T.D. 10/95
Decision rendered on June 9, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

MARIE-JEANNE RAPHAEL, MARTHE GILL,
LOUISE PHILIPPE AND NELLIE CLEARY

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MONTAGNAIS DU LAC SAINT-JEAN COUNCIL

Respondent

DECISION OF TRIBUNAL

MEMBERS OF TRIBUNAL:

ROGER DOYON - Chairperson
ANDRÉE MARIER - Member
GRÉGOIRE MPUTU-BIJIMINE - Member

APPEARANCES: FRANCOIS LUMBU, Counsel for the Canadian Human Rights Commission

PIERRE LORTIE, Counsel for the Montagnais du Lac Saint-Jean Council

ROBERT LABBÉ, Representative of the Complainants.

DATES AND PLACES OF HEARINGS:

Alma January 10, 11, 12 and 13, 1994 - January 24, 25, 26, 27 and 28, 1994 - April 18, 19 and 20, 1994 - May 17, 18, 19 and 20, 1994 - May 25, 26 and 27, 1994

Québec June 20, 21, 22 and 23, 1994 - September 6, 7, 8, 9 and 10, 1994 - December 6, 7 and 8, 1994.

INTRODUCTION

Keith Norton, the Chairman of the Human Rights Tribunal Panel, constituted this tribunal on December 15, 1993. The mandate of the Tribunal was to hear the complaints filed with the Canadian Human Rights Commission by Marthe Gill (August 17, 1987), Nellie Cleary (November 2, 1987), Marie-Jeanne Raphaël (February 12, 1987) and Louise Philippe (February 16, 1987) against the Montagnais du Lac Saint-Jean Council.

These complaints were dealt with together in accordance with the provisions of section 40(4) of chapter H-6 of the Statutes of 1985.

The hearing of these complaints took place at Alma on January 10, 11, 12, 13, 24, 25, 26, 27 and 28, 1994, April 18, 19 and 20, 1994 and May 17, 18, 19, 20, 25, 26 and 27, 1994 and continued later at Québec on June 20, 21, 22 and 23, 1994, September 6, 7, 8, 9 and 10, 1994 and December 6, 7 and 8, 1994.

At the commencement of the hearing, the representatives of the parties to the dispute agreed on common evidence for all the complaints and the document constituting the Tribunal was filed as Exhibit T-1.

In order to determine the nature of the complaints filed and to facilitate an understanding of them, the Tribunal feels that it should set out the history of the Indian Act that was assented to on June 28, 1985 and of compliance therewith by the respondent, the Montagnais du Lac St-Jean Council (Band Council).

HISTORICAL BACKGROUND

When the British North America Act, 1867 was enacted, the power to legislate on all matters relating to Indians and lands reserved for the Indians was conferred on the Parliament of Canada.

Chapter XLII of 13 & 14 Victoria 1850, entitled: "An Act for the better protection of the Lands and Property of the Indians in Lower Canada" provided for the appointment of a Commissioner of Indian Lands for Lower

Canada who was given the power to grant or to lease lands to any tribe or body of Indians in Lower Canada.

For the purposes of this Act the following classes of persons were considered to be Indians (section VI):

First: All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.

Secondly: All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.

Thirdly: All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be counted as such.

Fourthly: All persons adopted in infancy by any such Indians, and residing in the village or upon the lands of such Tribe or Body of Indians, and their descendants.

Section 6 of Chapter VI, 32-33 Victoria 1869, restricted the definition of "Indian". It reads as follows:

The fifteenth section of the thirty-first Victoria, Chapter forty-two, is amended by adding to it the following proviso: Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issued of such marriage be considered as Indians within the meaning of this Act; provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issued of this marriage, shall belong to their father's tribe only.

This Act of 1869 was amended many times and became the Indian Act. It was under this name that it was included in the Revised Statutes of Canada 1970 as chapter I-6.

Sections 11, 12, 13 and 14 of the 1970 Act repeat substantially what is said in the earlier enactments with respect to the status of an Indian woman.

Moreover, where an Indian man married a woman who was not an Indian, the latter acquired the status of an Indian and a member of the band to which her husband belonged, as did the children of this union. (s. 12)

These inequalities between Indian men and Indian women contained in the Indian Act of 1970 could not continue.

In April 1978 the Canadian Advisory Council on the Status of Women and the Indian Rights for Indian Women group published "Indian Women and the Law in Canada: Citizens Minus". This was a study showing that the Indian Act discriminated against Indian women, their families and their communities.

At the same time, Sandra Lovelace, who had lost her status as an Indian because of her marriage to a man who was not an Indian applied to the United Nations Commission on Human Rights. She alleged that Canada did not comply with the International Covenant on Civil and Political Rights, to which it had been a party since 1976.

In 1981 this Commission rendered a decision declaring that Canada did not comply with the provisions of section 27 of the Covenant, which guaranteed cultural rights, by preventing Sandra Lovelace from living in her cultural community.

In December 1981, Canada signed the United Nations Convention on the Elimination of all Forms of Discrimination Against Women. By accepting

this agreement, Canada demonstrated its intention to amend the Indian Act to eliminate the discriminatory provisions it contained.

Other feminist movements were created, particularly the Association des Femmes Autochtones du Québec inc. and the Association des Montagnaises du Lac St-Jean, the mission of which was to [TRANSLATION] "take part in co-operative projects on the identification of rights that all aboriginal people wish to see protected and guaranteed". (Exhibit P-20) Also, in February 1985 the Association des Montagnaises du Lac St-Jean had prepared a brief entitled "La réintégration de la Montagnaise destatuée - Ce qu'en pense [sic] les Montagnaises du Lac St-Jean" [What the Montagnais women of Lac St-Jean think of the reintegration of Montagnais women who have lost their status].

This memorandum had four (4) major objectives: (Exhibit P-20)

(a) Recognition: The Montagnais women of Lac St-Jean wished to be recognized by the Montagnais du Lac St-Jean Council and by their peers.

(b) Status: The Montagnais women of Lac St-Jean who had lost their status requested that they be registered in the active band list with the same band number as they had had earlier and that their descendants also be registered.

(c) Reception: The Montagnais women of Lac St-Jean requested that they be received as full members of their community and that they be treated with dignity, respect, fairness and justice without the shadow of racism, sexism or prejudice.

(d) Participation: The Montagnais women of Lac St-Jean asked to be allowed to enjoy the same freedoms, duties and privileges on the reserve as women who were status Indians.

During this period, namely on February 28, 1985, Bill C-31, an Act to amend the Indian Act, was tabled for first reading.

This Bill was designed particularly to enable Indian women who had lost their status to regain their status as Indians and as band members.

On March 4, 1985, this brief of the Association des Montagnaises du Lac St-Jean was submitted to the Montagnais du Lac St-Jean Council, Mashteuiatsh Indian Reserve (Pointe-Bleue). It was accepted with such enthusiasm by the Chief of the Band, Armand Noë Germain, that a task force was established to attempt to realize in an appropriate manner the expectations expressed in the brief. (Exhibit P-20)

The task force held its first meetings on April 13 and April 18, 1985. On that occasion the Band Chief expressed the opinion that the new Act would lead Indian women who had regained their status to return to the reserve, which would require a moratorium for one (1) year on the application of the Act with respect to housing, except in emergencies. (Exhibit P-20)

On May 24, 1985 the Montagnais du Lac St-Jean Council ordered at a regular meeting that a moratorium on the application of Bill C-31 be adopted. This

moratorium applied to housing, the right of residence and employment. (Exhibit I-5)

On May 27, 1985 Armand Noë Germain was reelected as Chief of the Montagnais du Lac St-Jean Council.

On June 28, 1985 the Act to amend the Indian Act, S.C. 1985, c. 27, was assented to with retroactive effect to April 17, 1985, that is the date on which the Canadian Charter of Rights and Freedoms came into effect. It was subsequently referred to as "Bill C-31".

As a result of subsection 6(1) and paragraph 11(1)(c) of this Act, a woman who had lost her status as an Indian, commonly known as a C-31, could regain her status as an Indian and as a band member.

To this end, she had to submit a written request to the Registrar in the Department of Indian Affairs and Northern Development (DIAND) responsible for keeping the Register of Indians and Band Lists.

Children born to such a woman also became Indians but their membership in a band remained subject to subsection 11(2) of the Act, which should be quoted:

> Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band
>
> (a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or
>
> (b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

In short, Bill C-31 gave band councils a period of two years from the date on which it took effect, namely June 28, 1987, to determine their membership rules.

At its regular meeting on August 26, 1985, the respondent unanimously adopted a resolution in which it decided to [TRANSLATION] "extend the existing moratorium to all areas offering such services as housing, education, employment, hunting and trapping; the Council accordingly decides to maintain the status quo in all services provided to the people registered in the Band List". (Exhibit I-6)

On September 28, 1985, the Band Council informed the people of its [TRANSLATION] "decision to order a moratorium on services so as to establish membership criteria and also to measure the impact that might result from the arrival of new people on the reserve and on the additional territory". (Exhibit I-3)

At the elections held on May 25, 1987, Mr Aurélien Gill was elected Chief of the Montagnais du Lac St-Jean Band Council and the new Band Council assumed office on July 11, 1987.

A few months later, in a policy paper (Exhibit I-15) the Montagnais du Lac St-Jean Band Council announced that all services would in future be provided to band members and this officially put an end to the moratorium.

Bill C-31 caused quite a stir in the aboriginal communities. A large number of persons subject to Bill C-31 remained outside the reserve and people were afraid that they would return to the reserve with their children and that, as a result, large numbers of white people would arrive, which would lead to the loss of lands, houses and grants. Mrs Marthe Gill, moreover, had had an opportunity to confirm this when she attended two information meetings that the Band Council had held with the elders in the spring of 1986. She had even taken the liberty of writing to the Band Council on April 15, 1986 to express her opinion on the way in which the information was conveyed. (Exhibit P-1) She stated: (Volume 2, pages 336 and 337)

[TRANSLATION]
It was an unfounded fear because the people, and I said this to the band organizations many times, listen, people who have properties in Montreal, who have farms in Trois-Rivières, who have farms all over the place, people will not leave from one day to the next and will not sell their cows and their cattle to settle at Pointe-Bleue when they know there is a lot of unemployment. That was not the goal of the women and their claims. The women, it was clear that those who were there were completely respected. And those who came to join us would do so

for reasons that were quite human. It would be because they had been widowed in an urban setting, they would decide to return to the reserve to rejoin their brothers and their sisters or to reception centres, to be with their relatives rather than among strangers.

They were afraid and this fear was not justified because at the time when people began requesting assistance, we were, to the best of my knowledge, 11 women on the reserve who were C-31s. I think that today, if I were to give a figure, I don't think we are more than twenty or so.

So people did not break down the walls like that and did not come in great strength and usurp the place of others.

MEMBERSHIP CODE

Since Bill C-31 allowed a Band Council two years from its coming into effect to determine the membership rules for band members, the respondent considered it appropriate to establish a committee called the "Membership Code Committee".

This Committee had two objectives:

(a) to inform the electors on the Pointe-Bleue Reserve of the amendments made by Bill C-31 and particularly the determination by the band of its own membership rules;

(b) to obtain from the electors their opinion of the creation of a Membership Code that would admit or exclude the children of the C-31 women.

This Membership Code Committee was to consist of five (5) persons elected from among the members of the community and five (5) persons selected by the respondent.

At a public meeting on June 14, 1986 the Band Council proceeded to select five (5) persons from the community as members of this Committee, excluding C-31 women.

Following the meeting held on June 14, 1986, it seems that during the ensuing months certain members of the Membership Code Committee proceeded to consult with the people.

On May 18, 1987 the Band Council held a public meeting to inform people of the results of the consultation. (Exhibit P-22)

On March 2, 1987 the Minister of Indian Affairs and Northern Development reminded the band chiefs that: (Exhibit P-24)

[TRANSLATION]
If your band wishes to keep its band list itself on or before June 28, 1987, you should decide whether it is necessary to begin the process immediately in order to achieve this objective.

It appears that in the days that followed a pamphlet was distributed (Exhibit P-22) to the people to explain the procedure to be observed in deciding whether or not the band would determine the membership rules of its people and this document invited the electors to sign the consent register.

