the Port of Montreal. The exact words used by Mr Duquette during his examinations by Me Trotier, counsel for the HRC and Me Dortelus, counsel for the NBC and later on during his cross-examination by Me Rochon, counsel for the MEA, were:
M. Duquette: (questioned by Me Trotier)

[translation] "A. I spoke with Mr Therrien once when he came to my office -- the offices are landscape offices -- and he showed me an MEA application and we looked at it and discussed some things . . .

Q. Before going on, what do you mean by 'application'?

A. An official MEA form. People making an application must fill out a questionnaire drawn up by, I believe, the MEA or a company.

Q. Go on.

A. At that time, while we were talking, he told me that he preferred not to have blacks because they were not used to the Port, and he said that it could cause conflicts, that's what he told me.

Q. Now then, who . . .

Mr Rochon: Can we situate this in time? I'm sorry, but I did not hear the date of that meeting. I would like to know what time is being referred to here.

Witness: I believe this happened on November 12, 1986. (p 62, Transcript 1)

Mr Duquette: (questioned by Mr Dortelus)
A. He told us quite simply that he preferred not

to have blacks because, well, that could cause problems; they aren't used to the Port. (p 70, Transcript 1)

Mr Duquette: (cross-examined by Mr Rochon)
A. No, it took place in my office. I think that he had received a bunch in an envelope. He showed me one and then we took a look at it, nothing more.

Q. And it was in the course of this rambling conversation, if you will, as he was showing you the document, that he supposedly told you, as you say, that he preferred not to have blacks in the Port of Montreal?

A. That's correct.

Q. Had he said anything to you about this being one of his

directives, his orders?

A. That was as far as it went. I didn't pursue it.

Q. Was this, then, the only time that you heard Mr Therrien mention this matter?

A. Yes." (pp 88-89, Transcript 1)

Another meeting on that same day between Mr Therrien, Mr Duquette and Mrs Lahaye took place to discuss the agreement between EIC and MEA (p. 63, Transcript 1). Tests were discussed, as the candidates for the jobs in the Port of Montreal would be required to submit to them. Mr Duquette claimed to have objected to this whole scheme because the employer was discriminating and also because a newspaper article had alluded to a possible conflict in the Port of Montreal, said article discussing the situation in the Port of Quebec (he was not sure) and referring to a potential conflict in the Port of Montreal. Mr Duquette went on to claim that both he and Mrs Lahaye refused to work on this agreement. (p. 63, Transcript 1). Mrs Lahaye did not testify before the Tribunal. Mr Duquette's testimony on the verbal exchanges between the longshoremen who visited the EIC St. Denis St. Office on November 18, 1986 and the personnel in that office is quite explicit: there was no friendliness (p. 65, Transcript 1).

At that point in time, there was no question of discrimination. The issue was the pre-selection of new workers for the Port of Montreal and the

«interference» of an outside body in what had always been a «chasse gardée» of the union. Mr Duquette claimed to have been aware of the practice whereby sons of union members were favoured over other potential workers. (p. 66). He had also been aware that negotiations were underway between the union and the MEA. (p. 66). And he had understood that the union was claiming a right to look over the hiring of workers in the Port of Montreal.

He did see Mr Tardif's memo about the removal of EIC from a «proposed agreement» with the MEA. The Tribunal uses the qualifier «proposed agreement», because this is how the memo characterized it. The Tribunal is fully aware of the fact that the MEA contended that there was a genuine agreement between it and the EIC. Also, in Mr Duquette's testimony, there is no hesitation as to the existence of such an agreement. It is also abundantly confirmed in written documents: HRC-3, HRC-4, R-16, R-17, R-18, R-19.

Mr Duquette related the closing of the St. Denis St. office after the disturbances caused by the noisy visit of longshoremen protesting the EIC-MEA agreement, to a question of security. (p. 69). The EIC employees' union wanted an external inquiry and not just an internal inquiry by EIC on the events which had taken place on November 18, 1986.
Mr Duquette and his co-workers were not prepared, so he claimed, to work on the agreement between EIC and MEA: their argument was that they were not equipped to handle the tests as announced by Mr Lucien Therrien, their boss. Typewriting tests has been conducted in that office previously (p. 79), but since 1983, there had been no references for tests. As the MEA had determined that tests had to be conducted to evaluate the candidates regarding their dexterity and their aptitudes in carrying out the jobs in the port of Montreal, this whole aspect of the agreement between EIC and the MEA was frowned upon by the EIC counsellors as not being part of their mandate. (p. 80).

The meeting with Mr Therrien was qualified by Mr Duquette, upon cross-examination by the counsel for the MEA, as an informal one (pp. 87-88). According to Mr Duquette's testimony, the first time any official mention of Mr Therrien's alleged discriminatory remark occurred on November 20, 1986 at a meeting with Mr Tardif, Mr Pilon, Mr Therrien and another unidentified person, acting on an interim basis at the EIC centre on St. Denis St. The EIC employees' union was then represented by four people. (p. 117).

Mr Duquette said that he had previously seized his union of the discriminatory remark allegedly made by Mr Therrien. (pp. 119, 120, 121). The Tribunal learned from Mr Duquette that there had existed at the time, between Mr Therrien and the EIC St. Denis office personnel, a conflict: prior, then, to the events which took place on November 18, 1986, when the EIC St. Denis St. office was visited by longshoremen and one representative of the longshoremen's union; and also prior to November 12, 1986 when, during an informal meeting with Mr Duquette, Mr Therrien would have made his discriminatory remark. (p. 65, Transcript 1). There seems to have been, later on, a disagreement with Mr Therrien on the question of the collective agreement which, according to the visitors, granted their union a right over the hiring of workers in the Port of Montreal. (p. 126, Transcript 1).

On several occasions during his testimony the Tribunal heard Mr Duquette change his original testimony as he was confronted with dates of events which really took place on certain dates while he had situated them at other moments in time.

Questions put to Mr Duquette by the Tribunal as of p. 173, Transcript 1, were aimed at settling once and for all the exact sequence of events. The result was the following: there were three meetings (pp. 183-184-185): the first one between Mr Therrien and Mr Duquette on November 12, 1986. The second one was also held on November 12, 1986, between Mr Therrien, Mr Duquette and Mrs Lahaye. The third one was held on November 20, 1986, between the directors of the EIC office and the employees. On p. 187, Transcript 1, Mr Duquette talked about informal meetings and declared that the discussions touched on what type of worker was needed at the Port of Montreal. He mentioned that they continued to talk about it (what type of worker they were looking for and so on), but nothing more than that, and said that even on that matter there was little agreement, since it didn't meet the centre's needs. He stated that as a centre they could not, did not at all see themselves capable of meeting this need, adding that this would have been far too demanding for their centre. (p 188, Transcript 1)

[translation] "Ms Trotier:

Q. How many times did you speak with Mr Therrien, and what did you talk about on those occasions? In other words, were there more than three meetings?

A. We are often in touch, naturally. There were three meetings. There may have been more on an informal basis, where I stated that in any case this type of recruiting was not part of our mandate, as we lacked the necessary physical and human resources. He was thinking of cutting a

position in our department. So even if we were in favour of administering these famous tests at our office as agreed and desired by Mr Therrien, we would have needed additional personnel, and seeing that those jobs were very well paid and all the rest, naturally we would have been flooded with candidates, which means that we might have lost all control over the

matter, our primary responsibility would have been . . .

Q. But did you, at the time of these informal meetings, emphasize once again what you referred to as the issue of discrimination?

A. Informally, no, because, quite simply, it probably happened a short while before he told me that. (p 188, Transcript 1).

Q. So the informal meetings supposedly took place before November 12, 1986!

A. Yes." (pp 188-189, Transcript 1).
When Mr Duquette testified on the inquiry at EIC, he answered the counsel for the NBC that he and his co-workers received convocation letters for an internal inquiry. A discussion within their union resulted in a position favouring an external inquiry because of the refusal, by him and his co-workers, to work on an offer for services. They did not want to be in trouble because of that. They wanted to protect themselves because, so explained Mr Duquette, when a government employee refuses to work, he may be fired. (p. 194).

Mr Dortelus:
[translation] "Q. Was this inquiry, the external one that had been requested, to have addressed any aspects other than discrimination, which included not sending blacks?

A. I think that it was quite simply to have addressed everything that had happened, not necessarily the matter about not hiring blacks but everything, the warnings that we had given to Mr Therrien not to continue and so on. He was eventually found to be in the wrong in that area. We simply wanted to shed light on the whole matter and in the end, it was the Canadian Human Rights Commission that . . . where we went to testify. An external inquiry did not in fact take place; there was only the one by the Commission.

Q. The Mr Tardif who signed the letter of the 25th, is he Mr Therrien's supervisor?

A. He's the director of the network.

Q. On November 25, when he sent the letter, or prior to November 25, he knew that Mr Therrien had asked you not to send blacks?

A. Yes. That had been mentioned on the morning of . . .

Mr Rochon: I object. Once again, my colleague is continuing to paraphrase what was said to suit his own purposes. That is not at all what Mr Therrien said. Mr Therrien said that he -- this was the statement -- not [translation] 'I ask that you not send any blacks', not that at all, and I would like my colleague to correct his statement once again. He should be adequately . . . have a good enough memory to remember that.
Mr. Dortelus:

Q. So, after Mr Therrien told you personally that he preferred -- that was the exact term -- that he preferred that no blacks be sent . . .

A. That's right, that he 'preferred'. . .

Q. Did you meet with Mr Tardif?

A. We eventually met with our union to advise them of the situation, of the discrimination matter and all that, and then . . . well, I wasn't the first to meet with him because we wanted only to protect ourselves, since we intended to refuse to work what with all the events that had taken place, and we did not see Mr Tardif because that week he was, I believe, in meetings. I think that there was only one supervisor below.

Q. If I understand you correctly, the first refusal was an individual refusal; you refused to continue, to participate . . .

A. Ms Lahaye was the first, I think, who said that she refused, and I supported her by refusing to work as well.

Q. And this initial refusal was strictly a result of the matter about not sending blacks?

A. That and the other things that had happened.

Q. On the 12th, if we can go back to November 12, the other events had not yet occurred.

A. No, but let's say that the fact remains that we were not in favour on the 12th of working on this matter in any case, because of the newspaper article that I mentioned; we had not yet reached the point of conflict as such, where people were presenting themselves at the office. But we were hesitant from the beginning about engaging in a recruitment process for which we were not equipped. That was the problem, in the beginning at least. Our primary preoccupation was that we were not equipped to meet those needs. It all sounded fine, but when the time came to administer the tests and so on, we would not have had the proper tools.

Q. In the letter of November 25, R-2, which you have before you, signed by Mr Tardif and stating:

[translation] 'We are still prepared to go ahead
with the project on the condition that the
International Longshoremen's Association is party
to the agreement.'

A. Hum . . .

Q. As you recall, were there discussions in which the suggestion or request made to you by Mr Therrien to not send blacks . . .

Mr Rochon: A request not to send blacks was never made. To repeat it once again . . . you may laugh, but I'm sorry, my colleague should know better, he 'preferred' . . .

Mr Dortelus: I think that we are playing with words here.

Mr Rochon: Words are very specific. I am sorry, Madame Chairman, but I suggest that my colleague is misusing words, and he is doing so with full

knowledge of the facts. This is the third time that I have had to raise this objection, and the third time that you are maintaining exactly what happened. I mean, this is really an abuse by my colleague.

Ms Trotier: I have a suggestion, Madame Chairman. Perhaps instead of everyone paraphrasing this famous statement, we could refer to the notes to be prepared by Mr Legault and see exactly what the witness said at the time. In this way we can all avoid referring to it and interpreting it.

Mr Dortelus: Then I will try to use another expression that might be suitable. I will refer to Mr Therrien's words about blacks. Is that suitable?

The Chairman: We have an extremely short statement of which Mr Duquette spoke, and that is the one that interests us, nothing more.

Mr Dortelus:

Q. My question, then, Mr Duquette was . . . you said that you had been satisfied with this agreement, this letter.

A. That we were stopping our service to them, yes.

Q. You also said that there were two problems, one of which was a labour dispute, of interpreting the agreement, and there was also the problem of discrimination, as you called it.

A. Yes, yes.

Q. Illegal discrimination.

A. There were a number of problems, in addition to which we were not equipped, to begin with, to handle this type of request for workers. It was not part of our mandate.

Q. My specific question is . . . this letter, the one of the 25th by Mr Tardif, talks about a possible agreement between the union and the employer.

R. Hum.

Q. So action could be taken on the requests. My specific question relates to -- and I am here for a very specific purpose -- discrimination.

A. Hum.

Q. In terms of discrimination, to what extent were you satisfied with the service?

A. Listen. There had not yet been an inquiry on that specific matter. What was important for us was stopping the service, period. As for anything else that might happen, we would see about it later, but what was important for us was to simply stop the service, to no longer have longshoremen come into our office, to see them agree once and for all on their own problem and to see them discuss it.

The other question -- whether or not someone said things -- that's another matter. Listen, there was no need to . . . if it had been necessary to write memorandums, Mr Tardif . . . if he had said that despite . . . I don't think that we could have addressed this matter in writing. It would not have been so appropriate to send a letter to Mr McMaster [sic] saying things like that.

Q. In other words, if I understand correctly, on the 26th . . . November 25, 1986 you were in agreement with this letter but you did not reverse your decision to not participate in racial discrimination.

A. For sure we did not reverse our decision." (pp 194 to 201, Transcript 1).

The Tribunal has quoted extensively from Mr Duquette's testimony as it contains many clarifications. Mr Duquette had indicated earlier on, at p. 12 of Transcript 1, that he an his coworkers were not too keen on working on the EIC-MEA agreement. At p. 13, asked about Mr Tardif's letter of November 25, 1986 and a meeting with Mr Tardif, the witness answered that there had been a meeting with his union on both the question of discrimination and that of their refusal to work on the agreement.

At p. 14, Mr Duquette alluded not only to the «no Black» remark, but also to «all the events that had taken place,» to explain the refusal to work on the EIC-MEA agreement.

As the counsel for the NBC pointed out a discrepancy in the dates, Mr Duquette admitted that the refusal to work on the EIC-MEA agreement had been triggered by their objection to the nature of the work, prior to Mr Therrien's alleged discriminatory remark on November 12, 1986. What mattered to Mr Duquette and his fellow councillors in the St. Denis St. office was: [translation] "What was important for us was stopping the service, period. As for anything else that might happen, we would see about it later, but what was important for us was to simply stop the service, to no longer have longshoremen come into our office, to see them agree once and for all on their own problem and to see them discuss it." (p 201, Transcript 1).

Mr Théo Beaudin, the longshoremen's union President, testified that the ILA was created in 1898 (p. 233), that it files about 750 grievances a year (p. 232), that in 1965 it was 3 400 members strong, and that he joined it in 1960.
(p. 235, Transcript 2).

The collective agreement of 1986 had been signed in August, 1984. A reference was made to clause 37(HRC-5 and p. 239, Transcript 2) which allowed for an extension of said collective agreement until the signing of the following one.

Article 37 Duration of the collective agreement

[translation] "This collective agreement will remain in effect for a period of three years, from January 1, 1984 to December 31, 1986, and will continue to be in effect from year to year unless one of the parties to the agreement sends a notice of termination or revision of the agreement between the ninetieth and the sixtieth day before the agreement's expiry date.

In this same period, each party shall send to the other party the text of the amendments that it intends to make to the existing

agreement.

New articles in this agreement apply retroactively only to salary rates and pension and welfare fund contributions. Any other changes brought about by the existing agreement will come into effect only as of 8:00 am on the first Sunday following ratification of this collective agreement.

Notwithstanding the above, the provisions of article 7.01(c) will come into effect as soon as the changes to the programming have been made.

On the other hand article 1.07 specified that the union provided the work force to the MEA, not only regular workers and overtime workers but also casual workers, also referred to as part time workers. (HRC-5 and p. 240, Transcript 2).

Article 1.07 (article 1: Recognition)

[translation] "When all available union members have been called, candidates for membership, members under the control of the union, may be hired through the hiring hall. Once all these workers have been called, employers may call non-unionized workers, while giving immediate notice to the Local."

Mr Beaudin testified that there had been no new members in his union because there had been no need for them. Between 1898 and 1970, the work done by longshoremen was essentially physical: what were needed were two strong arms and good legs.

As of 1970, changes occurred: technological changes saw containers becoming more and more prevalent. Less specialized workers were needed. The kind of equipment installed in the Port of Montreal was and still is very sophisticated. Mr Beaudin testified to the role the union played in the recruitment of workers as described in the collective agreement of 1984 to 1986. He also explained that there had been no recruitment since 1965. (p. 240, Transcript 2).

In the context of changes, the Port of Montreal's work force became too abundant and in order to reduce it, various schemes were devised. One was buying back a number of jobs in 1973 and 1976. (p. 241). 850 employees accepted $12 000.00 to remove themselves from the Port of Montreal. In 1984, a new regime of premature retirement was put into place, so that workers aged 60 and over could take advantage of it.

In 1986 to get work priority, aspiring union members were charged $100.00. (In the 1970's, it had been $60.00). (p. 244, Transcript 2). Their names were put on a list transmitted to the employer, thus securing for them priority of full year employment over casual workers, who walked off the street to get some work for a day or more. (p. 244, Transcript 2). The composition of the work force was the following as explained at p. 244, Transcript 2.

1: Longshoremen with full job security, as full-fledged members of the union, the ILA,
2: aspiring union members,
3: casual or part time workers.

Why so many categories? The demands in the Port of Montreal explained this situation.

Mr Beaudin testified to a conflict between the MEA and his union, (pp.

248, 249), said conflict going back to 1985 as the union and the MEA started discussing selection and hiring of workers for the Port of Montreal.

In December, 1985, the union took a stand and all aspiring members, who had paid an annual due to be recognized as such ($100.00), became members of the union. Lists of names had been drawn up in December, 1985, and during 1986, groups of aspiring members were integrated in the union up to the Fall of 1986. Thus, the union had 250 more members as it prepared to undertake negotiations with the MEA at the end of 1986. (p. 249, Transcript 2).

The employer (MEA) was aware of shortages in the work force. It was his prerogative to either hire a large number of people with full job security or to postpone the work on a given number of ships till the available workers supplied by the union became free to handle the work put on hold: ever since 1967, explained Mr Beaudin, as a result of the Picard inquiry there had been a regime of job security for longshoremen: this was expensive. And when the question arose to add to the work force, the economic impact of any decision regarding the hiring of additional workers could not be set aside by the union as unimportant.

The question raised by the counsel for HRC as to the period past 1986 up until 1989 touched on the hiring in that period of time. A strong objection by the counsel for the MEA was voiced. He referred to the complaint as filed by the NBC and qualified it as a complaint in virtue of Section 10 of the Canadian Human Rights Act. He pointed out that said complaint dealt strictly with the question of an agreement, a verbal contract, and was not a complaint accusing an employer of systematically practising discrimination in hiring at the Port of Montreal. Nor was it a complaint that had to do with the hiring process presently underway. He insisted that the situation which had given rise to the NBC complaint was well situated in time and was very specifically targeted. (pp. 252-253, Transcript 2). He reminded the Tribunal that the EIC-MEA agreement had found no application, that it was let go by the EIC and that no hiring ever took place in 1986. He objected to questions being put to the witness with regards to what happened in later years as being irrelevant.

In answer to his objection, the counsel for HRC developed an argumentation around the notion of a plot between EIC and the MEA: something difficult to prove she recognized, so much so in fact that one has to rely on circumstantial evidence to eventually conclude that, indeed, the agreement in question had been the background to the act of discrimination complained about. The counsel for HRC quoted a passage from Beatrice Vizkelety's book: «Proving discrimination», published by Carswell. Her quotation was borrowed from page 140 in said book. (pp. 258, 259, Transcript 2).

«Although the element of intent is no longer considered a prerequisite in proving discrimination, it may still be difficult to establish the reasons for which a less than candid respondent acted in a particular manner, especially where the decision is largely based upon subjective criteria. The problem arises with similar acuity in cases involving allegations of sexual harassment where the acts are almost always carried out in private.
In cases such as these, where «direct evidence» of illegal behaviour is unavailable, discrimination may be established by way of inference, through the use of «circumstantial evidence». This latter type of evidence, which may be likened to a jigsaw puzzle, usually depends on a series of facts, each of which would by itself be insufficient to permit an

inference of discrimination but when combined may justify it.
One should not hope, in the absence of direct evidence, to achieve certainty in proving a fact in issue; however, the greater the number of pieces that can be assembled, sometimes painstakingly, the stronger will be the foundation of the ultimate inference.»