A petition signed by 207 individuals was submitted to the Band Council on April 6, 1987 asking it to extend the right to express an opinion not merely to the electors but also to the band members living outside the reserve. The Band Council did not accept this proposal.

On May 22, 1987, in its resolution No. 1592, the Band Council expressed an opinion that a majority of the band members had approved the proposal that [TRANSLATION] "the band should decide on the membership of its people and

set down in writing the rules governing this". These rules had to be subsequently approved by a majority of the band's electors. (P-26)

To this end, two (2) referendums were held successively on June 15, 16, 17 and 18 and June 23, 24, 25 and 26, 1986 and a majority of the electors refused to adopt the band membership rules.

Despite the results of these secret ballots, the Band Council adopted its membership rules in its resolution dated June 27, 1987 and informed DIAND, which refused to recognize their legality.

Consequently, the persons referred to in the provisions of paragraphs (a) and (b) of subsection (2) of section 11 of Bill C-31 were entitled to be registered in the list since the respondent had not adopted membership rules within two (2) years of the promulgation of Bill C-31, that is prior to June 28, 1987.

Thus, as a result of Bill C-31, the first-generation children of C-31 women became members of the band on the same basis as their mothers.

The moratorium ordered by the respondent and the events surrounding the action it took to determine its membership rules form the basis of the complaints filed by the complainants against the respondent based on their sex and their marital status.

THE ACT

The provisions of the Canadian Human Rights Act relevant to the disputes are as follows:

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

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

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

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. 1976-77, c. 33, s. 5.

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. 1976-77, c. 33, s. 7.

10. 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. 143, s. 5.

15. It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

67. Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act. 1976-77, c. 33, s. 63.

1- EVIDENCE OF THE COMPLAINANTS

The complainants must show to the satisfaction of the Tribunal that they were prima facie the victims of a discriminatory practice, which the Supreme Court of Canada defined as follows in Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, at p 174:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will

rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The Tribunal will first analyze the facts proved on each aspect of the complaints to determine whether the prima facie evidence of a discriminatory practice has been established. Second, it will examine whether the respondent has, in those cases where it will be necessary to do so, discharged the onus on it to prove that there was bona fide justification for the alleged discriminatory practice.

(A) COMPLAINT OF MARTHE GILL

Marthe Gill's complaint was filed as Exhibit C-2(1), and reads as follows:

[TRANSLATION]
The Montagnais du Lac Saint-Jean Council is discriminating against me in refusing to grant me a building permit, to recognize my candidacy for a committee and to issue a hunting permit because of my sex and my marital status, in contravention of sections 5 and 6 of the Canadian Human Rights Act. I am the owner of a lot on the Reserve and in April 1985 I made an application for a building permit, which was refused.

Similarly, at a public meeting held on June 14, 1986 my candidacy for the Membership Code Committee was refused by Councillor Gilbert Courtois. Finally, in October 1986 I attended at the office of the Band Council to obtain my hunting permit, as in previous years, and Line Bégin, a secretary, refused to grant me such a permit. I believe that these refusals by the Band Council are based on the fact that I was married prior to April 17, 1985 to a person who was not a Band member. However, men who are Band members and who prior to April 17, 1985 married non-members are not refused building permits or hunting permits and have their candidacy for the membership committee recognized;

hence my complaint of discrimination on the basis of sex and marital status.

Done at Pointe-Bleue, Quebec August 17, 1987

Marthe Gill
Complainant's signature Witness of signature

This complaint involves three (3) aspects which will be analyzed in turn.

The complainant was born on April 25, 1931 on the Mashteuiatsh (Pointe-Bleue) Indian Reserve of an Indian father and a white mother who had acquired her status as an Indian as a result of her marriage to an Indian.

After concluding her primary education on the Reserve, she completed secondary school at an Ursuline convent school at Roberval and at the Ecole Normale du Bon Conseil in Chicoutimi, where she obtained a teaching diploma and a Bachelor's degree in education from the University of Quebec at Chicoutimi in 1960.

She has lived since birth on the Pointe-Bleue Reserve, first with her parents. Then, on October 31, 1957, she married Benoit Dufour, who was not an Indian. She continued to reside on the reserve, living successively at 77 and 176 Ouiatchouan in a dwelling belonging to her father. This dwelling was transferred to her by her father in 1990.

As a result of her marriage to a white man, the complainant lost her status as an Indian and as a band member. Furthermore, Pierre and Sandra, who were born of this marriage, did not have status as Indians and as band members. She spent thirty years of her life teaching on the Pointe-Bleue Reserve before retiring in 1986. She worked at promoting Amerindian culture in school programs.

She devoted a great deal of time and energy to defending the rights of aboriginal women, especially in the Association des Femmes Autochtones from 1984. In 1985 she was elected to the Advisory Council on the Status of Women for a term of three (3) years.

1- Building permit

Marthe Gill's father had long planned to divide a lot that he owned on the reserve among his three (3) daughters but their non-Indian status prevented him from doing so.

Following the enactment of Bill C-31, the complainant made an application for registration on July 18, 1985 and she was reregistered on November 13, 1985 (Exhibit C-31) under band number 3199.

Work with DIAND had enabled her to learn of the probability that DIAND would grant housing subsidies to so-called C-31 women.

Since she could now own a lot on the reserve and wished to construct a residence, the complainant sent an application for a permit to construct a

house to the Band Council's Housing Committee on December 16, 1985. (Exhibit C-1 - Tab A - Document 6)

On February 12, 1986 the Band Council replied to Mrs Gill as follows through its Housing Officer: (Exhibit C-2(7))

[TRANSLATION]
Dear Madam:

Further to your application for a building permit, we wish to inform you that we cannot issue one at this time.

The Band Council has imposed a moratorium on all cases affected by Bill C-31 as long as the Membership Code has not been submitted. We shall keep your application on file and as soon as we can respond to it, we shall contact you.

Danielle Paul
Housing Officer
DP/ for/Montagnais Council

On February 27, 1987 Mr Paul-Emile Gill transferred to Dame Marthe Gill, his daughter, possession of Lot 28-7-5 in Range "A" on the Mashteuiatsh Reserve. On May 7, 1987 an application to register this transfer in the Register of Reserve Lands was sent to DIAND in accordance with the Indian Act. The transfer was registered on April 27, 1987 as number 200708. (Exhibit C-3) On August 28, 1987 DIAND issued a certificate of possession of the said lot to Marthe Gill (Exhibit C-4) and she was informed of this in a letter from DIAND dated October 7, 1987. (Exhibit C-4)

It should be noted that the lot had been served by all infrastructure services for several years.

After receiving the reply from Mrs Danielle Paul, the complainant admitted that she did not take any further steps to obtain a building permit, even after obtaining her certificate of possession of the lot. She explained her attitude as follows: (Volume 2, page 301-302)

[TRANSLATION]
Question: Once you had your certificate of possession, did you return to the Council to request a new permit?

Answer: No, because Mrs Paul had told me in her letter that she would get back to me as soon as possible, that she would reply to

my application. So I was still waiting, since they had already sent me a letter saying we shall keep your application on file and we shall contact you as soon as we can.

I think that when you have worked in offices, you are not going to disturb people for the same things. So I said to myself that the application had been made and she will reply to it.

The Housing Committee never officially took action on Mrs Gill's application for a building permit.

2- Hunting permit

Residing on the reserve, the complainant liked to go in the company of her mother to her father's hunting ground, where she occasionally hunted small game such as partridge.

Although she had lost her status as an Indian, the Band Council nevertheless granted her a small game hunting permit each year.

Having regained her status as an Indian and as a band member by the effect of Bill C-31, she expressed as follows her feelings when she attended at the Band Council's offices in October 1986 to obtain her hunting permit: (Volume 1, page 145)

[TRANSLATION]
Let us say that on that morning, I can tell you how enthusiastic I was. I was very happy to go with my brother to pick up my hunting permit because officially we had had our band numbers and I said to myself, finally I am entering by the front door, I'm not afraid. I did not feel anxious that morning about going before the Band Council; that is to say that at that time I remember very well, it was the small police office upstairs, near the students' residence.

I arrived in the morning with my brother, Jean-Marie. I was one of the first; I was so happy to take action officially and that I could do so, it was recognized.

She was astounded to learn that her permit had been refused because of the moratorium. Whereas she had no longer been an Indian since her marriage to a white man, she had always been given her permit; now that she had regained her Indian status, it was refused. (Volume 1, page 148)

... all the same I shall tell you how angry I was, I was very, very, very violent at that point because I said to myself this is not possible. This is another big blow to your pride because you are an Indian.

Mrs Gill was highly insulted to be refused her hunting permit and she has never applied for a permit since. (Volume 1, page 155)

... I was so frustrated when I went that I set up a barrier against it and said I'll never go down on my knees again before my blood brothers to apply for a permit. I shall never go again. It's finished. I shall never go back there again. Even if I have nothing to eat, I shall go to the houses to beg in order to have something to eat.

The complainant then applied to the Quebec Department of Recreation, Hunting and Fishing and was given her permit. Thus, she wished to show

that she could obtain a hunting permit without approaching the Band Council.

3- Membership Code Committee

As part of its initiative to establish the Membership Code Committee and to elect five (5) members from the community to work on this Committee, the respondent decided to hold a public meeting on June 14, 1986.

On June 13, 1986, in accordance with the established custom, the Band Council distributed to the people a notice of a general meeting of the members of the Montagnais du Lac St-Jean Band to be held on June 14, 1986 at 1:30 p.m. in the Mashteuiatsh community hall for the purpose of setting up a Membership Code Committee by depositing it in the mail boxes and posting it in public places. This notice was dated June 11, 1986. (Exhibit P-4)

In a radio announcement broadcast on two (2) occasions by the community radio on June 12, 1986, the Band Council informed the population that a meeting was being held to establish a Membership Code Committee and explained that [TRANSLATION] "all those who have had their band number since [Tribunal's emphasis] April 17, 1956 are invited to attend this meeting ...". (Exhibit P-9). Then, on June 13, 1986 a radio announcement, broadcast on two (2) occasions, explained that [TRANSLATION] "those who are

entitled to vote are those who had their band number prior to [Tribunal's emphasis] April 17, 1985". (Exhibit P-9)

It emerged from the latter announcement that persons subject to Bill C-31 who were included in the Band Register after April 17, 1985 would not be entitled to vote at this meeting.

The Executive of the Association des Montagnaises du Lac St-Jean reacted immediately to this position taken by the respondent by transmitting a notice to all members of the Band Council in the hours that followed. (Exhibit P-3)

This notice informed the respondent that, under the provisions of Bill C-31 (section 1(1)), persons who were of the full age of eighteen years and were registered in the Band List were entitled to vote and it was requested that these persons be given the right to vote. However, no mention was made of the fact that the persons qualified to vote also had to live on the reserve.

The complainant attended the meeting on June 14, 1986 with the well-avowed aim of being elected to the Membership Code Committee because she felt that she was able to convey her knowledge of Bill C-31 to Band members objectively so as to enable them to make the most enlightened decision.

The meeting was chaired by Mr Gilbert Courtois, a member of the Band Council and authorized by it to take charge of the application of Bill C-31. He was accompanied by Mr Roger Valin, also a member of the Band Council. Mr Gilbert Courtois informed the persons present that the Membership Code Committee would consist of ten (10) persons, five (5) of

whom would be elected by the meeting and five (5) selected by the Band Council. Despite the warning given to the respondent by the Association des Montagnaises du Lac St-Jean, Mr Courtois was careful to explain to the meeting that, in order to ensure the neutrality and objectivity of the members of this Committee, the persons subject to Bill C-31 who were not members of the band prior to the enactment of the Bill were not eligible to be members of the Committee. Furthermore, they could neither nominate nor second the nomination of members of this Committee.

A proposal to nominate Marthe Gill was duly made by Jeanne Larouche, seconded by Hélène Cleary. Before a vote was taken on this motion, Messrs Courtois and Valin consulted with each other. Mr Courtois stated that the complainant could not sit on this Committee because she was a C-31.