The counsel for HRC also quoted the following passages at pp. 148 and 150 of the same book.

«As the preceding discussion suggests, a complainant may introduce evidence concerning the respondent's conduct on occasions not directly related to the case at bar in order to show differential treatment; it is also permitted in some circumstances to present evidence of previous misconduct, as yet another means of proving discrimination indirectly. This is known as similar fact evidence.

In line with this approach, human rights tribunals have had occasion to consider the probative worth of similar fact evidence and to weigh it against the prejudice that it might cause to a respondent if admitted.»
The counsel for the MEA maintained his objection, attacking the pretention that a plot had existed in order to discriminate against Black people. The complaint alluded, he once more argued, to an agreement and not to a plot. There was no attempt by the defendant to deny the existence of an agreement concerning the hiring of new workers on the docks. It did exist and there was ample proof of it.

The counsel for the MEA dealt also with the question of circumstantial evidence as introduced in this debate by the counsel for HRC. (pp. 262, 263, Transcript 2).

Mr Rochon:
[translation] "When my colleague quotes Béatrice Viskelety, she properly quoted the part on circumstantial evidence, but forgot to stop there:

«In cases such as these, where «direct evidence» of illegal behaviour is unavailable».

Where is it unavailable? Have we at least asked Emploi Immigration Canada if they did have one? You would need to prove that first before you start trying to say that it's unavailable.

It's incomprehensible that they would go that far at this point and now raise the fact of complot to be able to prove or put into the record things that got nothing to do with the present case because, and I restate the fact, we are faced with a situation that is determined clearly in a complaint as being one agreement between a Crown corporation, not a Crown corporation, a branch of government, my God!

The counsel for the MEA could not agree that the «similar fact evidence» theory applied here, because the evidence showed that in the Port of Montreal there had been, prior to the 1986 agreement between EIC and the MEA, employment contracts entered into by the MEA and the longshoremen union, the effect of which had been the exclusion from the Port of Montreal of any outsider. And that included visible minorities. (p. 263, Transcript 2).

The Tribunal understands the statement made at page 263 Transcript 2, by the counsel for the MEA as meaning that no one had access to jobs in the Port of Montreal, because: first of all, they were, whenever available, opened to sons of union members, and secondly, as there had been no hiring

in the Port of Montreal for all intents and purposes since 1966, then there was no discussion possible on the question of hiring in that port.
The counsel for the MEA insisted that there was indeed an agreement between it and EIC, but it never came to fruition. Thus, there was no hiring practice to attack as regards the MEA, the EIC counsellors having refused to work on said agreement.

He went on to point out that Mr Duquette's testimony was very clear.
He and his co-workers at the EIC St. Denis St. office refused to work on this agreement because their office was not equipped to handle the

requirements set by the MEA as part of that agreement. (pp. 265, 266, Transcript 2).

To rebut the arguments developed by the counsel for the MEA as part of his objection, the counsel for HRC reminded the Tribunal that Section 10 of the Canadian Human Rights Act had been contravened in this case:
Section 10: Discriminatory policy or practice

«It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. (1976-77, c. 33, s. 10; 1980-81-82-83, c. 142, s. 5).»

Her interpretation of the contents of Section 10 was the following:
[translation] "According to this section, it is a discriminatory practice for a person affected to enter into an agreement concerning, among other things, recruitment, when that agreement has the potential to deprive an individual or group of individuals having any of the characteristics specified in the Act of opportunities for advancement, promotion and so on. The proscribed grounds of discrimination are, as we know, set out in section 3 of the Act.

The alleged discriminatory practice, therefore, is the conclusion of an agreement that would have deprived a group of individuals of employment opportunities in the recruitment process. This is the practice of which the respondent is accused.

That practice, therefore, is clearly the agreement. I have used the words 'plot' and 'agreement' synonymously.

Now, a similar practice that would be, I suggest respectfully, admissible would be an employment practice that is or is likely be harmful to a group protected under the Act.

These are the similar acts to which Ms Viskelety, and the references and cases cited, refer.

The similar act or practice is introduced in support of evidence of
the alleged principal act that is the subject of the complaint, and hence
to corroborate the other evidence, and it is in this sense that I suggest
it is admissible. Thank you."
The Tribunal decided, at that point in time, to reserve its decision
on the objection raised by the Counsel for the MEA.
After carefully reading all the transcripts, after reading all the

doctrine quoted in support of both parties's arguments it is the opinion of
this Tribunal that the objection raised by the counsel for the MEA was well
founded. The Tribunal has adopted the view that it cannot go beyond the
events which took place in 1986. It is its opinion that, as the 1986
agreement lapsed and was never applied, there is no reason to examine the
hiring practices which were in effect in later years up to 1989.
As the Tribunal, at the time of the hearing, did not want to miss any
element which might help it in reaching the right decision, it allowed a
great deal of latitude to the complainant, who introduced much evidence which, eventually, convinced the Tribunal of
the following:

The ILA, the longshoremen's union in the Port of Montreal, should have
been a party to the proceedings.

The NBC as well as the HRC must have become aware, in the course of
the proceedings, that the hiring «problem», if we may qualify it that way,
was deep rooted and rested with the tradition created and entertained over
the years by the union. It became abundantly clear to the Tribunal that
the employer attempted to modify the rules of the «game» so to speak, but
as he found out, time and time again, and more specifically in 1986, the
union was not prepared to let go anything. It considered quite
unacceptable the EIC-MEA agreement as it interfered with what was
considered by the union as a definitely acquired right.

As Mr Beaudin explained in his testimony at p. 270, Transcript 2, in
answer to a question by the counsel for HRC: in November, 1986, the hiring
problem in the Port of Montreal was no more intense than it had been
before. The context was though, as the talks were about to begin regarding
the renewal of the collective agreement which was coming to an end on
December 31st, 1986. Mr Beaudin also explained that a major problem
existed for the union, as some workers could accumulate 60 hours of
overtime to their normal work week. (p. 271). Relations between ILA and
the MEA were difficult. At one point in time, a list of 15 names suddenly
appeared. No one knew any of the listed people in a milieu where everyone

knew everyone. It did not take long to figure out that the employer had solicited the cooperation of EIC to send workers to the Port of Montreal, said Mr Beaudin. (p. 272, Transcript 2).

When «Flash» was distributed to the longshoremen on November 17, 1986, they considered the announcement it contained as a strategy to destabilize the union's position as negotiations were about to start.

Mr Beaudin:

[translation] "Two or three days later we heard talk of a longshoreman who had been to threaten the employees of Employment and Immigration Canada. On that occasion we reacted a little more . . . after what happened at the hiring hall I must tell you that not one of them was given work. They stayed seated in the hall, and we heard later that they had been paid eight hours without having worked." (p 272, Transcript 2). This statement by Mr Beaudin tends to imply that no outsider, whomever he may have been, could have worked in the Port of Montreal: neither the colour of one's skin nor the ethnic origin of any person interested in working in the Port of Montreal seemed to have had anything to do with having access or not to longshoremen jobs.

Was Mr Beaudin, or his union for that matter, concerned with discrimination? Not at all. At p. 273 of Transcript 2, he explained that his concerns rested with finding who had gone to the EIC St. Denis St. office and made threats.

As regards the question of discrimination, here is what he said: [translation] "After that, we learned from the newspapers of an incident involving a certain Therrien, Lucien Therrien, who had been dismissed by Employment and Immigration Canada supposedly for an agreement with an employer to not send blacks to the Port.

But what I'm talking about now are all rumours that were going around in the meantime. With respect to the incident involving the longshoreman, I was anxious to meet with the staff of the Employment and Immigration office, and two of the gentlemen there came to see me.

If my memory serves me correctly, it was a Mr Beaulieu and a Mr Tardif. They came to our place and I explained to them the union's situation, that we were in the process of renewing our collective agreement and had a clause providing for the union to be the supplier of manpower from an identified group.

When they realized that, they stated firmly that there was no longer any question of an agreement, that they would no longer send anyone to the Port before a formal request was made by both parties, namely, the union and the employer.

As far as we are concerned, the incident ended there. If we had been able to identify the longshoremen, maybe yes . . but frankly we never believed this story about the longshoremen. There was also an internal conflict going on at that time, between labour and management within the Employment and Immigration Canada office.

We never really believed that story. Personal inquiries at our end did not enable us to identify anyone either who might have gone there.

After that meeting with the people from Employment and Immigration Canada, they promised us that they would no longer send anyone without the consent of both parties, and in fact they did not. We never had problems in that sense.

We had hiring problems of another sort, but where Employment and Immigration was concerned, it ended there." (pp 273, 274, 275, Transcript 2).

Questioned by the counsel for NBC, Mr Beaudin explained the nature of the problem between the union and the MEA. Asked if he and Mr Masters, the President of the MEA, had discussed the problem of hiring Black people in the Port of Montreal, Mr Beaudin answered the following at p. 304:

Mr Dortelus:
[translation] "Q. During 1986, or more specifically, in November 1986, when you mentioned that the problem became public, did you personally have discussions with Mr Masters on the problem of hiring blacks in the Port of Montreal?

A. In 1986, after the employer's circular, that is, the newsletter circulated by the employer, we had meetings with the employer every week, sometimes several times a week. Whether we spoke of blacks in a more specific manner . . . for us, the arrangement that the MEA had made with Employment and Immigration Canada did not involve a problem with blacks.

It was simply that we perceived this as an attempt to bypass our

collective agreement. The problem of blacks was not present as it was after . . . after the Employment Equity Act, for example. It wasn't that.

The measures that we took as a union were that we attempted to counter the problem and to have our collective agreement respected.

The letter that you just showed me, the one in which Lacroix stated firmly to the union that he would be going ahead with the recruiting, that was contested in a grievance. We simply wanted to counter the employer's attempt to interfere in our collective agreement.

At the same time, well, we became aware through the newspapers and Employment and Immigration Canada's actions that there was also a matter involving blacks.

Supposedly the employer had made a point of specifying to Employment and Immigration Canada to send people but in particular no blacks. That is certainly not a union position." (pp 304, 305, Transcript 2).

Then Mr Beaudin, again trying to answer that same question, alluded to part of a discussion he remembered having had with Mr Masters. (p. 305). In discussing productivity in the Port of Montreal, Mr Masters would have mentioned that the Port of Chicago was in a slump because its Black workers stopped working frequently. Mr Beaudin went on to explain that he did not take this remark seriously and treated it in the same fashion as a running joke about the rain which keeps falling on the Port of Chicago. Mr Beaudin invoked other factors to explain the poor showing in the Port of Chicago. (p. 306). As the counsel for the NBC tried to establish that Mr Masters attributed this situation in Chicago to the fact that Black people worked there, Mr Beaudin's answers shied away from drawing any such conclusion. He was non committal: «all ports in North American have experienced at one time or another bad periods. (p. 307). At page 308, Mr Beaudin acknowledged that that remark by Mr Masters had been made, but that he had not paid attention to it.

[translation] "Witness: This statement was indeed made by Mr Masters, but at the time I did not pay any more attention to it than that. It came back to me afterwards, with the story about the blacks, and myself I still wonder about it. Who at one time or another doesn't recall something that happened before and ask himself whether it was accurate, whether it was meant seriously at that time. It's normal.

At the time, I simply took it to be an argument that Mr Masters tried to put forward to prove that Montreal longshoremen are more or less

productive. But these were negotiations and discussions, of which there are all kinds.

Our discussions did not stop at the Port of Chicago nor at American ports in general. From time to time we talked about European ports as well, but that is part of a person's expertise in his field, it's as simple as that.

But later that came back to me as an incident which I associated with recruitment of blacks." (p 308, Transcript 2)
Out of the preceding testimony, this Tribunal concludes that in 1986 Mr Beaudin was not preoccupied with the question of hiring Black people in the Port of Montreal. Nor was he aware of any discrimination in the Port

of Montreal.

Cross-examined by the Counsel for the MEA, starting at p. 314, Transcript 2, Mr Beaudin explained that, as far as he could remember from listening to his own father's remarks, the union provided the work force. At that time, employers in the Port of Montreal were all independent and they sought the union to hire the longshoremen they needed. (p. 314). The workers came from construction sites and spent variable periods of time working in the port. (p. 315). The port was shut for the winter and it was only in the 1970's that more work stability was gained, as the port began operating on an annual basis.

The Picard inquiry, he went on to explain, had led to the creation of a job security regime in the Port of Montreal. (p. 318). What it meant, generally speaking, was that the longshoremen were promised a certain amount so that they would remain available. (p. 321).

The counsel for the MEA invoked article 1.07 of the collective agreement (HRC 5) in an effort to confirm the close shop reality in the Port of Montreal. The job security was set up in 1967 and went on uninterrupted till 1986 at least. (p. 324). Only specialized workers were admitted to the job security regime in that time span. (p. 325).

In 1986, the union was reduced in size compared to 3 400 members it had had in 1973. By 1974, the number was 1 400. Where had they all gone? 878 longshoremen had accepted a package offered by the MEA and for $12 000.00 took an early retirement. (Mr Beaudin had indicated 850 longshoremen at page 240 of Transcript 2). At that time union members had

an age average of was over 50 years old. (pp. 330, 331). (57 quoted Mr Masters at page 649 of Transcript 4).

A brief look at what existed between 1900 and 1966 allows the Tribunal to grasp the evolution of employment in the Port of Montreal. From a very casual work force, which meant that people were paid for four hours of work when they offered their services, it evolved to something much more interesting. (p. 596, Transcript 4).

In 1980, 1981 and 1983, there were labour shortages. (pp. 613, 614). Article 13.06 of the collective agreement (R-10) in force between 1984 and the end of 1986 provided for a joint effort on the part of the MEA and the union.

Article 13.06 (article 13: Job security plan eligibility)

[translation] "If it becomes necessary, in management's opinion, to increase the number of workers on job security for the duration of the collective agreement, the new workers will be selected jointly by the union and management from a list provided by the union."

It so happened that an inability by the union to meet the requirements of the shipping industry created a problem. (pp. 616, 617).
Was the request put to the union for additional workers a valid one?
Work needs in the Port of Montreal, for the years 1985 and 1986, give the Tribunal an idea of the requirements.
Mr Masters:

«So that we're looking at a work force where we had everybody on job security on a computer and they call up and they're given work assignments and when we don't have enough there is casual workers or regular casual workers who come to the hiring hall location in section 49 of the Port of Montreal and we give orders out and they take them and they go to work.

When that process ends you may be able to have some people from the street or whatever, but there comes a point where you can no longer fill the orders. At that stage the ships are not being serviced and it would be more the manual ships that aren't being serviced and these are the ships that come in with labor intensive cargo and they're there for quite some time.» (pp. 619, 620, Transcript 4).

Mr Masters explained in detail the difficulties the MEA experienced in 1986, and at the end of that year his description of the situation in the Port of Montreal was vivid:

Mr Masters:

«Again, then starting in November, December they become rather intensive. So that 1985 saw the Association looking to fill orders and when you see this situation you have to understand you have a whole lot of companies saying you're not handling our ships very well and therefore, nobody quite blames the employees, they're looking at us and saying why haven't you done something about this. Many of these ships are in the $30 000 a day class and other ships have to be turned around quickly to meet the requirements.

So there is rather intense emotion when we're into a situation like 1985.

Q. Could you comment about the November impact, particularly December 1985.

A. Again, you're down to Christmas time, ships are going to wind up and many of these ships are not ice strengthened, so they have to get out and we haven't had such a severe winter as we had this year back then, but still the conditions prevail and have in the last 30 years. December is always a massive need. 85 seems to me we had problems, we were trying to do something about employment, getting new people and in 1986, if you start to look at that, in the first months again the condition was quite serious and here we had a new problem in that the union intervened and suggested to its people not to...la «seine» is the term used and I should explain, la «seine » is fishing, and it's fishing for work, the implication, it's a current term in the longshoring industry and certainly in the Province of Quebec, «on va seiner» and the intent is I have a job, I work every day, but if I feel like making additional money I'll go down to the hiring hall and I offer myself for additional employment.
Now, there aren't many people who do that on a very regular basis and over the years there are people who make very large income by working intensive extra hours.

On the other hand, there has been over the recent years pressure to keep that down and certainly in 1986, in January, that kind of hit, we had a real messy situation where the union suggested to the members not to work, don't work overtime et va pas sur la «seine», dont' go fishing.»
(pp. 621, 622, 623, Transcript 4).

Mr Master's testimony proved to be very instructive to the Tribunal as it emphasized the difficulty in the hiring process and the solution his organization found amid grievances filed by the union. Eventually, the MEA secured 75 people, very short of the required workforce to service the ships in the Port of Montreal. Here is how he described the labour front at that point in time:

Mr Masters:

«So we had a known situation, we had the work force that was in the computer job secured, together with its normal attrition. Secondly, we had the extent to which we could tap the non-job secured work force and thirdly, we knew what the pure casual work force was. We also had some indications of our needs and therefore we had a problem, simple a,b,c,.

Q. Is that at the time where you finally turned to the CEIC?

A. This was late Summer, early Fall 1986 and we then said we have no labour, we have no means of getting it, our partner is not going to resolve this until the negotiations are over, the negotiations potentially will last much longer than the period we can live with and so we decided that the best thing we could do was form people, or try to acquire people who could operate small equipment such as 6-ton, 12-ton lifters and if they could be trained, acquired and trained and put in the backup pool then we would be able, a little closer to be able to meet our requirements and then the problem was selection and all of the things related to employment which we as an association had not done.

We're sitting with a work force that has been around since the sixties and we now had the requirement to go out into the market place and find new people and traditional source was no longer valid.» (pp. 629, 630, Transcript 4).

As regards a hiring policy more connected to the reality of equity in employment, Mr Masters explained how he had been involved with FETCO, an organization regrouping federal employers in transportation and communications and covering 400 000 employees coming under the federal jurisdiction. (pp. 631, 632, Transcript 4).

Mr Masters worked on a Submission by FETCO to the Parliamentary Committee dated November 27, 1985. (R-15) FETCO supported Bill 62 on employment equity. It also reported on «problems in the area».

Mr Masters:

«Secondly, it perceived problems in the area of collective agreements, particularly in the longshoring industry and where there was an application of a hiring concept and where there was negotiations of joint undertakings to deal, to jointly employ people, and it suggested to both the Minister, the CEIC and the Parliament, and ultimately to the Senate, that until such time as the government accepted the proposition that the union should have some obligations along with the employer in those situations that it would be very difficult for the employer to meet the requirements of the Bill.» (pp. 634, 635, Transcript 4).

In a section entitled «Role of unions and Collective Agreements», the FETCO brief, on page 5, «goes on to make the point that with inversed seniority, with seniority and inversed use of seniority for layoffs and the condition of federal industries at this time in the transportation sector, that there was obviously, if you were going to meet the requirements of the legislation you also had problems in promotions and things like that where seniority was the main criteria.

Q. At the bottom of page 5, Mr Masters, in the last paragraph, it's dealing...:

«Probably the most striking example of this is found in the stevedoring and shipping sectors...»

That's where you deal with the situation.

A. Yes.» (p. 635, Transcript 4).
Another question discussed by said brief had to do with the quality and usefulness of data collected on information provided on a voluntary basis by the employees.

At p. 8 of the brief, the general comment made is that «self identification was unlikely to produce solid results and that the data would be difficult if not useless at times.»

«We recognized, said the brief, that in our society it would not be acceptable for individuals to be legally required to identify themselves as «disabled» or as «visible minority». (p. 636, Transcript 4).

Mr Masters:

«A. This presentation and our involvement in Bill C-62 made the MEA very well aware of its obligations and clearly we understood that we had a problem because we had lived for many years dealing with the obsession of union hiring and therefore all of a sudden we had an obligation that the government had not seen fit to mitigate with the union and we were stuck with the responsibility.

So going into the negotiations we knew full well that we had to develop a hiring policy that would not only resolve our difficulties and give us people to do the job, but also met the requirements of Bill C-62. So throughout 1985, 1986 we had two situations in parallel, one where labour shortages and inability to acquire enough people to deal with the problems, and on the other hand we were sitting before government arguing about the application of C-62. So there was no lack of understanding on the part of the MEA that there was a changed environment that it had to deal with if and when it came to hiring.

Secondly, we knew that our work force was and is still today a reflexion (sic) of the conditions of 1966. So it was as obvious as it could be that we had a major situation to overcome.

Q. And what decision was made therefore in order to acquire new employees at that point?

A. Given the two situations, we approached CEIC to take on the role of screening and developing a program which met both requirements and that is going on in September and October, and in November we settled the situation with CEIC and we advised the longshoremen...