During a telephone conversation on the following day, Mr Courtois explained that she had not been accepted on to the Committee because of her lack of objectivity. She requested that she be given the reasons in writing. (Volume 3, page 587)

On July 8, 1986 the respondent sent her the following letter through Mr Gilbert Courtois: (Exhibit C-2, Document 8)

[TRANSLATION]
Mrs Marthe Gill

Dear Madam,

Following the appointment of the Membership Committee on Saturday, June 14, the Mashteuiatsh Band Council confirms that you were not eligible to sit on the said Committee because of the moratorium imposed by the Band; however, your comments on the subject will be noted in the same way as those of the Band members in the consultation to be held in the coming weeks.

Yours truly,

Gilbert Courtois
Councillor responsible for C-31
for/Montagnais Council
GC\lp

Cc Femmes autochtones.

In short, the five (5) persons elected to the Membership Code Committee at this meeting on June 14, 1986 were not subject to Bill C-31.

It emerges from the evidence adduced that the respondent's refusal to grant her a building permit and a hunting permit as well as the right to be elected to the Membership Committee were prima facie discriminatory practices against the complainant. As a result of the moratorium imposed by the respondent on the application to it of Bill C-31, the respondent refused to recognize that Marthe Gill was an Indian and a member of the

Montagnais du Lac St-Jean Band in accordance with Bill C-31 and to provide her with services in the same way as the other band members.

(B) COMPLAINT OF LOUISE PHILIPPE

Mrs Louise Philippe's complaint was filed with the Human Rights Commission on February 16, 1987 and she described herself as follows: (Exhibit C-29)

[TRANSLATION]
The Montagnais du Lac Saint-Jean Council is discriminating against me because of my sex and my marital status by refusing to grant me a house or even to consider my application and also by refusing my application for a popular Montagnais language course that it offers to people on the Reserve, in contravention of section 5 of the Canadian Human Rights Act. I applied for a house on January 31, 1986 and on February 12, 1986 the Montagnais du Lac St-Jean Council informed me that it refused to consider the applications of persons subject to Bill C-31 amending the Indian Act. In reply to my second letter dated February 27, 1986, the Council wrote on March 26, 1986 stating that I had lost my status as a member of the Band because prior to April 17, 1985 I had married someone who was not a member of the Band. I also wrote a third letter to the Band Council on May 20, 1986 stating that, according to the Department of Indian Affairs, I was in fact a Band member. On May 30, 1986 the Council informed me by letter that it was maintaining the decision it had sent me earlier. With respect to my application to register in the popular Montagnais language course, the Council informed me by letter dated December 5, 1986 that my application had been refused because of the moratorium imposed by the Band Council against persons subject to Bill C-31. On December 9, 1986 I wrote a letter to the Band Council appealing its decision to refuse my registration for the popular Montagnais language courses and the Council neither responded to my appeal nor issued an acknowledgment of receipt of my registered letter. I believe that these refusals were based on the fact that I was married prior to April 17, 1985 to a person who was not a member of the Band. The men who are members of the Band and who were married prior to April 17, 1985 to women who were not members of the Band do not have such applications refused; hence my complaint of discrimination based on sex and marital status.

Done at Pointe-Bleue, Quebec on February 16, 1987

Louise Philippe Nancy Basile
Signature of complainant Witness of signature.

Amendment of complaint

At the commencement of the hearing, counsel for the Canadian Human Rights Commission applied to the Tribunal to amend Louise Philippe's complaint in

order to add the following point:

In particular, from 1986 to the present time the Band Council has used criteria to select candidates for the housing program that are legally discriminatory. Among other things, in fact, no point is allowed for a spouse or a child of a Montagnais woman who regained her status as an Indian and as a band member following the enactment of Bill C-31 in 1985.

This application to amend was contested by counsel for the respondent. The Tribunal allowed the amendment of the complaint on the ground that it related to the complainant's claim that the respondent was still discriminating against her because of her sex and her marital status and that, furthermore, the respondent was not taken by surprise and was able to make full answer and defence.

In short, it was agreed by the parties that Louise Philippe's complaint would include the above-mentioned addition.

Louise Philippe was born on December 5, 1936 in Range "C" on the Pointe-Bleue Reserve. Her father, Philippe Philippe, who was an Indian by origin, had married a white woman, Emérilda Cayouette, who had acquired her status as an Indian and as a band member through her marriage with the complainant's father.

After concluding her primary education on the Pointe-Bleue Reserve, she went to Rivière-à-Pierre for her secondary education, which she had to interrupt after one (1) year in order to take care of the family because her mother was ill.

Later, she took a course in dress-making and haute couture in Montreal for three (3) years before returning to the bedside of her sick mother and working in a boarding school for Indian children and in the Hudson's Bay store located on the Pointe-Bleue Reserve, where she met her future husband, Mr Robert Labbé, who was also employed by this company.

In 1965, she left the Pointe-Bleue Reserve to work in a private house in Montreal, where she married Mr Robert Labbé on December 31, 1966.

Given the provisions of the Indian Act at that time, she did not lose her status as an Indian because she had married a man who was not an Indian. Nor did she therefore lose her status as a band member and her band number, namely 460, which she had acquired when she reached the age of majority

because previously, in accordance with custom, she had the same band number as her father.

It was later confirmed that the complainant had never lost her band member number because, most probably, the Band Council had not been informed of her situation because of her marriage outside the reserve.

The complainant lived in Montreal and, following the loss of her employment, she established a residence for seniors in 1976 after she went to live in Lachute. In 1980 she returned with her two (2) children, Marie-Pierre, born in 1975, and Jean-Philippe, born in 1977, to live in Montreal

until August 1984, when the family settled on the Pointe-Bleue Reserve at 79A Ouiatchouan.

Since she was then unemployed, she became involved in the Association des Montagnaises du Lac St-Jean. From 1989 to May 15, 1993 she successively performed the tasks of assistant and then of manager of a retail craft business called "MASHK". Then, in June 1993, she was hired as the manager of a craft business at Robertson's and from January 1, 1993 she leased a house located at 223 Ouiatchouan from her employer. Following the enactment of Bill C-31, she requested that she be registered with her children on July 15, 1985 and regained her status as an Indian and a member of the Montagnais du Lac St-Jean Band on May 9, 1986. However, she kept the band number that she had not lost at the time of her marriage. (Exhibit C-31)

1- Respondent's refusal to give the complainant a residence

On January 31, 1986 the complainant was living in a two (2)-bedroom house which was not suitable because she had a boy and a girl who had to share the same room. Furthermore, her asthmatic son could not occupy the room regularly with his sister, whom he disturbed when he suffered attacks. For these reasons she applied to the Montagnais Band Council for a house.

The document read as follows: (Exhibit C-33(1))

[TRANSLATION]
Louise Philippe
PO Box 215

79A, Ouiatchouan Street
Pointe-Bleue, Quebec
G0W 2H0
Montagnais du Lac
Saint-Jean Council
152, Ouiatchouan Street
Pointe-Bleue, Quebec
G0W 2H0

Dear Sirs:

Re: Application for a single-family dwelling

In my capacity as a Montagnais residing at Pointe-Bleue and, being registered as number 460 in the Register of the Montagnais du Lac Saint-Jean Band, I am applying to the Band Council for a house.

The three main reasons for my application to the Band Council for a house are as follows:

1. Because of a lack of available dwellings, I had to house my family in a summer camp for 1 1/2 months on the Philippe property and for a further 1 1/2 months as a boarder with my brother, Mr Réal Philippe, in the summer of 1984.

2. Since the fall of 1984 I have rented a four-room apartment, including two bedrooms, a living room and a kitchen for my family of four.

This apartment does not meet the essential needs of my family adequately, in that:

(a) I have only a small bedroom that must be shared by my ten-year old daughter and my eight-year-old son.

(b) The smallness of their bedroom subjects them to stress and this makes them nervous and aggressive because, in addition to being of different sexes, they are very different in character. There are accordingly often fights at bedtime. In addition, my son is a chronic asthmatic; he is therefore constantly on medication which has the secondary effect of overexciting him and it was consequently recommended that we provide him with a peaceful and quiet refuge because of his asthma. He must also sleep in very humid air to enable him to

breathe comfortably, that is without constantly having to fight for his breath during his sleep. The noise of

the humidifier and my son's panting and often even rattling breathing prevents my daughter from sleeping. She often seeks refuge on the couch in the living room before the night is over and, as a result, has a disturbed sleep that makes her nervous, tired and bad-tempered when she gets up.

3. My financial situation does not at this time give me access to property without assistance; this is in the context of my family's urgent need, the lack of adequate housing for rent and the financial impossibility, in any event, for us to pay more rent.

I trust this is satisfactory and remain

Yours truly,

Louise Philippe 86.01.31
Band No. 460

On February 12, 1986 Mrs Louise Philippe received the following reply: (Exhibit C-33(2))

[TRANSLATION]
Pointe-Bleue
February 12, 1986
Mrs Louise Philippe
PO Box 215
79A, Ouiatchouan Street
Pointe-Bleue, Que
G0W 2H0

Dear Madam:

We acknowledge receipt of your letter dated January 31, 1986 concerning an application for a house.

We wish to inform you that we cannot consider it at this time because the Band Council has imposed a moratorium on all cases

subject to Bill C-31 as long as the membership code has not been defined.

We shall keep your application on file and as soon as we are able to take action, we shall inform you.

Yours truly,

Danielle Paul
Housing Officer
for/Montagnais Council

DP/mg

In reply to this letter the complainant repeated her request to the respondent for a house on February 27, 1986 on the ground that she had never lost her status as an Indian and a band member. (Exhibit C-33(3))

On March 26, 1986 the respondent reminded her that the provisions of the Act that were in effect prior to Bill C-31 were very clear:

[TRANSLATION]
A woman who is a band member ceases to be a member if she marries a person who is not a member. (Exhibit C-33(4))

Thus, the Montagnais du Lac St-Jean Council confirmed to the complainant that she had legally lost her rights even though this was technically not the case and that she could not claim a house because of the moratorium that had been imposed.

On May 20, 1986 the complainant made a fresh attempt but the respondent informed her in writing on May 30, 1986 that it was maintaining its position. (Exhibit C-33(5))

Since September 29, 1986 she had owned a lot described as being the whole of 3-8, Range "B" on the Mashteuiatsh Indian Reserve. (Exhibit C-1, Tab B - Document 12)

Mrs Louise Philippe made a new application on January 29, 1987 and received the same refusal from the respondent on February 13, 1987, again for the same reason, namely the existing moratorium.

2- Refusal of the Montagnais du Lac St-Jean Council to allow Louise Philippe to take a popular Montagnais language course given on the reserve

On October 7, 1986 the Montagnais du Lac St-Jean Band Council informed the people that a meeting would be held at 7:30 p.m. on October 14, 1986 in the community hall.

The purpose of this meeting was to provide information following the conference on preserving the language held in April 1986 and to heighten public awareness of the work done since the conference.

Furthermore, this meeting provided an opportunity to receive early registrations from persons interested in taking a Montagnais language course. (Exhibit C-36)

As the complainant's children were taking Montagnais language courses at school, she was interested in taking these courses so as to be able to learn the language and eventually to converse in it with her children. (Volume 13, page 1976) Accordingly, she registered for this course at the meeting on October 14, 1986.

On December 5, 1986, Mr Clifford Moor, Language Development Co-ordinator for the Montagnais du Lac St-Jean Council, informed the complainant that she could not be allowed to take this course because of the moratorium in effect. (Exhibit C-37) This course, which ran from mid-January to mid-April 1987, (I-38) was given. The complainant challenged this decision of the Montagnais du Lac St-Jean Band Council. (Exhibit C-38)

On April 6, 1989, however, the complainant was made aware of a project of the respondent to offer a Montagnais language course in September 1989 but this never materialized (Exhibit C-39) because of a lack of candidates. Montagnais language courses were given by the CEGEP in St-Félicien in 1991 and by the University of Quebec at Chicoutimi in 1993.

The facts disclosed by the evidence concerning the respondent's refusal to provide the complainant with a residence and to allow her to take a popular Montagnais language course given on the Reserve show prima facie that the respondent engaged in discriminatory practices against the complainant for the same reasons as were given with respect to the complaint of Marthe Gill.

3- From 1986 to the present, the Band Council has used selection criteria for candidates for the housing program that are discriminatory for the reason that no point is awarded for the spouse or a child of a Montagnais woman who regained her status as an Indian and a band member following the enactment of Bill C-31

In 1976 the Lac St-Jean Band Council had adopted a policy on housing and set up a Housing Committee consisting of members of the community.