Q. Were you personally involved in the exchange with CEIC in order to put together whatever was required in the hiring process?

A. No, I was involved in establishing the criteria within the Association, but the negotiations with CEIC were done by Mr Bélanger.» (pp. 637, 638, Transcript 4).

Questioned about the November 17, 1986 issue of «Flash», Mr Masters explained the context of this publication.

Mr Masters:

«We issued this communication to all longshoremen in the Port of Montreal knowing full well -- because in November 1986, and having lived the period that I've been describing to you with all of the complications and that people would have to understand that there was a change and that things could not continue as they had continued in their mind because

remember, there had been no hiring, and therefore what we're talking about here is a mind set as opposed to people regularly being involved, we have people who had an average age of 57 at this time and you're talking about a mind set that says the new people that come here are from our families as opposed to normal employment procedures.

So if you're going to communicate with people and tell them why you're changing things and why did you go to CEIC one had to explain that the world had changed and this is what we tried to do here. We sought some advice from professional people on how to communicate this kind of information and this document was prepared and given to everybody.

Q. Now, do you deal in that document with the particular aspect of the obligations under Bill C-62 and the criterias and the hiring process, et cetera, specifically?

A. Yes, we try to specifically take a subject in the 1986 context that we would have to communicate to a person in the 1966 frame of mind and, as I say, we sought advice on that and this document was prepared explaining why: a) there had been a huge change, b) we have a new law, the huge change and the new law means things have to be done differently and not that they've been done differently...in my time they never employed anybody, but we thought that that would be the way to do it and that's exactly what this document sets out to do.» (pp. 639, 640, Transcript 4).

The result of this communication was that the MEA, after certain events took place and of which the Tribunal was informed, was told that the EIC «couldn't continue with the program without the consent of the union». (p. 644).

Asked about the comments he would have made on the Port of Chicago, as quoted by Mr Beaudin in his testimony, Mr Masters denied any discussion about the Port of Chicago with Mr Beaudin. Mr Masters insisted that he never visited the Port of Chicago which could not be compared to the Port of Montreal, the latter competing, rather, with that of New York and that of Baltimore. (p. 649, Transcript 4).

Cross-examined by the counsel for HRC on the question of discrimination, Mr Masters, at p. 706, Transcript 4, referred to his comments as reported in The Gazette: «If you want to know what I thought, it's in the next page:

«MEA president Arnold Masters told The Gazette it wasn't true his association had asked that no blacks be selected.

It's an absolute lie to suggest that we requested any form of discrimination. We haven't hired for 20 years, so we decided we needed the assistance of the government to help us apply new rules covering fair hiring practices.»

You could have gone back and found out that it was Jean-Pierre Blier, who I've never met in my life, who apparently has great knowledge and that is all secondhand according to this article.

Q. But what I meant, sir, is that when you read that I assume that you were quite upset about that.

A. You bet. I still am.

Q. So you made a public statement about that.

A. Yes.

Q. Did you complain to CEIC, did you mention that in another letter to CEIC, you know, that their employees were sort of leaking information that there were agreements between the MEA and somebody in CEIC on discriminatory practices? Did you complain about that?

A. If you go by the other correspondence, we spent from that day until sometime in January to try and get any kind of sense out of CEIC and at the end all they told us is because you have a disagreement with your union we will not give you the normal services we give employers.

Q. Oh! I understand that, but did you ever mention to them that you were concerned about charges of discrimination? Did you complain specifically about the fact that you were sort of...

A. I don't think the CEIC ever said that we had discriminated, to my knowledge. I wouldn't say to them...you know, they did say we discriminated. It was the president of the union apparently. Not them. So why should I say to them, why should I blame them for something? I said what I had to say in public and I said it on the day that it happened.

Q. But you didn't complain formally about CEIC employees' behaviour, if you want, specifically in any subsequent correspondence.

A. I don't think that the person who is saying what he is saying is acting as a spokesman for CEIC. He's acting as president of the union who closed down one of their offices and is trying to defend themselves. That's what I sensed from the whole charade, that's exactly what was happening.

Somebody had closed the office because he was afraid and when he had to reopen it he had to have a reason.» (pp. 706, 707, 708, 709, Transcript 4).

Cross-examined by the counsel for the NBC, Mr Masters pointed out that all through the exercise of protesting the EIC's decision to cancel the

service to the MEA, «are we dealing in anything other than the annulling of what we felt was a legitimate contract with CEIC and nowhere did CEIC ever tell us that anything that they were stopping to do for us had anything to do with discrimination.

We know it had nothing to do with discrimination from our point of view and only in the newspaper do you read about discrimination. So I don't understand why I would do anything other than what we did.» (pp. 714, 715, Transcript 4).

Asked to explain the hiring policies at the MEA, Mr Masters answered the following:

«A. First, from 1966 to 1984, or 80, let's say, I don't think that there was any hiring whatsoever. So there was no politique comme telle.

Then there was, as I indicated this morning, there was the various... and during that time if there were maintenance people needed, they were hired individually by the companies after giving notice under the collective agreement because you had to give a notice to train and if there was no one to train, then you could go and hire and the companies hired individually and I believe there is a specific provision in the agreement dealing with that for specialized or mechanical operations. So for the hiring that was done in those areas there is no policy, it is a condition of the collective agreement.

There was no policy on anything else until 1984 when we attempted to build in a start of a policy which is the clause I gave you under 13.06 and there we talked about a referral list.» (pp. 720, 721, Transcript 4).

Asked about an «obsession» concerning the hiring of sons of union members, Mr Masters explained that in 1984, «we had a short term requirement, as it turned out, we thought it was a long term requirement, for 20 carpenters, and because there was no provision on how to add people in the collective agreement...in 1981, I'm sorry, at the time we wrote to the union and said we needed 20 more carpenters. We gave notice in the absence of a prescribed way to do it.» (p. 722, Transcript 4).

Asked about equity in employment, Mr Masters explained: «As I indicated in the «Flash» that I sent out on November 17th, 1986, that the MEA both in 85 and 86 was extremely preoccupied with our obligations under the new act, and also preoccupied by the fact that we couldn't resolve our hiring problems, and that was the total testimony that I gave this morning, is that we were trying to resolve a new hiring system that would take into account the resolution of the obligations that were promulgated under Bill C-62. So yes, we were preoccupied with both the hiring and with respecting Bill C-62.» (p. 730, Transcript 4).

How many Black people worked for the MEA in 1986? «I don't know exactly. First of all, the report we have here wouldn't tell you that because it's only 1987.

In 1986, I believe there were visible minorities in two locals... of personal knowledge. I wouldn't know how many... you know, there had been no hiring. I know two people who are black and who worked on the waterfront and they've been there for a long time, but it's just that they were in the West and that I knew them.» (pp. 730, 731, Transcript 4). Again Mr Masters explained that «our work force covers job secured, which is an old work force and I certainly don't know every person. We have a casual work force that comes out of the hiring hall I don't know the

answer to the question how many.

As to were there visible minorities, yes. Were there a large number, I would say no, but the answers are not something that I have in a quantitive sense, but I also know that at the same time there were not many women. I mean there were not many women, there were not a lot of visible minorities and we're dealing with a work force that's evolved very very slowly and we've hired nobody. So the answer is obvious. I mean you know there is not a large number of women, there is not a large number of visible minorities, and if that's the answer you want that's the one I can give you, but what he was asking me was how many. I don't know.» (pp. 731, 732, Transcript 4).

Mr Jacques Bélanger, an MEA employee told the Tribunal, starting at page 763, in Book 5 of the Transcripts, that he first met Mr Lucien Therrien of Employment and Immigration Canada in 1985.

Mr Jacques Bélanger:

[translation] "I spoke with Mr Lucien Therrien, whom I knew from before; he had come to see me in 1985 to offer us the Canada Employment Centre's services in case of a shortage in the Port of Montreal. So I met with him . . .

Q. So you knew Mr Therrien from these previous occasions?

A. Yes, I had had previous dealings with Mr Therrien, in 1985.

Q. Did you have . . . before coming back to 1986, in 1985 did you receive casual workers from the Canada Employment Centre when you needed them?

A. We had telephoned Mr Therrien twice, but only once did we ask him to send us machine operators. These operators came to the hiring hall on the morning we made the request, but in the end we did not use them that morning. We nevertheless paid them for their travel costs. That was the only time that Mr Therrien supplied us with manpower.

Q. Had you at that time used up all your other internal resources, that is to say, regular employees and casual workers who came to the hall regularly?

A. Yes.

Q. Now then, at the end of the summer, beginning of the fall of 1986, you say that you got in touch with the Canada Employment Centre and that it was Mr Therrien, whom you knew from before, with whom you communicated. Did a meeting take place?

A. Yes, there was one meeting between Mr Therrien, Mr Lafrance and myself." (pp 763, 764, 765, Transcript 5).
Everything Mr Bélanger said after that in relation with a series of events reported to the Tribunal confirmed the testimonies of Messrs Duquette, Beaudin and Masters.
The MEA had not hired any longshoremen for 20 years. The workers in place belonged to the ILA which had been in existence since 1912. (1898 had said M. Beaudin at p. 222). When the Picard Inquiry was set up in the 1960's there were 3 400 longshoremen employed in the Port of Montreal by

the Maritime Shipping Federation to load and unload ships. Technological changes were rapidly progressing as of the early 1970's; the employers

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having to sustain such a large work force, whereas the needs no longer existed, abided by the Picard inquiry solution: job security was negotiated and a buy out program of jobs was put into place: $12 000 were given to each and everyone who opted to get out. 878 did.

Who were these longshoremen working in the Port of Montreal? People from various ethnic origins and most had been working there for many years when, in 1985, there was a need for more employees. To meet the demands for specialized workers, - no references having been made by the union, - the MEA which had succeeded the Shipping Federation in 1968,- contacted the EIC, which had previously offered to provide employees to the Port of Montreal. EIC sent the number of people required by the MEA at that time, but they were not employed that day as the union provided the necessary number of workers needed.

How did the process work in the Port of Montreal? As mentioned previously in other testimonies, the union had always been the provider of the work force which was made up of skilled workers who had been trained by the companies building the equipment put into place in the Port of Montreal.

As the trainees became skilled, they, in turn, trained other workers. The union was a large family. (pp. 334, 425, 613, 616). Fathers expected to have their sons and daughters become candidates to full membership in the union like themselves. But, first, they had to become part of the casual workers'pool, which was in place to furnish the additional workers required to fulfill the demand if, for example, there were many more ships than usual in the Port of Montreal; this happened at peak times, from the summer to late December when the Port usually closed.

So, the casual workers' pool was a back up pool, and it was made up of workers who were envisaging to become members of the union to enjoy job security.

What did job security entail? So many hours of work per year for so much pay! Any additional hours were remunerated in consequence. As part of the back up pool, workers showed up at the Port of Montreal early in the morning. Between 6:00 a.m. and 7:30 a.m., the union members who were required to call in the evening before to register their presence came into the hiring hall to fill the jobs. If they did not show up there were less

people available; after all the union members had filled the jobs, the remaining jobs were offered to the casual workers in the hall. Of course, said casual workers had to be able to fill those jobs and it was not enough for them to be present: they had to be able to do what was required of them. As was mentioned earlier on, they had to have had prior training to fill those jobs; if they did not, then the jobs remained unfulfilled. If this process could not work, evidently there had to be a way out. The MEA tried to find it, and the Tribunal was made aware of the approaches favoured by the MEA and of the reactions they provoked at the union level. (Decision 559, Canada labour relations board, Maritime Employers' Association, applicant, and International Longshoremens' Association, local 375, and Theodore Beaudin and Jacques Giroux, respondents. P. 3 contains a more detailed description of the daily process of job attribution. (R-14)).

At the time the events mentioned in the complaint by the NBC are purported to have taken place, there was tenseness between the ILA and the MEA which recognized that the context within which it operated in 1986 was not a stable one. It was one of confrontation as negotiations were getting underway to renew the 1984 collective agreement about to end.

Were there in that collective agreement provisions which allowed the MEA to hire outside the union? Yes. Was the MEA justified in trying to hire skilled personnel via EIC? The fact that the MEA concluded an agreement with EIC whereby EIC would embark on a pre-selection program to find workers for the Port of Montreal, test them and then send them to MEA which, in turn, would test them before they had access to the jobs that, presumably, the union could not fill, did not meet with the approval of the union.

This whole exercise by the MEA was announced at the same time it explained to the work force its intention to abide by the requirements of Bill-62, the Employment Equity Act. The MEA chose to announce its colours as regards the two questions by distributing «Flash», dated November 17, 1986.

The reaction of members of the union was a forceful one, as the Tribunal found out, so much so that EIC decided to close its office for a few days. Contacts were established by the union president with EIC. He explained his side of the story and his union's objections to what was envisaged. The result: EIC denounced the agreement it had made with the MEA, invoking the lack of agreement between the union and the MEA on the presence, in the Port of Montreal, of workers who did not belong either to the union with full job security or to the casual force or back up pool

which comprised would-be members of the union, without job security though. (p. 350). The EIC was prepared, nevertheless, to go ahead with the agreement as soon as it got the written proof that the MEA and the union were in total agreement over the program. (R-10) and (R-19).

Out of the various testimonies heard by the Tribunal came out the existence of a third group of workers the MEA wanted constituted (bassin de réserve). Asked how he could claim to have had any rights over the hiring of this third group, Mr Beaudin answered: [translation] "Normal employer-employee relations. Should the group referred to in article 1.07 of the collective agreement not have sufficed, the employer ought normally to have asked the union to try to enlarge the group of aspiring members. Normal employer-employee relations.

Q. In this context is it not true to say, Mr Beaudin, that during 1985 the employer submitted a request to you to supply workers, in accordance with article 13 of the collective agreement, which I am about to quote. I will specifically read clause 13.06 of the collective agreement, where it is written that:

[translation] 'If it becomes necessary, in management's' -- thus, the employer's -- 'opinion, to increase the number of workers on job security for the duration of the collective agreement, the new workers will be selected jointly by the union and management from a list provided by the union.'

Is it not true that the employer asked you to provide such a list in 1985 and that the union systematically refused to provide such a list until ordered to do so by an arbitration tribunal?

A. Yes. Are you referring to crane operators?

Q. I am referring to workers to be added to job security.

A. Yes, but tell the Tribunal the whole truth, Mr Rochon. You were the one involved in this matter, which lasted three years. The gentleman wanted fully trained crane operators. The applicable clause in Article 19 of the collective agreement stated that the employer was to

provide the training to the people working there.

That affair lasted three years. That's what this gentleman was trying to do there, and yet today, the Tribunal is saying that lists must be submitted. Well, I submitted lists of crane operators, but to no avail.

Q. Would it be true to say, Mr Beaudin, that the union systematically refused during this whole period (and up to 1988) to provide the necessary candidates to enable the employer to hire, and that the employer had to in fact file a grievance itself in order to obtain an order against you to this end?

A. There was one grievance that was studied. I don't deny it."
(pp 350, 351, 352, 353, Transcript 2).
The reading of the following pages of Transcript 2, brought about Mr Beaudin's insistance that the collective agreement, as it stood at the time, justified his action in contesting - before the EIC representatives,- the agreement between EIC and the MEA.

Mr Beaudin:
[translation] "A. I told them that I had a collective agreement whereby I supplied the manpower, and that they were not part of the picture unless both parties decided to use their services.

Q. Would it be basically true to say that you wanted to protect your 250 aspiring members at that time, who later became members?

A. Well, you know, for me that has a lot of merit. When a man becomes a member of Local 375 he pays union dues and I am not ashamed to defend him. I have been doing it ever since I became a union official.

Q. But on the other hand . . .

A. I am not uncomfortable with that at all.

Q. Mr Beaudin, would it be true to say that contrary to what happens in the industry in general, where a worker becomes a member of a union after he or she is employed by the employer, the people in question here become members of your association, your union before they are even hired full time by the employer?

Is that what happens in the case of your union?

A. You change the facts easily." (pp 357, 358, Transcript 2).
Mr Beaudin saw no problem with the membership offered by his union to the 250 aspiring members who had worked on a temporary basis for 15 years, but who were not employees of the MEA.

He reminded the Tribunal that prior to the Picard inquiry decisions, any longshoreman had to become a union member before he started working in the Port of Montreal. (p. 360, Transcript 2).
The MEA had computerized its operations and it produced the names of longshoremen dispatched to the hiring hall. Mr Beaudin had no control over that and he feared that a mass of people coming from EIC would take away his members' jobs. Mr Beaudin, although not directly, admitted that he did want to protect the 250 new members who were not covered by job security.

Mr Beaudin:
[translation] "In 1985 the aspiring members, or supernumeraries, were not assigned like they are today, by computer. They were assigned at section 49, the hiring hall. Everyone came there in the morning. There

were 300 to 350 people there every morning looking for work. That is the context.

That is what is in charge, that is what does the assigning. If I do not have ways of sending other people in, I am going to find myself with I don't know how many grievances each week about people that it has designated, that it has decided to assign instead of assigning mine in conformity with the agreement.

The context was awful. I explained myself clearly to Employment and Immigration Canada and they understood me, because they confirmed to me that they would no longer send workers to the MEA as long as they had not received confirmation from the union that there was indeed a shortage of workers.

Mr Rochon:

Q. In order to attempt to clarify, Mr Beaudin, the question put to you by the Tribunal, you clearly indicated just now that employment priority was defined in article 1.07, under which union members covered by job security had first priority.

Aspiring members had second priority, and only after these two labour pools were used up was it possible to go outside. Is that right, Mr Beaudin?

A. Yes, that's correct.

Q. This collective agreement was in force in 1986, in November 1986?

A. Oh, no. We signed that one in 1988, the one you have.

Q. This one?

A. Yes, that's the one that was in effect.

Q. The clause 1.07 that we were looking at a few minutes ago?

A. Yes.

Q. Then, Mr Beaudin, would it be correct to say that in effect, in assigning work, priority was given first to your members, then to aspiring members, who had second priority whether or not they became members, and then to third parties?

A. That's correct.

Q. Therefore, when a request is made . . . would it also be correct to say, Mr Beaudin, that when a request is made to Employment and Immigration Canada to provide additional manpower because there is a shortage of workers, it is from this third category that these workers will necessarily come, that is to say, after the resources in terms of members and aspiring members have all been allocated?

A. Tell me what you're getting at. I have never known your intention. I intend to protect myself against whatever position you eventually take, because it is much more complicated than that.

Even if there were 200 people in the hiring hall tomorrow morning, it is a matter, if you go to

article 19, for the employer of . . . " (pp 362, 363, 364, 365, Transcript 2).

The counsel for the MEA characterized the union's opposition at p. 373:

[translation] "Q. If you listen to my questions you will see that it is rather simple. With respect to the opposition to the agreement in question, or the supplying by Employment and Immigration Canada, through

a recruitment program, of the additional manpower required by the MEA, would it not be true to say, Mr Beaudin, that that opposition is owing to the traditional and never ending idea that it is the sons of members who are given the jobs and no one else, to the fact that it was your members who objected to the agreement on that basis, and to the fact that the employer told you that it was out of the question under the provisions of the Act, that today this no longer works?

A. I was never opposed to Employment and Immigration's plan.

These two people came to see me because I telephoned there to try to find out what happened with . . . " (p 373, Transcript 2).
After Mr Beaudin made that stunning admission, «je me suis jamais opposé au projet d'Emploi et Immigration», the counsel for the MEA wanted to know more; what came out of his probing was that Mr Beaudin was convinced that the work force in place in the Port of Montreal at that time was sufficient to handle the demands of the MEA. There were shortages, but he insisted that EIC could not provide the specialized workers needed. (p. 376). He never accepted the idea that the MEA would not consult the union first. He extended that pre-requisite to cover the third group of employees, whereas the MEA refuted any obligation on its part to consult the union.

Based on that conviction, the MEA, through Mr Jacques Bélanger, contacted EIC.

The jurisprudence and the doctrine

Both parties to the proceedings quoted jurisprudence in support of their respective positions, based on the evidence adduced. Since the Tribunal has agreed with the counsel for the MEA that his objection to examine the situation between 1986 and 1989 in the Port of Montreal as being foreign to the present debate was a valid one, it will then deal only with the pertinent jurisprudence as regards the complaint filed in 1987 by the NBC following an investigation by HRC and its conclusion that, indeed, the facts justified such a filing.