It had also established housing assistance programs that took four forms. (Exhibit C-44)

1. Social Housing Programs (program 56.1)

These involve housing in the form of either single-family dwellings or apartment buildings built by the Band Council, which was responsible for funding in part through the DIAND contribution and in part through a loan from a banking institution. This is capped by an operating subsidy paid by the Canada Mortgage and Housing Corporation (CMHC) under an agreement with the Montagnais du Lac St-Jean Band Council. (Exhibit C-46) Each year DIAND establishes the number of housing units allocated to the Band Council and the subsidy granted for each unit is $24,100. Beneficiaries of this program must pay a rent equivalent to 25 per cent of annual family income and also pay the common costs set by the operation.

After 25 years of occupancy, a beneficiary who has been a tenant may acquire ownership of the dwelling if he has complied with the obligations contained in the housing agreement signed with the Montagnais du Lac St-Jean Band Council. (Exhibit C-44)

2. Band Program

This program applies to the construction of a new house, replacement of an existing house and to the purchase of a house that is already built.

It is geared to those who have the financial resources to enable them to purchase or construct a house and who can obtain assistance from a financial institution.

It assumes that the candidate for this program has a certificate of possession issued by DIAND attesting that he has a lot and that he will

submit a plan of the house to be built. He must guarantee to invest a sum equivalent to ten per cent of the cost of the project.

With the help of the DIAND contribution, the Montagnais du Lac St-Jean Band Council first grants an interest-free loan of $12,000 repayable in instalments of $50 per month over a period of twenty years and, second, a grant of $10,000 repayable at a rate of $2,000 per year. If the house is disposed of during the five (5)-year period, the balance becomes due.

If further funds are required to build the house, the candidate must show that he is able to provide them himself or that he has the support of a banking institution guaranteed by the CMHC.

3. Renovation Program

This program is designed eventually to improve the quality of existing houses in order to increase the life-span of the community's housing as a whole.

It applies to major repairs on a house such as carpentry, plumbing, heating, electricity and so on. The applicant must guarantee an investment equivalent to 5 per cent of the cost of the project. The CMHC may provide a maximum grant of $5,000 repayable at a rate of $1,000 per year over five years. If the house is disposed of during the repayment period, the balance becomes due.

Furthermore, the Montagnais du Lac St-Jean Band Council may provide a maximum grant of $6,000 repayable over five years at a rate of $1,250 per year. If the property is disposed of before the repayment period has expired, the balance becomes due.

The candidate must also be able to take out a loan, if necessary.

4. Loan Guarantee Program

This program is designed for those who, while having the financial means to build or renovate a house, require financial assistance to complete the project.

They may be given a loan guarantee by the Montagnais Band Council.

Given the number of applications from the community to participate in these various programs, the Housing Committee had recommended that the respondent adopt selection criteria for the acceptance of candidates for the various

programs as part of the Social Housing Assistance Program and the Band Program. Each year, the respondent adopts selection criteria for candidates after analyzing the Housing Committee's recommendations. These selection criteria are based on the family and housing situation of the members of the community. When these criteria are applied, a number of points is obtained which enables the candidates to be selected in order of priority.

The selection criteria contain three (3) elements, namely: general eligibility criteria, criteria relating to persons and criteria relating to housing. The evaluation of the criteria relating to persons totals a maximum of 40 points and those relating to housing a maximum of 60 points for a person living on the Reserve.

A knowledge of the general eligibility criteria and those relating to persons from 1985 to 1993 is required for an analysis of certain aspects of the complaints.

(1) General eligibility criteria

In 1985: One of the general eligibility criteria required a person applying for housing assistance to be first a member of the Montagnais du Lac Saint-Jean Band.

In 1986: This eligibility criterion remained in effect although the following was added: "in compliance with the moratorium imposed by the Council".

In 1987: The criterion was modified as follows: "Any person applying for housing assistance must be registered in the Mashteuiatsh Band List prior to April 17, 1985". [Tribunal's emphasis.]

In 1988: The criterion was modified again to read as follows, until 1993 inclusive: "Any person applying for housing assistance must be registered in the Mashteuiatsh Band List".

(2) Criteria relating to persons

The criteria relating to persons remained unchanged from 1985 to 1993:

(a) couple with dependent child(ren);
(b) single-parent family with dependent child(ren);
(c) couple with no children;
(d) single person.

For the purposes of this criterion, in 1985 the following point system with a possible maximum of 40 points was applied:

1 adult = 15 points
1 child = 5 points

In 1986 the evaluation of this criterion was the same although it was explained that no points were awarded if the spouse was not registered in the Pointe-Bleue Band List.

In 1987, while the possible maximum of 40 points was retained, the evaluation system was modified as follows:

Adult = 10 points
Child = 5 points

NB When a spouse was not registered in the Mashteuiatsh Band List, he or she was not awarded any points.

In 1988 the possible maximum remained at 40 points. However, the method of evaluation was modified again.

Adult = 15 points - maximum 30 points
Child = 2 points - maximum 10 points

In 1989 the evaluation system was retained although the following was added:

Supplement for families: A supplement of three (3) points per child is awarded for the first and second child and 5 points per child starting with the third child.

In 1990 further modifications were made to the evaluation system. The maximum increased from 30 to 61 points, distributed as follows:

Adult = 15 points - maximum 30 points
Child = first and second = 5 points each
3rd, 4th and 5th = 7 points each
maximum 31

The criterion relating to housing situation was modified for a person living on the Reserve because the evaluation was reduced from 60 to 50 points.

These criteria, modified in 1990, remained unchanged in 1991, 1992 and 1993. The policy of not awarding points for a spouse who was not a member of the Band was maintained.

During the year, persons wishing to take advantage of the housing assistance programs had to submit a written application to the Housing Committee on an application form containing relevant information that made it possible to apply the conditions of eligibility and the selection criteria. Since 1989 applicants have had to specify the program to which the application relates. The deadline for applications was announced in a public notice that was duly posted. On filing an application, the applicant received information on the various selection criteria. The Housing Committee analyzed each application to determine that it was eligible and to make a selection in accordance with the established criteria for each program.

Once the eligibility criteria were met, the number of points obtained under the selection criteria determined the priority of the candidates who qualified within each program in light of the number of units allocated in accordance with the budget obtained.

If two or more candidates had the same number of points, the Housing Committee determined their order of priority on the basis of the number of previous applications made by these candidates and, if they were still equal, in accordance with the date of the applications of these candidates.

The list of persons chosen for each program remained in effect for the year in case the persons selected could not meet all the conditions of a program or in case additional budgets were allocated.

The Housing Committee submitted the list of candidates selected to the respondent for each of the programs and the respondent approved it without change.

On January 21, 1988 the complainant attempted again to obtain a house from the respondent (Exhibit C-33(9)) and on January 28, 1988 the respondent acknowledged receipt thereof. (Exhibit C-33(10))

Since the moratorium was over, the Montagnais du Lac Saint-Jean Council informed the complainant on April 14, 1988 that her application had not been selected because she had not met the selection criteria for candidates for the House Building Program.

In each subsequent year until 1993 inclusive Mrs Louise Philippe applied for housing assistance and was constantly refused, always on the basis that she did not have sufficient points under the selection criteria, given the number of registered candidates and of housing units available each year. In 1993 she was in thirteenth position on the waiting list.

The Tribunal must first analyze whether the evidence shows prima facie that the selection criteria established by the respondent since 1986 were discriminatory on the ground that no points were awarded for a child [Tribunal's emphasis] of a Montagnais woman who had regained her status as an Indian and as a Band member following the enactment of Bill C-31.

The Indian Act (Bill C-31) provided that a band council was given a period of two (2) years from the date the Act was assented to on June 28, 1985 to decide whether the children of C-31 women who had regained their status would become members of the band and that if no membership rules had been established by a band council at the end of this period, the first generation children of an Indian woman who had regained her status would become members of the band as a result of the Act.

Thus, until June 27, 1987 the children of a Montagnais woman who had regained her status were not members of the Montagnais du Lac St-Jean Band since it had not adopted any membership rules.

During this period the respondent did not engage in any discriminatory practice against the complainant since, as a result of the Act, the

children of C-31 women were not band members. Furthermore, section 67 of the Canadian Human Rights Act provided as follows:

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

The evidence, especially Exhibit I-24, shows that from 1988 the selection criteria awarded points for a child whose mother was an Indian and a member of the Montagnais du Lac St-Jean Band without exception.

Since no evidence established that the respondent engaged in a discriminatory practice against the complainant by not awarding any points in its selection criteria for a child of a C-31 woman, that part of the complaint must be dismissed.

Secondly, we must examine whether the evidence shows prima facie that the selection criteria established by the respondent since 1986 were discriminatory on the ground that no points were awarded for a spouse [Tribunal's emphasis] of a Montagnais woman who had regained her status as an Indian and as a band member following the enactment of Bill C-31.

Lengthy testimonial and documentary evidence (Exhibit I-24) showed how the selection criteria were applied to determine the eligibility of candidates for housing assistance programs without any points being awarded for the spouse of a person who was not a band member.

The selection criteria state that when the points are calculated, a candidate's spouse does not obtain any unless he or she is a band member.

The Band Council imposed a neutral rule in the sense that it applied to any spouse of a band member and not solely to the spouse of a C-31 woman.

A study of the selection criteria and the amendments to them over the years shows that the number of points increased in accordance with the number of children. The goal to be attained seems clear: namely to give large families priority in access to the respondent's social housing programs and not to victimize C-31 women by not awarding any points for their spouses.

The Tribunal finds that the complainant did not show that the Band Council engaged in a discriminatory practice when it did not award any points to the spouse of a C-31 woman in applying its selection criteria and it dismisses this part of Louise Philippe's complaint.

(C) COMPLAINT OF MARIE-JEANNE RAPHAEL

On February 28, 1987 Marie-Jeanne Raphaël filed a complaint with the Human Rights Commission that read as follows: (Exhibit C-16)

[TRANSLATION]
The Montagnais du Lac St-Jean Band Council is discriminating against me and my minor children Lucie, Roland, Nancy, Stéphane, Stéphanie and Candide Gagnon by requiring us to leave the

dwelling in which we were living at 339, rue Mahikan, Pointe-Bleue, Quebec G0W 2H0, by refusing to admit them to the Reserve School and by requiring me to pay for transportation to the secondary school in the town neighbouring the Reserve because of my sex and my marital status, in contravention of section 5 of

the Canadian Human Rights Act. This requirement of the Band Council that I leave my residence was specifically served on me in person by Mrs Danielle Paul, the Housing Officer for the Montagnais Council, in the offices of the Band Council in the presence of the owner of my residence, Mr Jean-Marc Raphaël, in the morning of September 5, 1986. Mr Raphaël, who is my adult son, was employed outside the reserve throughout the winter and he gave me the right to occupy his house throughout the time he was away. The Band Council based the authority for its requirement on the fact that it had endorsed the mortgage on my son's house.

The refusal to admit my minor children Nancy, Stéphane, Stéphanie and Candide Gagnon to the Reserve School was specifically served on me by word of mouth by Mr Claude Pednault, Principal of the Reserve School acting on behalf of the Montagnais du Lac St-Jean Council, in the presence of my adult daughter, Cécile Gagnon, in the office of the Principal of the Reserve School in the morning of Monday, September 8, 1986. At the time I was living in the house of my adult son, Jean-Marc Raphaël, at 339, rue Mahikan, Pointe-Bleue, Quebec G0W 2H0.

This requirement of the Council that I pay for transportation to school for my minor children Lucie, Nancy and Roland Gagnon, was specifically given to me over the telephone by Mr Denis Gill, Director of Education for the Band Council, in a conversation with me on or about September 17, 1986. At that time I was living in the house of my adult son Jean-Marc Raphaël at 339, rue Mahikan, Pointe-Bleue, Quebec G0W 2H0.

I believe that these requirements of the Band Council that I leave my residence on the Reserve and pay for transportation to school and its refusal to admit my children to the Reserve School are based on the fact that I was married prior to April 17, 1985 to a person who was not a member of my Band. However, men who are members of the Band and who married non-members prior to April 17, 1985 are not required to leave their residences on the Reserve or to pay for transportation to school and their children are admitted to the Reserve School by the Band Council; hence my complaint of discrimination based on sex and marital status.