The NBC based its complaint on two «reports» published in The Gazette of November 26, 1986 and November 27, 1986. Was this an acceptable complaint? The Tribunal finds that the process by which the NBC lodged a complaint about an alleged discrimination directed against a specific group of individuals poses no problem. Had the NBC known, though, what the evidence has, since the start of the hearings, revealed, it might have insisted, as suggested by Mr Philip himself in his testimony as reported on pages 209 and 216 more specifically, that said complaint be directed

against more than one party, or another party.
Did the NBC have «reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice»? In support of this

proposition, the counsel for HRC referred to Mr Justice LeDain's pronouncement at p. 695 of the Latif case, as he explained the meaning of «reasonable grounds». (Latif c. la Commission canadienne des droits de la personne, (1980) 1.C.F. 687). The Tribunal takes note of this.

Although she admitted that no direct evidence of discrimination existed in the case at bar, the counsel for the HRC turned to the doctrine to supplement the lack. She quoted extensively from the work of Ms Beatrice Vizkelety. Food for thought, no doubt, but the Tribunal's concern rests with the prescriptions of the law. And the law is quite clear: Section 32 of the Canadian Human Rights Act entitled: «Discriminatory practices and other dispositions» refers to discriminatory practices as defined at section 5 and following, more specifically, for our purpose, section 7:

Section 7: It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.

The only evidence presented as regards discrimination is a remark allegedly made by Mr Lucien Therrien during an informal meeting between himself and Mr Denis Duquette, both employees of IEC. The remark stood alone without any reference to its origin or on whose behalf it was made. The complainant did not produce any evidence showing a link between that remark and the respondent, the MEA. All parties to the hearings, though, attested to the fact that there had been no hiring in the Port of Montreal since 1966, except on a punctual basis to recruit a limited number of specialized workers.

In 1986, did the MEA «refuse to employ or refuse to continue to employ»? At the time the events mentioned in the complaint occurred, the MEA was not hiring. It wanted to, but had first established a formula involving pre-selection as specified to the EIC and agreed to by the EIC. The actual hiring was the last step of a rather long process which was abruptly interrupted in 1986. Can it be said, then, that the MEA was engaged in 1986 in a practice and a discriminatory practice at that?

What the respondent claimed all along was that it entered into an agreement with a government department, Employment and Immigration Canada, and that said agreement never really got off the ground. That is confirmed by the evidence tabled at the hearings. The Tribunal has the testimony of Mr Denis Duquette who claimed, at page 62 and later on as well, that Mr Lucien Therrien [translation] "at that time . . . told me that he preferred not to have blacks because they were not used to the Port, and he said that it could cause conflicts, that's what he told me." (p 62, Transcript 1). (We underlined).

Does that reported statement constitute a practice, a discriminatory practice? The evidence revealed that the ILA controlled the distribution of jobs in the Port of Montreal. The MEA was the employer, and the employees were the dockers, members of the ILA. There were «categories». [translation] "Employees who work as longshoremen in the Port of Montreal are divided into four broad categories, the biggest one being the first, which is composed of workers who are union members covered by the job security regime. They always have preferential status over all other categories, depending on the work available. The second group is composed of workers who are union members not covered by the job security regime; the third is formed of aspiring members; and finally, there are the casual workers, called 'people from outside the Port'. (R-8: Concerning

negotiations on the renewal of the collective agreement between the MEA and ILA, Local 375, Port of Montreal, memorandum submitted by the MEA to Marc Gravel, conciliation commissioner, Montreal, June 2, 1987, p 71)." The Tribunal found in this MEA official document a more detailed description of the work force which was explained at pages 19, 20, 45, 46, 47 of this decision. The collective agreement in force in 1986 did provide for cooperation between the MEA and the union, and the evidence left no doubt that the union was adamant in protecting its acquired rights. Exhibit R-7, with its various annexes: F, L (1), (2), (3), and M are most revealing in that respect.

There was, without a doubt, an agreement between the respondent, the MEA, and the EIC to pre-select and test candidates for jobs in the Port of Montreal. Did said agreement include an understanding to restrict some designated group of individuals, namely Black people, from having access to said jobs? The EIC, at no time, either in its verbal or written communications on said agreement, made any reference to anything of the sort, not even when it denounced the agreement. The only argument it used to withdraw from the agreement, for the time being, was that: as the MEA

and the ILA were involved in a dispute, the EIC would wait for a settlement before any work was to resume on the agreement.

This argument was again used in a letter dated January 6, 1987, in which Mr Roger Tardif, director, EIC Montreal Center stated: [translation] "In view of current circumstances, we feel we must uphold our decision to discontinue our services to the Maritime Employers Association. We cannot recommence pre-selection and selection of new workers for the Port of Montreal as long as there is no evidence of an atmosphere of co-operation between the parties involved." (R-19).

The Tribunal noted that the EIC did not mention in that communication to the MEA that it was not equipped to handle the kind of work agreed upon by itself and the MEA: that had been the argument invoked by Mr Duquette, throughout his testimony, to explain his refusal and that of his confrères to work on said agreement. The EIC never acknowledged, officially or otherwise, that it could not handle such a contract. Quite the contrary. The Tribunal is left with the appraisal of official EIC documents containing specific statements and the testimony of an EIC employee which is not corroborated by any official position of his superiors or any documented official protest by either Mr Duquette himself or his union to whom he claimed to have referred the matter. Where does that leave the Tribunal? It has to take into account that particular setting and also the fact that EIC, in none of its official communication, mentioned anything about an investigation about the alleged remark made by Mr Therrien, its employee. Mr Therrien was not called as a witness by any of the parties to the proceedings.

As stated by Mr Masters in his testimony, «the CEIC comes back and says we don't really care about any of your problems, our problem is you and the union disagree and we don't want to be involved. Now, at no time in that exercise are we dealing in anything other than the annulling of what we felt was a legitimate contract with CEIC and nowhere did CEIC ever tell us that anything that they were stopping to do for us had anything to do with discrimination. We know it has nothing to do with discrimination from our point of view and only in the newspaper do you read about discrimination. So I don't understand why I would do anything other than what we did.» (p. 714, Transcript 4).

In furthering her argumentation, the counsel for HRC invoked a plot, assimilating the EIC-MEA agreement to a plot: [translation] "The evidence

of the type of agreement described in the complaint is similar to that of a civil conspiracy." (p 21 of the Commission's pleadings). "In effect, the complaint states that there existed an agreement between the Canada Employment Centre and the Maritime Employers Association for the purpose of excluding blacks from the eventual recruitment of qualified workers. This type of evidence is generally difficult to establish. There will rarely be direct evidence of the elements of a given complaint, and it is for this reason that the courts have accepted circumstantial evidence as evidence of such violations in both civil and criminal cases. Furthermore, for this type of conspiracy, the courts have also accepted, in both civil and criminal cases, statements by one of the parties to an agreement as evidence against another party. It is on these grounds that Mr Lucien Therrien's statement is admissible both against himself as evidence of his intention, this being an exception to the hearsay rule, and against the MEA as a party to the agreement." (paragraph 37)

The Tribunal is not prepared to follow the counsel for HRC in this direction. The idea that there was a plot to accomplish indirectly what could not be done directly, a premeditated contravention as it were, of a specific legislation, namely an Act Respecting Employment Equity, 1986, c. 31, is not supported by any of the evidence heard by the Tribunal.

Contrary to what the counsel for HRC claims at p. 22 of her Plaidoiries, the Tribunal concludes that: [the Tribunal concludes that] [translation] "as a whole, the evidence presented does not make it possible to conclude as to the existence of an agreement between Mr Lucien Therrien and representatives of the MEA independently of Mr Therrien's statement." (paragraph 40). (We underlined our addition not in that quotation.)

Therefore a purported agreement between Mr Therrien and the MEA to discriminate cannot stand. Direct evidence of this illegal behaviour was unavailable, as recognized by the counsel for HRC. This is why she turned to Ms Vizkelety's work: «Discrimination may be established by way of inference, through the use of «circumstantial evidence» (...) «What of the degree of proof required to make the inference?» (...) «There is every reason to believe that it is the usual civil standards that applies which may be phrased as follows: «an inference may be drawn if it is a reasonable deduction from the circumstances, and the court must act on a reasonable balance of probabilities.» «Therefore, this burden of proof is neither so lenient as to allow inferences based on mere possibilities or conjecture, nor is it the stringent criminal standard which requires proof beyond a reasonable doubt.» (Béatrice Vizkelety, Proving discrimination, Carswell, [1987], p. 142).

The Tribunal agrees rather with the submission made by the counsel for the MEA, as expressed at page 22 of his Plaidoiries: [translation] "The

complainant did not succeed in establishing prima facie evidence of the existence of a discriminatory directive issued by the MEA (p 22) . . . In this case, the existence of a hiring agreement between the MEA and the Canada Employment and Immigration Centre is acknowledged. However, with respect to the requirement based on a proscribed ground of discrimination, counsel for the Commission admits, on page 3 of her pleadings, that there is no direct evidence of this on file.
However, she claims to have succeeded, through circumstantial evidence, in proving that the agreement to which the MEA was a party contained a discriminatory requirement. (p 22) . . . The Commission claims that the agreement that is the subject of the complaint is comparable to a conspiracy, and that in such a situation the alleged statement by Mr Therrien is admissible against the MEA as evidence of the MEA's participation in the conspiracy. (p 26) . . . While the Tribunal agrees to

compare the agreement to a conspiracy, the content of the statement is nonetheless inadmissible against the MEA. In fact, case law states the following condition for admissibility of such evidence:

«In deciding the issue of membership for the purpose of determining guilt or innocence on the charge contained in the indictment, the hearsay exception may be brought into effect, but only where there is some evidence of the accused's membership in the conspiracy directly admissible against him without reliance upon the hearsay exception raising the probability of his membership.»

(Regina v Carter, 67 CCC (2d) 568, page 575). (Our underlining.)

Therefore, there must be evidence beyond that of the MEA's involvement in a conspiracy, namely, of its participation in an agreement to pursue an unlawful end. Such evidence, however, does not exist. Certainly there is evidence that the MEA participated in an agreement, but not that it was involved in an agreement to pursue an unlawful end. Quite the contrary. The agreement was designed to recruit candidates with the aptitudes and ability to do the work of carpenter and fork lift operator, which action is not unlawful at all. The parts of the agreement contained in document R-28, which have not been contradicted, are evidence of this.

For these reasons, we suggest that Mr Therrien's statement, as reported by Mr Duquette, is not admissible against the MEA.

Further, an analysis of the alleged statement itself offers no indication of a discriminatory requirement by the MEA, since it was in fact Mr Therrien, on his own behalf, who supposedly stated a preference not to have blacks.

When examined and cross-examined on the alleged statement by Mr Therrien, Mr Duquette stated that the former had told him that he preferred that there be no blacks, and that this statement had not been made in the form of an order (p 89 of the shorthand notes, volume 1). Moreover, Mr Masters and Mr Bélanger stated under oath that the MEA had made no such requirement (pp 648 and 777 of the shorthand notes, volumes 4 and 5).

Finally, the value of the alleged statement by Mr Therrien when seen in its true context takes on a totally new dimension. We have heard that this was an isolated statement made in the course of a rambling conversation, and not an order (p 89 of the shorthand notes, volume 1). (pp 27, 28, 29). "Because the Commission did not call Mr Therrien to testify, it is obliged to proceed by way of indirect circumstantial evidence and hearsay in order to establish prima facie that the agreement was discriminatory. Beyond this hearsay circumstantial evidence, there is on file direct evidence in the testimonies of Mr Bélanger and Mr Masters to the effect that the agreement contained no discriminatory requirement. In law, hearsay evidence cannot be given precedence over direct evidence concerning the fact to be proven, as indicated in the following passage of the Board of School Trustees of School District No 68 (Nanaimo) v Canadian Union of Public Employees, Local 606 decision, BCLRB 68/76, page 44:

«Arbitration boards may properly and sensibly admit hearsay evidence to establish many of the facts necessary to a determination of the issue. However, an arbitration board cannot accept hearsay evidence over sworn direct testimony unless it has been corroborated by other evidence. As well, when an

arbitration board allows hearsay evidence on a crucial issue, that evidence should be given no weight unless it is corroborated by other direct sworn testimony.»

Furthermore, Mr Therrien's statement, as reported by Mr Duquette, is in the case at bar the only potentially discriminatory element, and the only basis for starting the whole process leading to the appointment of this tribunal. Hearsay evidence cannot be admitted, in the absence of

other evidence, to establish the truth of the crucial and central matter being debated (see Board of School above).

We therefore suggest that the presumed statement by Mr Therrien, as reported by Mr Duquette, cannot be retained as evidence of a discriminatory agreement, since this assumption has been refuted by direct proof and since no other evidence that the agreement was discriminatory exists." (pp 29 and 30 of the respondent's arguments)

In her rebuttal to the respondent's pleadings, the counsel for HRC discussed the intent of the Canadian Human Rights Act, and she, rightly so, corrected some misunderstandings on the part of the respondent. The Tribunal appreciates this approach as a constructive one, but still maintains that, neither the counsel for HRC, nor the complainant (there were no pleadings by the Counsel for NBC) discharged their obligation to prove a practice, a discriminatory practice on the part of the MEA. As much as the counsel for HRC tried to prove the existence of a plot, as much as she tried to prove her point through circumstantial evidence, also resorting to the similar fact evidence theory as a means of proving discrimination directly, she cannot defeat a very simple fact: the MEA was not hiring in 1986. It had not hired for some 20 years. It entered into an agreement with EIC to get from that Government Department candidates for jobs that needed to be filled. Mr Therrien was an EIC employee. If the quotations chosen by the counsel for HRC are to be examined closely, as she demanded, the logical conclusion has to be that EIC would be responsible for the «act» performed by Mr Therrien, as suggested by an extract from the case Robichaud c. le Conseil du Trésor (1987) 2 R.C.S. 84, 89, 90, 91, 94 et 95.

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.. . .

The interpretative principles I have set forth seem to me to be largely dispositive of this case. To begin with, they dispose of the argument that one should have reference to theories of employer liability developed in the context of criminal or quasi-criminal conduct. These are completely beside the point as being fault oriented, for, as we saw, the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them. . . .

The last observation also goes some way towards disposing of the theory that the liability of an employer ought to be based on vicarious liability developed under the law of tort. . . .

Not only would the remedial objectives of the Act be stultified if a narrower scheme of liability were fashioned; the educational

objectives it embodies would concomitantly be vitiated. . . .

Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.

Robichaud v Canada (Treasury Board), [1987] 2 RSC 84, 89, 90, 91, 94 and 95. (pp 30 and 31 of the Commission's pleadings).

The conclusion reached by the counsel for HRC, [translation] "In consequence, we respectfully suggest that the MEA should be held responsible for the agreement concluded between Mr Lucien Therrien and MEA representatives, an agreement designed to exclude blacks from the longshoremen recruitment process in the Port of Montreal in November 1986. It is also submitted that the evidence allows us to conclude that such an agreement did exist between MEA representatives and Mr Lucien Therrien. It is furthermore respectfully suggested that section 65 of the Canadian Human Rights Act makes the MEA responsible for the acts and practices of its employees, officers and directors, as well as for the acts and practices of its agents. It should be concluded in fact that Mr Lucien Therrien acted as an agent for the MEA in executing the service agreement concluded for the eventual recruitment of longshoremen." (pp 31 and 32 of the Commission's pleadings) - cannot be shared by the Tribunal. None of the evidence, whatever its nature, heard by the Tribunal throughout five days of hearings can lead to such a conclusion. Mr Duquette was not offended by Mr Therrien's remark allegedly made on November 12, 1986. He did not bother:

Mr Rochon:
[translation] "Q. And it was in the course of this rambling conversation, if you will, as he was showing you the document [an application], that he supposedly told you, as you say, that he preferred not to have blacks in the Port of Montreal?

A. That's correct.

Q. Had he said anything to you about this being one of his directives, his orders?

A. That was as far as it went. I didn't pursue it." (pp 88 and 89, Transcript 1) He did not report Mr Therrien, although Mr Therrien would have, in so doing, - if he did make the allegedly discriminatory remark,- contravened specific policies established by his employer, EIC, said policies being clearly defined in Guides E and A.

Ms. Trotier:
[translation] "Q. Are there to your knowledge policies or guides that apply to your duties, which you as an employee are required to follow?

A. Yes, there are what we call guides E and A, which state the

employment and immigration policies, with the various program sections. They describe just about everything, maybe not the duties, but the programs. In the section on discrimination in employment, for example, the presentation of workers is covered, and so on.

Q. What do those guidelines provide for in the area of discrimination?

A. Discrimination is not, of course, allowed at all when receiving employment offers from employers. If an employer has a tendency to show signs of discrimination, we have to say that we can't do it, and if the employer is persistent, then we cannot offer him service. It is against the law. (pp 58, 59, Transcript 1)."

Mr Duquette claimed he consulted his union. When exactly? A date was not mentioned by Mr Duquette, but the Tribunal was told that nothing was done concerning that remark until more than a week after, when a meeting was held to discuss the events of November 18, 1986 with the officers of

the St. Denis St. Center who had been away that day. (pp. 117, 118, Transcript 1).

When, on November 25, 1986, Mr Roger Tardif, Director of the St. Denis St. Center, wrote to the MEA, he alluded to a «projet d'entente de recrutement» (R-2), mentioning the dispute between the ILA and the MEA, as regards the recruitement and pre-selection of new regular employees in the Port of Montreal. He alluded to the pressures exercised on the EIC employees just days before and concluded with: [translation] "We are still prepared to go ahead with the project on the condition that the International Longshoremen's Association is party to the agreement." (R-2) The agreement negotiated by Mr Lucien Therrien and Mr Jacques Bélanger is not open to question. Why did MEA go to EIC? In need of new workers for the Port of Montreal, the MEA found that it could not rely on its traditional source of recruitment, the ILA. The MEA also had to abide by the Employment Equity Act. Everything it did and which is substantiated by written proof, (pp. 777, 778, plus R-29 and R-30), leads the Tribunal to the conclusion that it is highly unlikely that, on the one hand the MEA would announce its official colours and on the other hand, would plot, «off the record», to defeat all it had done openly: «pour donner le change» so to speak? It just does not make sense, and it is not supported by any evidence, inferred or otherwise.

The Tribunal, thus, has to conclude, as asked by the respondent, that the NBC [translation] "has not discharged itself of the burden of proof in this matter. There is no direct evidence, and the factual presumptions to which we are referred by the NBC in support of its argument are not serious, specific or consistent enough to convince us of the probability of a discriminatory act" . . . to paraphrase the Quebec Court of Appeal decision in Commission des droits de la personne du Québec c. C.E.G.E.P. St-Jean-sur-Richelieu (1984) R.D.J. 76, at page 79.

Had the complainant succeeded in establishing a practice, a discriminatory practice, although it can be said that he had «reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice» (section 32 of the Canadian Human Rights Act, 1985, c. 26) as explained in Latif c. Commission canadienne des droits de la personne (1980) 1 C.F. 687, 695, the situation might have been different.

It is, thus, the conclusion of this Tribunal that the

complaint made by the NBC, represented by Mr Dan Philip, cannot be sustained.

In consequence, the MEA has not contravened section 10 of the Canadian Human Rights Act according to the terms of the complaint filed by Mr Dan Philip, representing the NBC.

Also, in consequence, the MEA is not guilty of discrimination based on race and colour according to the terms of the above mentioned complaint in conformity with section 53 of the Canadian Human Rights Act.

Dated this 22th day of October, 1990.

Niquette Delage, Chairman
Antonio De Joseph, Member

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DAN PHILIP FOR THE NATIONAL BLACK COALITION

Complainant

- and -

MARITIME EMPLOYERS' ASSOCIATION

Respondent

I have read the Decision of the Chairman of the Tribunal and Mr. Antonio De Joseph and agree entirely with its conclusions. In particular, I agree with the decision to maintain the objection of Counsel for the Respondent to the introduction of any evidence of the hiring practices of the Respondent after 1986.

The Chairman and Mr. De Joseph note in their Decision (at pages 25 and 26) that the Tribunal took the objection under reserve and in fact heard extensive evidence of the events following November 19, 1986, being the date mentioned in the Complaint around which discriminatory acts were

alleged to have been committed. But there is nothing in such evidence to support the complaint as against the Respondent.

If there was any discrimination in the hiring practices at the Port of Montreal after 1986, it lay in the requirement that an applicant have a working knowledge of the French language. Such a requirement is not a prohibited ground of discrimination under the Canadian Human Rights Act. Rather, the Charter of the French language encourages (if not requires) employers in Québec to make French the language of the work place. Accordingly, I cannot accept the submission of Counsel for the Commission that such a requirement was only introduced to exclude black persons from being hired at the Port of Montreal.

Daniel H. Tingley, Q.C.
Member
Dated this 22th day of October, 1990