Done at Pointe-Bleue, Quebec on February 12, 1987

Marie-Jeanne RaphaëlDenis Gagnon
Louise Philippe
Complainant's signature Witness of signature

If this was the case, read to

the complainant by Robert Labbé February 12, 1987

At the commencement of the hearing of this complaint counsel for the respondent moved that two (2) parts of the complaint should be dismissed because they were res judicata.

Motion to dismiss and decision

Counsel for the respondent maintained that the parts of Marie-Jeanne Raphaël's complaint relating to the refusal of the Montagnais du Lac St-Jean Council to admit her minor children Lucie, Roland, Nancy, Stéphane, Stéphanie and Candide Gagnon to the Pointe-Bleue Reserve School and its requirement that the complainant herself pay the cost of her children's transportation to secondary school outside the Pointe-Bleue Reserve should be dismissed since they had been the subject of a Human Rights Tribunal decision in the case of Louise Courtois and Marie-Jeanne Raphaël v. Department of Indian Affairs and Northern Development (CT 2-403) and that the matter was consequently already res judicata.

The Tribunal heard the arguments of each of the representatives of the parties and took the above-mentioned decision under advisement. For the reasons stated orally, which appear at pages 1550 to 1560 of the reporter's notes and which do not need to be reproduced in full, the Tribunal allowed the respondent's motion to dismiss on the basis of res judicata.

Consequently, the two (2) parts of the complaint described above are dismissed.

The Tribunal must accordingly rule on the complainant's contention that she was evicted by the Montagnais du Lac St-Jean Council from her son's house, which she occupied on the Pointe-Bleue Reserve.

Marie-Jeanne Raphaël is an Indian and was born on April 28, 1941 at Lac à Jim, where her father had hunting and trapping rights on a piece of land. She lived in a tent at that location for twenty (20) years in the company of her parents. She went to the Pointe-Bleue Reserve only for a few months during the summer and lived in a tent because her parents did not have a residence there.

The constant life in the bush prevented her from attending school. Prior to her marriage, the complainant had had two children born of an Indian

father, namely Jean-Marc, born on February 7, 1959, and Jacob, born on March 3, 1961. (Exhibit C-18)

In 1961 or 1962 she married Mr Rosario Gagnon, who was not an Indian, and she lost her status as an Indian and as a member of the Montagnais du Lac St-Jean Band, as was then required by the Indian Act.

Following her marriage, she continued to live in the bush and her union with Rosario Gagnon produced nine (9) children. (Exhibit C-18) When her children began to attend school, namely in about 1966, she returned to the Pointe-Bleue Reserve. In 1979 she obtained a divorce from her husband.

In 1982 she went to live in a house at Notre-Dame-de-la Doré and during 1983 she moved to St-Prime, where she lived in two (2) houses in turn.

With the enactment of Bill C-31, Marie-Jeanne Raphaël filed an application for registration on September 19, 1985 and was reregistered as an Indian and as a member of the Montagnais du Lac St-Jean Band on October 10, 1986. Her children also obtained status as Indians. (C-31)

During the summer of 1986 the complainant was informed that the house she was occupying had been sold and that she should leave the premises because repairs had to be made.

At that time her son Jean-Marc Raphaël was living with his wife and three (3) children on the Pointe-Bleue Reserve in a house leased from the Montagnais du Lac St-Jean Council under its housing program called the "56.1 Program" at a cost of $200 per month. (Exhibit C-23) In August 1986 Jean-Marc Raphaël was preparing to leave his residence with his family from September to April to go hunting on the OBEDJIWAN Reserve, where his in-laws had a hunting ground.

Since his mother had nowhere to live and he wanted to have someone in his house while he was away, Jean-Marc Raphaël invited her and her seven (7) children to move in. Although the house had only two (2) bedrooms in the basement and two (2) rooms on the ground floor, it seems that they could make do with this space and all live there together because the children could sleep on the floor.

She had to drive her children from the Reserve to the road to St-Prime so that they could take the school bus to St-Félicien. The complainant settled into her son's home with her children, who had to attend school outside the Reserve because they were not band members. In early September

1986 her son gave her sufficient money to pay the rent. She went to the office of the Housing Officer, Mrs Danielle Paul, to give her the money.

Mrs Danielle Paul refused to accept the sum offered and said to her: (Volume 11, page 1635)

[TRANSLATION]
She told me that I did not have the right to remain there because it was a house for Amerindians.

In her testimony Mrs Danielle Paul claimed that she could not precisely remember this meeting but that she told the complainant that she had to leave her son's house because of the moratorium.

The complainant informed her son, who suggested that she stay in his house anyway and he left to go hunting. She remained in the house for two (2) months until she found housing. In the meantime, her son had returned from hunting with his wife and children for personal reasons.

However, she approached the Chief of the Band Council, Armand Noë Germain, with whom she was able to discuss the matter since he spoke the Montagnais language. He told her: (Volume 11, page 1640)

[TRANSLATION]
We do not even have the right to give you even a tent because all the women who married whites are sent outside. To give you even a tent. Because the women who married whites are leaving the reserve.

In October 1986 she leased a house in St-Prime for a monthly payment of $250, not including electricity and heating (Exhibit C-19), and this made it easier to transport her children to school.

In September 1987 she went to live in St-Félicien in a low-rent apartment building called "Habitat Métis du Nord", which was managed by the Waskahegen Corporation. (Exhibit C-22)

Finally, in December 1989 she returned to the Pointe-Bleue Reserve and occupied a dwelling belonging to the Montagnais du Lac St-Jean Band Council. (Exhibit I-10)

It was clearly established that Marie-Jeanne Raphaël had to leave the Pointe-Bleue Reserve because she was a C-31 woman subject to the moratorium

and that the respondent refused to allow her to live on the Pointe-Bleue Reserve when she was entitled to do so.

(D) COMPLAINT OF NELLIE CLEARY

On November 2, 1987 Nellie Cleary filed the following complaint with the Canadian Human Rights Commission: (Exhibit C-1 - Tab D - Document 1)

[TRANSLATION]
The Montagnais du Lac St-Jean Council is discriminating against me by refusing to give me permission to build a house or to install a shed on a lot belonging to me on the Reserve on account of my sex and my marital status, in contravention of section 6 of the Canadian Human Rights Act. I made an application to build on January 19, 1987 and I received a letter dated January 29, 1987 in which the Band Council informed me that it refused to consider my application. I also applied for permission to install a shed on my lot in April 1987 and this application was refused in a letter dated April 30, 1987 and signed by Jean-Claude Paul, the Band Council foreman.

The Council is also discriminating against me by prohibiting, in a letter dated May 27, 1987, my partner, who is not an Indian, from sharing with me the apartment that I lease from the Band Council.

The Montagnais du Lac St-Jean Council is also discriminating against me by refusing to continue to employ me because of my sex and my marital status, in contravention of section 7 of the Canadian Human Rights Act. I worked as a social worker at Le Refuge (Reserve Addiction Centre) from August 21, 1985 to July 4, 1986, when I was notified that I would be laid off because of a

lack of funds and that I would be recalled. However, I was not recalled and within a period of two weeks a person who was not subject to Bill C-31 was hired to replace me on a permanent basis. I believe that these refusals of the Band Council were based on the fact that I was married prior to April 17, 1985 to a person who was not a member of my Band. However, men who are Band members and who were married to non-members prior to April 17, 1985 are not refused building or installation permits, jobs or the right to cohabit with partners who are not Indians; hence my complaint of discrimination based on sex and marital status.

Done at Pointe-Bleue, Quebec the 2nd day of November 1987

Nellie Cleary Louise Philippe
Complainant's signature Witness of signature

Nellie Cleary was born on April 3, 1929 on the Pointe-Bleue Reserve and is of Indian origin. At the age of fifteen she left the reserve to live with her parents in Jonquière.

In 1947 she married Fernand Gagnon, with whom she lived until 1957. Because of her marriage to a white person she lost her status as an Indian and as a member of the Montagnais du Lac St-Jean Band.

She resided successively in Jonquière, Chicoutimi, Sept-Iles, James Bay and Larouche before returning to the Pointe-Bleue Reserve in 1985, where she occupies an apartment in a 31-unit apartment building belonging to the Band Council called "Domaine Kateri".

Following the enactment of Bill C-31, the complainant was registered in the Register of Indians kept by DIAND as an Indian and as a member of the Montagnais du Lac St-Jean Band on November 26, 1986. (Exhibit C-31)

1- Band Council's refusal to issue a permit to the complainant to build a house because she was a C-31 woman

On November 19, 1986 Mrs Cleary acquired from Jean-René Cleary, her brother, the whole of lot 3-4-7 in Range "A", Mashteuiatsh Reserve (Exhibit C-1 - Tab D - Document 2)

On January 15, 1987 the complainant applied to the respondent as follows: (Exhibit P-6)

Pointe-Bleue, 15-1-87

Montagnais Council
Pointe-Bleue

Dear Sir:

I hereby wish to inquire whether I may build on my lot. I know that there are funds for us C-31s.

Thank you for your co-operation.

Yours truly,

Nellie Cleary, Band No 3510
408, rue Amish # 208
Pointe-Bleue GOW 2H0
Tel: 275-0564

As it stands, the request could lead to confusion. Was it in fact a simple application for a building permit or a request for a building permit combined with an application for a grant?

The respondent opted for the second interpretation and sent her the following letter on January 29, 1987 over the signature of Danielle Paul: (Exhibit C-1 -Tab D - Document 3)

Pointe-Bleue, January 29, 1987

Mrs Nellie Cleary
408, rue Amishk
Apt No 208
Pointe-Bleue, Que G0W 2H0

Dear Madam:

We acknowledge receipt of your letter dated January 19, 1987 concerning your application to build under the assistance programs for persons subject to Bill C-31.

We wish to inform you that the moratorium imposed by the Band Council is currently in effect and will remain so as long as the Membership Code has not been defined.

However, we shall keep your application on file and as soon as we are able to reply to it we shall contact you.

Yours truly,

Danielle Paul
Housing Officer
for/Montagnais Council
Pointe-Bleue.

It emerges from this letter that, for all practical purposes, the complainant was refused the service requested because of the moratorium.

Following this refusal, Nellie Cleary met with Mr Réal Paul, who was responsible for the housing sector, to obtain permission to build a shed on her lot and she was granted this permission. (Volume 8, page 1188)

Since the complainant's wishes were quite different, she hurried to begin construction of a building that had the characteristic of a house or a

cottage rather than those of a shed since it was 20 feet by 24 feet in size.

On April 30, 1987 Mr Jean-Claude Paul, who was in charge of public works for the respondent, informed the complainant that she could not obtain a permit to build "a garage, a shed or other structure" because of the moratorium and that action would be taken as soon as possible. (Exhibit C-43)

However, Nellie Cleary completed the exterior construction of the building, although she did not proceed to finish the interior as a dwelling because, on May 21, 1987, Mr Jean-Claude Paul informed her that she should immediately cease the work that was under way because, since she was proceeding to construct a building estimated to cost more than $1,000, she had to obtain a building permit and submit building plans to the respondent so that a complete evaluation could be carried out of the work to be done. (Exhibit C-8)

This requirement resulted from the provisions of sections 3.2 and 3.3 of Construction By-law 29 adopted by the respondent on June 17, 1985 and duly registered with DIAND on November 25, 1985 in accordance with subsection 82(2) of the Indian Act.

When she received this notice, Nellie Cleary did not meet the respondent's requirements, nor did she do so after the moratorium expired, and in 1992 she transferred her lot to her daughter.

The facts proved indicate prima facie that the respondent acted in a discriminatory manner against the complainant by refusing to provide her with a service that it offered and that she was justified in requesting.

2- Band Council's refusal to continue the complainant's employment at the "Le Refuge" Crisis Centre because she was a C-31 woman

During 1984 the Montagnais du Lac St-Jean Council decided to create a policy on the self-management of community services. To this end, it set up the Community Services Commission on May 20, 1985 and a memorandum of agreement was concluded with it. (Exhibit P-28)

The relevant parts of this agreement may be described as follows:

Preamble

2. The Community Services Commission is set up in order to enable the people to take charge of their own community services, reorganize, pool and co-ordinate the human, physical and financial resources of the various parties involved and at the same time to provide sound management of the Community Services Centre.

Article V of this memorandum defines the general powers of the Commission:

Under the principle of self-management of community services and having recognized the Commission as the organization responsible for managing the equipment and all activities relating to the fields of health, social and community services and recreation, the Band Council agrees to confer on this organization all the powers necessary for it to attain the goals for which it is established [Tribunal's emphasis] so that it can assume its responsibilities.

Paragraphs (B) and (C) of article V define the powers of the Commission:

(B) To establish its own policies, procedures, methods and rules governing the use of the human, financial, physical or material resources for which it is responsible;

(C) To manage the human resources allocated to the operation of the Community Services Centre as well as the various services, programs or projects brought together in it: recruitment, hiring, supervision, remuneration, evaluation conditions of work ...

In exercising the powers conferred on it by the respondent, the Community Services Commission had created an addiction assistance service called the "Le Refuge" Crisis Centre in order to help those members of the community who were struggling with problems of drug or alcohol consumption.

Mrs Nellie Cleary had applied for a position as a worker at "Le Refuge". She felt that she was able to do the work since she was herself an alcoholic who had stopped drinking 18 years earlier.

After she was interviewed by the members of the board responsible for selecting the person with the qualifications required to do the work, she was chosen. She was so informed on August 22, 1985. (Exhibit C-9)

On the same date she signed a contract of service with the Community Services Commission as a worker at the "Le Refuge" Crisis Centre. (Exhibit C-11) This contract was for a fixed term of eleven months, from August 26, 1985 to July 4, 1986 and it could be renewed under the same conditions with the consent of the two (2) parties. The pay was $280 per week. This contract also provided that either party could terminate it on giving at least fifteen (15) calendar days' written notice.

Although the complainant performed her duties as a social worker "with a very great sense of responsibility and judgment" (Exhibit C-13), the Community Services Commission informed her on June 20, 1986 that her contract would not be renewed because of the funding problems of the "Le Refuge" Crisis Centre. (Exhibit C-13)

However, it was not until February 18, 1987 that Nellie Cleary wrote to the Community Services Commission to find out why she had lost her employment. (Exhibit C-14)

On February 24, 1987 the Community Services Commission informed the complainant that it had had to terminate her employment for financial

reasons unrelated to Bill C-31 or to the moratorium imposed by the Band Council. (Exhibit C-15)

Furthermore, the Commission explained to her that the continuation of another social worker's part-time employment was based on her ability to communicate in the Montagnais languages, in accordance with the policy in effect.

It should be recalled that on May 25, 1985 the respondent had imposed a moratorium on the application of the future Bill C-31 with respect to housing services, the right of residence and employment and this moratorium was extended to all services on September 28, 1985 following the enactment of Bill C-31 on June 28, 1985.

It is strange to note that the complainant was hired on August 26, 1985 by the Community Services Commission as a worker at the "Le Refuge" Crisis Centre even though she was directly affected by the moratorium and, in addition, even though she was not registered as an Indian or as a member of the Montagnais du Lac St-Jean Band. Her registration was included in the Register of Indians on November 26, 1986. (Exhibit C-31)

Furthermore, her contract of employment provided for a six (6)-month probationary period during which it could be terminated if she did not meet the requirements of the position. (Exhibits C-9 and C-10) Thus it would have been easy for the respondent to terminate the contract during this period for reasons of the complainant's incompetence when it was found that a C-31 who was not reregistered had been hired contrary to the objectives of the moratorium, but this was not the case.

The contract of employment was for a fixed term. The respondent had no obligation to renew it when it expired and if there was good reason for non-renewal.

Can it be argued that the complainant's contract was not renewed because she was a C-31 woman?

Mr Edouard Robertson, the Director General of the Community Services Commission, stated the following in the letter dated February 24, 1987 that he sent to the complainant to provide explanations relating to the non-renewal of her contract: (Exhibit C-15)

Thus, your departure is not related in any way to your competence or the effects of the moratorium but rather occurred because your contract had expired.

The Tribunal believes that the reasons given to justify the non-renewal of Nellie Cleary's contract were not based on the fact that she was a C-31 woman.

When questioned concerning the allegation in her complaint that she was a C-31 woman, Nellie Cleary stated the following: (Volume 9, page 1255)

Q. So, why do you think that it was because you are a C-31 that your contract of service was terminated? Why do you think that?

A. Me, I don't know the reasons because I always had my heart set on my work. As far as I'm concerned, I don't know.

In the letter she sent to the Community Services Commission on February 18, 1987 (Exhibit C-14), she wrote: 'The reason why I waited so long before asking is that I felt that it was temporary -- but this was not the case -- or Bill C-31, because some of them are still employed."

She also stated that Chantal Kurtness, who was both Director of and a worker at the "Le Refuge" Crisis Centre, was also a C-31 and she did not lose her employment. (Volume 9, page 1255)

She then added the following in her testimony: (Volume 9, page 1281)

Q. What you say in your correspondence with Mr Edouard Robertson is: "I am well aware that it is not Bill C-31; Chantal is there." Is that what you said?

A. Well, that was what I, it was on my mind.

Thus, the complainant corroborated the fact that the refusal to continue her employment at the "Le Refuge" Crisis Centre did not result from the fact that she was a C-31 woman and it may be concluded that she was not the victim of any discriminatory practice in respect of this part of her complaint, which must be dismissed.

Should it be necessary to determine whether it was the Montagnais du Lac St-Jean Band Council or the Community Services Commission that was Nellie Cleary's employer, the Tribunal intends to render a decision on this issue.

The complainant's contract of employment was with the Community Services Commission, which had determined the term thereof, the conditions and the remuneration it had to pay. The work was to be done for an organization, "Le Refuge" Crisis Centre, managed by the Community Services Commission, and there was an employer-employee relationship of subordination with this organization. Finally, as is shown by the memorandum of agreement (Exhibit P-28), the Community Services Commission was an organization independent of the Montagnais du Lac St-Jean Band Council and Nellie Cleary's complaint about the refusal to continue her employment at the "Le Refuge" Crisis Centre should have been filed against the Community Services Commission.

3- Refusal of the Montagnais du Lac St-Jean Band Council to allow the complainant to have her partner, who was not an Indian, continue to share with her a dwelling belonging to the Band Council that she occupied because she was a C-31 woman

In 1985 Nellie Cleary settled on the Pointe-Bleue Reserve. She reported that a friend who was not an Indian stayed sporadically at her residence

for periods varying from fifteen (15) days to three (3) weeks and even to

one (1) or (2) months. She explained as follows why her friend did not live permanently with her: (Volume 9, page 1207)

... I did not stay with him all the time. I could not because I was on welfare; that meant that we were watched. I would have lost my welfare.

In July 1986 the respondent informed its members by public notice of the following decision: (Exhibit C-1 - Tab D - Document 5)

[TRANSLATION]
PUBLIC NOTICE

At its meeting on July 8, given the lack of housing on the Reserve, the Band Council decided to inform its tenants about the right to live in housing belonging to the Band.

To this effect, the tenants were informed that a non-member of the band is not authorized to occupy or to reside in one of the Council's dwellings without obtaining its authorization.

Consequently, we count on the co-operation of our tenants in ensuring that this decision is complied with.

Danielle Paul
Housing Officer
for/Montagnais Council
Pointe-Bleue
DP/jl

Then, during the same period, a notice was sent to all tenants [Tribunal's emphasis] occupying housing belonging to the Band Council: (Exhibit C-1 - Tab D - Document 5)

[TRANSLATION]
NOTICE TO ALL TENANTS

Following the meeting of the Band Council on July 8, 1986, we wish to inform you that the Band Council has confirmed that there are persons who are not Indians living in the Council's housing without obtaining appropriate authorization.

The Band Council wishes to inform its tenants and the occupants of these dwellings that persons other than Band members are not authorized to occupy or to reside on an Indian reserve.

Consequently, concrete action will be taken against tenants who do not comply with this requirement.

Danielle Paul
Housing Officer
for/Montagnais Council

Pointe-Bleue
DP/lf

On receiving this notice the complainant asked her friend who was not an Indian to stop visiting her and he never returned.

It emerges from the evidence heard that both the pubic notice and the written notice sent to all the tenants state that all persons [Tribunal's emphasis] living in housing belonging to the Band Council may not live with a person who is not a band member, and not specifically C-31 women, or even that the incident had occurred during the period of the moratorium.

If the respondent had sought to prevent a C-31 woman from living with a person who was not a Band member in one of its dwellings, given the moratorium, then a fortiori it would have had to require Nellie Cleary to leave her housing as soon as the moratorium took effect since she was not a Band member. According to the housing program, the first condition for eligibility to occupy housing belonging to the Band Council was: "to be registered and a member of the Montagnais du Lac St-Jean Band". (Exhibit C-44)

The complainant was reregistered as an Indian and as a member of the band on November 26, 1986. Furthermore, if the respondent had so wished, it would have told the complainant this as bluntly as it did in the cases of Marthe Gill and Marie-Jeanne Raphaël, as was shown.

Consequently, the complainant did not show that the respondent engaged in a discriminatory practice against her by prohibiting her from occupying one of its dwellings with someone who was not an Indian. Nellie Cleary's complaint on this point is dismissed.

2- EVIDENCE OF THE RESPONDENT

There is a long line of authority that, once the facts proved show prima facie that the respondent engaged in a discriminatory practice against the complainants, the onus of proof is reversed and the respondent must show that in its capacity as a provider of services it deprived the complainant thereof for bona fide reasons in accordance with the provisions of section 15(g) of the Canadian Human Rights Act.

The respondent submits that the complainants were not deprived of a service but that the provision of services was suspended during the period of the moratorium and reinstated at the end thereof. This claim cannot be accepted. While the provision of services was suspended for a certain period of time, it certainly had the effect of depriving the complainants when they requested service.

Counsel for the respondent maintained that the suspension of services by a moratorium following the enactment of Bill C-31 was justified for the following reasons:

(A) Following the enactment of Bill C-31, DIAND was not able to provide explanations and information to facilitate an understanding thereof and to make it possible to measure its impact on the activities, projects and programs put in place by the Band Council.

(B) It was feared that many persons would ask to be given back their status as Indians and as band members, as was permitted by Bill C-31, and that the Indians who had regained their status would return en masse with their families and possibly their spouses of the white race.

As is shown by the population statistics of the Montagnais du Lac St-Jean Band from 1983 to 1993, the mass return of persons who had regained their status did not occur.

Furthermore, as Mr Jacques Cleary, the then-manager of the Band Council, acknowledged in his testimony, the Band panicked at the possible impact of the coming into effect of Bill C-31 and imposed a moratorium even before Bill C-31 was enacted. (Volume 15, page 2322)

The Chairman: But, Mr Cleary, in essence, the fear that manifested itself, was it not a fear that a rush of people coming back to the reserve using their

right to regain their status that caused the Band Council to go into a kind of panic state? Am I correct in stating that?

The witness: That is possible, Mr Chairman. That is possible.

(C) It was not known whether the children of these C-31 women would become members of the band as long as no decision was made by the band members concerning the Membership Code.

There is no basis for this claim since the Band Council was aware that it had a period of two (2) years to decide on its membership rules and, failing this, to know which rules would apply under Bill C-31.

(D) A question also arose as to whether DIAND would make the necessary money available to the band councils to enable newcomers to enjoy all the services conferred on them by their status as Indians and as band members, such as education, recreation, hunting and trapping grounds and housing.

However, the evidence clearly showed that these funds were available. (Exhibit I-13)

Moreover, the fear that they would eventually not be able to provide the services required by the new members of the band for economic reasons did not justify the respondents refusal to provide the complainants with services. In AG Quebec v Service de Taxi Nord Est (1978) Inc (SC Montreal 500-27-007533-849), the Honourable Tannenbaum J stated:

[TRANSLATION]

I find it inconceivable that at the present time a discriminatory practice based on colour could be justified on monetary or economic grounds.

The Tribunal does not accept the respondent's arguments to justify its refusal to provide the services required by the complainants. Although a statute may raise questions, it must not be derogated from. Even though it is difficult to measure the consequences, it should be followed and any problems it causes should be rectified when they occur.

The reasons given by the respondent for depriving the complainants of a service to which they were entitled were based on fears, suppositions and

questions that did not justify its engaging in discriminatory practices against the complainants.

The Tribunal also intends to rule on the legality of the moratorium imposed by the Band Council.

In its volume entitled "Vocabulaire Juridique" [legal vocabulary], the Association Henri Capitant defines "moratorium" as follows:

[TRANSLATION]
Exceptional and temporary, collective and objective legislative measure (grace period) involving a special class of debtors (eg discounted) or debts (eg rents) the purpose of which is to allow time for payment, a suspension of execution and so on ... because of serious social circumstances that make it difficult to perform obligations (economic crisis, state of war) for a period laid down by the law (legal moratorium) or left to the determination of a judge (judicial moratorium). See term.

In the view of counsel for the respondent, this definition is entirely in keeping with the approach of the Band Council, which adopted an exceptional legal measure because Bill C-31 involved unusual factors and serious social circumstances, namely the expectation that new members would come to the community en masse and the services to be provided to them required action to suspend the provision of services for a fixed period, extending from 1985 to 1987.

However, it is necessary to explain a fundamental element of this definition. A moratorium is first of all a legislative measure. Did the Montagnais du Lac St-Jean Band Council have the power to impose a moratorium?

The powers of a Band Council are defined in sections 81 to 83 and 85 of Bill C-31 and they do not allow a Council to suspend the application of this statute to the Band, which was acknowledged by counsel for the respondent, who admitted that this approach was very restrictive.

Rather he invoked a broader vision of the powers of a Band Council and, in support of his claim, he referred to Public Service Alliance of Canada v Francis et al and Canada Labour Relations Board, [1982] 2 SCR 72, where the Supreme Court of Canada had to determine whether an Indian Band Council was

an employer within the meaning of the Canada Labour Code. The Honourable Martland J stated the following at 78:

> The Band Council is a creature of the Indian Act. It is given power to enact by-laws for the enforcement of which it is necessary to employ staff. In fact, the Council does engage employees to do work for it and it pays them. In view of these circumstances, for the purposes of the Code, it is my opinion that the Council could properly be considered to be an employer within the meaning of that Act. I am fortified in that conclusion by the provision contained in s. 27(7) of the Interpretation Act, RSC 1970, c I-23, that words in the singular include the plural. The word "person" in the Code therefore includes "persons". The Council is a designated body of persons which is given a specific role under the provisions of the Indian Act.

In Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Story Plain Indian Reserve No: 135, [1994] 1 CNLR 206, the Court recognized an Indian Band as having the power to conclude contracts while admitting that it did not explicitly have such a power under the Indian Act.

Consequently, for counsel for the respondent this more liberal approach to the powers of a Band Council allowed the respondent to impose a moratorium under the Indian Act so that: [TRANSLATION] "by the application of section 67 of the Canadian Human Rights Act, the Canadian Human Rights Act would have no effect on an action taken under the Indian Act". (Volume 30, page 4612)

The Tribunal cannot share this so-called broad view of a Band Council's powers because to accept it would be to recognize that anybody could avoid complying with a statute on the pretext that its application was likely to cause him problems or constraints and it finds that the provisions of Bill C-31 did not confer on the respondent the power to impose a moratorium suspending its application.

Thus, the provisions of section 67 of the Canadian Human Rights Act do not apply.

This finding is also based on the decision in Courtois and Raphaël v Department of Indian Affairs and Northern Development, 11 CHRR, Decision 41, paragraph 1-119, May 1990, where the Human Rights Tribunal found that the moratorium imposed by the respondent was unlawful.

In the alternative, the respondent submits that there was at least acceptance of the moratorium of May 24, 1985 since, at a meeting with the

Association des Montagnaises du Lac Saint-Jean in April 1985, it had announced its intention to impose a one-year moratorium on housing, the right of residence and employment. (Exhibit P-20)

Nothing in the evidence, either testimonial or documentary, shows that the Association des Montagnaises du Lac Saint-Jean accepted this moratorium.

In the alternative, if this were the case, such acceptance would not be binding on the complainants who had not consented to it. Furthermore, if such consent had been given by the complainants, it would have deprived them of the right to receive services from the respondent, a right recognized by the Canadian Human Rights Act. An agreement of this kind would be unlawful and without effect since it would be contrary to the Canadian Human Rights Act, which is a public law.

In Insurance Corporation of British Columbia v Heerspink, [1982] 2 SCR 145, at 158, Lamer J said:

> Furthermore, as it [the Human Rights Code] is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.

Concerning Marthe Gill's complaint, the Tribunal must render a decision as to whether the respondent's refusal to allow the complainant to be elected to the Membership Code Committee constituted a discriminatory practice within the meaning of section 5 of the Canadian Human Rights Act.

The respondent maintains that it did not derogate from this provision for the reason that the right to be elected to and to sit on the Membership Code Committee were not services it had a duty to provide to Marthe Gill.

The Tribunal cannot share this claim. Section 10 of Bill C-31 allowed a Band Council, within two (2) years of its enactment, to determine the membership rules for its people with the approval of the majority of the electors.

In order to determine the possibility of achieving this objective, the Band Council decided to establish a Membership Code Committee consisting of ten (10) persons, five of whom it would select and five (5) of whom would be elected from among the members of the community.

Once this decision was made, it had a duty not to deprive anyone of the right it had established for members of the community to be eligible to sit on this Committee.

Was the Band Council, within the discretionary power it had, justified in refusing to allow the complainant to be elected to this committee?

In British Columbia Council of Human Rights v University of British Columbia School of Family and Nutritional Sciences, [1993] 2 SCR 353, the Honourable Lamer CJ, writing for the Supreme Court, disposed of the question as follows: (page 392)

> It is a basic principle of administrative law that a discretion vested in an administrative official or body is only to be exercised on proper grounds. Similarly, in this context, while the existence of a discretion may mean that the person with the discretion is under no obligation or duty to extend the service or facility to everyone who asks for it, he or she is surely

> under an obligation to not make his or her decision in a discriminatory fashion.

The respondent alleged that this refusal was based first on the search for objectivity in the members of this committee, a criterion that the complainant did not meet. There is no doubt that the criterion of objectivity sought was illusory in the context prevailing at the time. For some people, it was logical that the first generation children of C-31 women who had regained their status should become members of the band in the same way as their mothers, while for other people such an approach was unacceptable.

This refusal to allow the complainant to be elected to the Membership Code Committee for the reason stated above was not justified and constituted a discriminatory practice based on an unlawful distinction with respect to Marthe Gill.

Secondly, the respondent claimed that this refusal was justified by the moratorium. For the reasons already stated concerning the legality of the moratorium, the respondent was also not justified and engaged in a discriminatory practice against the complainant by refusing to allow her to be elected to the Membership Code Committee.

3- DAMAGES

(A) Origin of right to damages

Did the respondent's refusal to provide the complainants with the services to which they were entitled cause them to suffer harm, according to the evidence submitted?

If this were the case, counsel for the respondent maintained that it was necessary to determine at what point the right to material damages arose, especially in the cases of Louise Philippe, Marie-Jeanne Raphaël and Nellie Cleary.

When these persons requested services from the Band Council, the first condition of eligibility for these services was that they be registered as Indians and as members of the Montagnais du Lac St-Jean Band, and they were not.

When Mrs Louise Philippe applied to the respondent for assistance under its Housing Program, she was not a member of the Band because she was reregistered as an Indian only on May 9, 1986, despite her application for reregistration in the Register of Indians kept by DIAND on July 15, 1985. (Exhibit C-31) Counsel for the respondent maintained that the right to damages arose following the respondent's refusal on February 27, 1987 to act on this application by the complainant. (Exhibit C-33(3))

As far as Marie-Jeanne Raphaël was concerned, she was invited to leave the Reserve in September 1986, whereas she had applied for reregistration on September 19, 1985 and was reregistered on October 10, 1986 (Exhibit C-31), that is the date on which her right to damages arose.

In the case of Nellie Cleary, there is no reason to consider this point, given the decision rendered on the merits of her complaint concerning the loss of her employment at the "Le Refuge" Crisis Centre and the Band Council's refusal to allow her to occupy a dwelling belonging to the Council with a partner who was not an Indian.

Section 2 of Bill C-31 defines "Indian" and "member of a band".

"Indian": means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

"member of a band": means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List.

Furthermore, under sections 5(5) and 8(5) of Bill C-31, the name of a person is registered as an Indian or as a member of a band only if an application for registration is made.

It is true that when Louise Philippe and Marie-Jeanne Raphaël requested services from the respondent, their names did not appear in the Registers kept for this purpose by DIAND as Indians and as members of the band.

However, they were entitled to be registered and had duly applied for registration.

In an article entitled "Native Law", the author Jack Woodward states the following: (page 17)

> Registration is a means by which an individual can provide evidence of his or her status as an Indian. It is entitlement to registration, and not actual registration, however, from which the rights of status Indians flow. Indeed, actual registration is of no assistance to someone who is not entitled to it. The Indian Act even provides that there is no requirement that the name of a person entitled actually be registered, unless there is an application to have it registered. Actual registration serves primarily to identify the individual as an Indian for purposes outside the Indian Act.

The Tribunal finds that although the complainants were not yet registered as Indians and as members of the band when services were requested from the respondent, they were entitled to benefit from these services, especially since they could prove that, because of their origins, they were entitled to be recognized as Indians without their names appearing in the Register of Indians. Furthermore, they had diligently made their applications, Louise Philippe on July 15, 1985 and Marie-Jeanne Raphaël on September 19, 1985, a few weeks after Bill C-31 was assented to on June 28, 1985. They should not suffer because of an 11-month delay between the application and the registration, for which they were not responsible.

(B) Right to real material damages

1- Complaint of Marthe Gill

(a) Damages resulting from the failure to issue a building permit

The respondent maintained that the nature of the services requested by Marthe Gill consisted solely of an application for a building permit and not an application for eligibility for the Social Housing Assistance Program or the Band Program.

The evidence shows that the complainant applied to the respondent on December 16, 1985 for authorization to build herself a house: (Exhibit C-2(6))

[TRANSLATION]
Pointe-Bleue, December 16, 1985

Mrs Danielle Paul
Housing Officer
Montagnais Council
151, Ouiatchouan Street
Pointe-Bleue, Quebec
G0W 2H0

Dear Madam:

Re: Construction of a house

Concerning the above-mentioned subject, I hereby apply for authorization to build myself a house at Pointe-Bleue. [Tribunal's emphasis.]

For 25 years now I would have liked this wish to become a reality and I hope that 1986 will be my lucky year to realize all these wishes.

Thank you for your consideration of my application.

Yours truly,

Marthe Gill
176, Ouiatchouan Street
Pointe-Bleue, Quebec
G0W 2H0

Furthermore, she alleged in her complaint that [TRANSLATION] "The Montagnais du Lac St-Jean Council is discriminating against me by refusing

to grant me a building permit." [Tribunal's emphasis.] There is then absolutely no question of an application for financial assistance.

In her testimony she repeated that her objective on December 16, 1985 was to obtain a building permit. (Volume 3, pages 415 and 416)

[TRANSLATION]
Member Mputu Bijimine: Excuse me for interrupting, I had a supplementary question because I did not want to lose it.

Mrs Gill, if when you applied for the permit in 1986, you had obtained it, would you have proceeded to build on the lot?

The witness: Absolutely, because then I would have been able to seek assistance. That is what I was planning. [Tribunal's emphasis.] I said to myself that if I had my number, if I had my building permit, I had my father's land and at that point I would have taken steps because I was in a good position to do so. I would have taken steps to apply for the grants that were given at that time. [Tribunal's emphasis.]

Member Mputu Bijimine: Independently of the grants, just the possibility of building on the lot that is your land, that was transferred to you.

The witness: Certainly, because it was my wish to have a house before ending my career.

The Tribunal finds that Marthe Gill had made an application to the respondent for a building permit, which she was refused because of the moratorium, and that the search for financial assistance was the second stage in realizing her dream of acquiring her own residence.

The respondent argued that this refusal did not cause the complainant any harm since, even in the absence of the moratorium, she could not have been granted the coveted permit; her application did not meet the formal conditions for an application for a building permit under Construction By-law No 29, in particular the evidence of ownership of a lot. (Exhibit C-

41) The Tribunal rejects this argument because the refusal to grant the building permit requested by the complainant was based solely on the moratorium and no other reason was given. (Exhibit C-2(7))

Counsel for the respondent criticized the complainant for having submitted only one application for a building permit and, despite the respondent's reply, for not having made a subsequent application.

It would have been pointless to make an application in 1986 or 1987 because of the moratorium. If the respondent had issued the building permit to the complainant by acting on her application in December 1985, she could have applied to the respondent for financial assistance through the DIAND funding program specifically available for C-31 women and have obtained a house under the respondent's Housing Program.

The Tribunal reaches this conclusion for the same reasons as were given in its analysis of the damages claimed for the respondent's refusal to allow Louise Philippe to obtain a house under its Social Housing Program.

Consequently, Marthe Gill claimed from the respondent her rental payments of $250 per month from January 1986 to September 1990.

The evidence shows that a person admitted to the respondent's Social Housing Program must pay a monthly rent of 25 per cent of family income. In accordance with this condition, it was shown that during the period with which we are concerned, the complainant should have paid the respondent a monthly rent of $350, that is a sum greater than the $250 in rent that she actually paid.

The Tribunal finds that the complainant did not suffer material damages as a result of the respondent's refusal to grant her the building permit applied for on December 16, 1985.

(b) Damages for hurt feelings

The evidence showed that Marthe Gill had been profoundly affected by the loss of her status as an Indian on her marriage to a white man. She was one of the first aboriginal women to participate and work in the feminist movements to increase the authorities' awareness of the situation of Indian women, of Indian women who had lost their status and of their children.

Her efforts were rewarded by the enactment of Bill C-31 on June 28, 1985.

In order to be able to exercise the rights conferred on her by her status as an Indian and as a member of the Montagnais du Lac St-Jean Band, she hastened to apply for reregistration on July 28, 1985. On December 16, 1985, barely a month after she was included in the Register of Indians on November 13, 1985, she applied for a building permit because she could now take steps to realize her dream of owning her own residence.

The respondent refused to issue this building permit and her hunting permit and to allow her to be elected to the Membership Code Committee because of the moratorium.

Marthe Gill was deeply humiliated, hurt and angered by this and she expressed herself as follows: (Volume 2, pages 387 to 391)

[TRANSLATION]
Q. Am I to understand that the facts and actions you are criticizing, you said this morning that there are elements that are the responsibility of Parliament, there are elements that are the responsibility of the public and there are also elements that are the responsibility of the Band Council.

The criticisms you made, were they directed to the Band Council that was there in 1986-1987, or were they also directed to the Band Council that followed?

A. Here again, I find that your question is double-edged. Whom am I accusing? I am not accusing anyone, I'm not. I make the accusation that, for the three complaints that I made, at the time when I made them, it was the people who were there and who were affected by that who should have reacted.

As I said, I was an officially recognized Indian; my complaints are not against any Tom, Dick and Harry. It was because I had been hurt, I was destroyed by these three points, the three complaints that I filed.

I cannot tell you anything else, to say whether it is against him or against her. It was not against anyone, it was against those who destroyed me at that time but I cannot name names. I am not here to accuse people. I am here quite simply to say what I experienced at the time of the three complaints that I filed.

I think that I have been fairly clear. I would not want to begin to describe those things again.

Q. I am given to understand that even if you had had a hunting permit in 1988, if you had had a building permit in 1988, the possibility of sitting on a membership committee in 1988, I think that for you the problem was complete at that stage.

A. Absolutely. The problem was complete because the baby we were left holding in 1986 and the slaps I experienced when I was refused a chance to give information to my brothers and sisters, that destroyed me, that did. Those are things that you cannot repair when you break a person. It's not like when you break your car. You can have your car repaired. But I am not a car, I'm not. I am a human being.

Q. I understand, Mrs Gill, that you were affected by those events but I can also understand that this destructive operation was already of long standing as a result of the law, as a result of the conduct of individuals. Is it correct to say that?

A. That is correct, maître Lortie, because at that time there was the Indian Act, which was discriminatory.

But when you regain, when you feel you are legal, from the time when I was recognized by the Act and then I received those blows, that was hard to accept.

Q. But I understand that you never accepted the former provisions of the Indian Act. Correct?

A. That is correct. They were ...

Q. You did not even accept Bill C-31. Is that true?

A. That is true. Those were things ... there are a lot of anomalies and I recognize that. But the questions precisely as to who, it was not who, I feel. It was events.

Q. You understand, Mrs Gill, that the Band Council cannot be the guardian of all that.

A. No, I do not recognize that, sir. When I had jobs and I was given responsibilities, I either accepted them fully or I withdrew. So I said to myself at that time that there were responsibilities.

To me it was clear; what I was asking for was simple. I was not asking for millions, I was asking for a building permit. It was easy for them. I had the site. It was easy for them to say, Marthe, perhaps I cannot give it to you today but I am going to take down the information, and we shall reply to your application, instead of telling me: No, there is a moratorium.

It was the same thing with the hunting permit. I was not given one because there was a moratorium. And why was my candidacy not accepted? It was not money that I was asking for. It was really things, but they destroyed me, they broke me, they did not give me the possibility of achieving my goals as a human being, to have my own house one day. I would have been proud of that. But I was not able to do it.

The Tribunal believes the complainant' statements concerning the impact on her feelings of the respondent's refusal to provide her with the services to which she was entitled. The Tribunal sets the compensation to which Marthe Gill is entitled for hurt feelings at $5,000.

2- Complaint of Louise Philippe

(a) Material damages as a result of the respondent's refusal to give her a house

On February 27, 1986 and January 29, 1987 the complainant applied to the Montagnais Council for a house but she was refused because of the moratorium.

The respondent claimed that the discriminatory practice it is alleged to have engaged in did not cause the complainant any material damage because, even in the absence of the moratorium, she could not have qualified for its Social Housing Program since she did not obtain sufficient points under the selection criteria for the construction of a house.

The evidence showed that, following the enactment of Bill C-31, DIAND had special budgets available that were to be allocated solely to C-31 women

(Exhibit I-13) with respect to housing. These budgets were available to the band councils that specifically applied for them for the C-31s.

Mr Jacques Cleary, who held the position of manager of the Montagnais du Lac St-Jean Band Council from 1975 to 1988, explained the position taken by the respondent at that time: (Volume 15, page 2292)

[TRANSLATION]
Now what we answered at that time was: "Listen, we agree about the additional envelopes but at the same time as you are going to give us additional envelopes, you are going to respect the process or project that was put in place".

They said: "There are too many people involved in this. If we give envelopes to those who have newly regained their status over those who have been there for years and who are waiting for a house, it will create too many problems."

They were told: "However, give us your envelopes and if, instead of making 10 houses, you give us 10 envelopes for those who have recently regained their status, we are talking about 20 houses, and that means that in five years perhaps we will have met all the needs of everyone or, in any event, we shall be very close because we will have doubled the existing program."

DIAND refused to accept this approach of the Band Council on the ground that the envelopes for those who had newly regained their status had to apply to them alone and were not paid to the respondent.

Is it reasonable to believe that the complainant could have received financial assistance for housing in 1986 under the respondent's Social Housing Program if the respondent had applied to DIAND with respect to the budgetary funds available specifically for the women who had regained their status?

Mrs Danielle Paul, the Housing Officer, answered these questions: (Volume 18, pages 3103 and 3104)

[TRANSLATION]
The Chairman: What I am trying to find out is the following: The Department had a special envelope for the C-31s.

The witness: Yes.

The Chairman: And do you know in what way the Department wanted the money to be distributed to the C-31s?

The witness: The only thing I know is that the Department asked us to file specific applications for the C-31s. So, considering that none were made, I do not know which envelope might have been available.

The Chairman: When you say "specific applications", do you mean that the Montagnais Council would have had to file applications for grants to the Department for x number of C-31s?

The witness: Yes, one application for each person.

The Chairman: And you do not know in what way ... or, in other words, what the C-31s would have received?

The witness: At that time?

The Chairman: Yes.

The witness: No. The contribution of a unit, for example, was the same as for a regular program, when we talk about a housing budget because subsequently ...

The Chairman: Am I to understand that if the Band Council had agreed to receive those moneys without applying its repayment criteria, would the C-31s have been able at that time to receive this envelope in the form of so many units?

The witness: Yes.

The evidence shows (Exhibit I-30) that in 1985 a single application for housing assistance was made to the respondent by a woman who had regained her status in 1985, seven (7) applications were made to the same effect in 1986 and three (3) in 1987. Furthermore, it was shown (Exhibit C-48) that there were 18 aboriginal bands in the Quebec Region. In the years 1986-1987 and 1987-1988 six (6) of these bands applied for housing assistance from the specific budget set aside for the C-31s and they all obtained grants for either the construction or the renovation of housing units. DIAND made grants for 34 units in 1986 and for 53 units in 1987-1988.

The KANESATAKE Band received 14 units in 1986-1987 while the ODONAK Band received 10. (Exhibit C-48)

In December 1987 DIAND informed the band councils in the Quebec Region of the difficulties it was experiencing with respect to funding the C-31 programs. (Exhibit I-14)

[TRANSLATION]
December 18, 1987

All Band Councils
Quebec Region

This is further to the many questions we have been asked concerning the funding of programs for persons subject to Bill C-31.

When the Act was promulgated in June 1985, the then-Minister gave an assurance that Indians who were already registered would not be penalized by this new legislation since he had obtained the necessary funding for its implementation on the basis of the information available at that time.

Now, after little more than a year's experience, we realize today that it was extremely difficult, if not impossible, to foresee accurately the cost entailed in implementing the new Act. In fact, the number of registrations foreseen has more than doubled and you will understand that the Department has no control over these applications for reintegration since they are the result of purely personal decisions.

Consequently, the funding provided and the five-year schedule of expenditures that was adopted cannot now meet all the new needs resulting from this increase.

The Department is currently making an intensive effort to resolve this problem but we do not believe that a government decision can be made within the next few months since the limited resources at our disposal add to the complexity of this question.

Your regular representative from the Band Support sector or the program directors concerned will be pleased to provide you with

any further information or even to meet with the principal parties involved where this is required by the situation.

Yours truly,

Frank Vieni
Director General
Indian and Northern Affairs

In fiscal 1988-1989 the number of units allocated to the bands in the Quebec Region was 44; this figure subsequently increased until the latest fiscal year for which figures are available, 1991-1992.

From 1988, that is after the moratorium had expired, as soon as the women who had regained their status obtained sufficient points as provided for in the selection criteria to fall within the number of units allocated under the Social Housing Program or the Band Program, the respondent applied to DIAND for grants from the budget reserved for the C-31 women using the application form required by DIAND.

This approach seems to have received at least the unofficial approval of DIAND and it bore fruit, since grants were given to women who had regained their status in the Montagnais du Lac St-Jean Band, namely one unit in 1988-1989, four units in 1989-1990, 9 units in 1990-1991 and 5 units in 1991-1992.

Whereas in April 1986 the specific budgets for women who had regained their status were available from DIAND; given the low number of applications for

assistance under its budgets made by women who had regained their status in the Montagnais du Lac St-Jean Band; whereas the aboriginal bands in the Quebec Region that made applications to this effect obtained grants for housing units for women in the band who had regained their status; whereas it is reasonable to believe that if the respondent had applied to DIAND for housing assistance for Louise Philippe under its funding program specifically for women who had regained their status, DIAND would have taken action, the Tribunal finds that the complainant was entitled in 1986 to be admitted to the respondent's Social Housing Program without being subject to the selection criteria.

The complainant claimed from the respondent the damages she sustained as a result of the respondent's refusal to allow her to obtain a house and she provided details of them as follows:

- Cost of rent from February 12, 1986
to May 31, 1994 (Volume 14, page 2005) $28,625.00

- Electricity from February 12, 1986
to May 31, 1994 (Volume 14, page 2006) $ 6,000.00

- Moving costs $ 250.00

- Winter heating 93-94 (Exhibits P-46 and P-47) $ 515.71

- Grant $24,100.00

- Increase in value of property

First, if the Band Council had asked DIAND to participate in the funding program for women who had regained their status, the sum of $24,100 paid by DIAND would have belonged to the respondent to build a house which it could have provided to the complainant. She cannot accordingly claim payment of this amount, to which she would not have been entitled.

Second, if the respondent had provided the complainant with a house under its Social Housing Program, she could have acquired ownership thereof only after 25 years of occupancy. She cannot accordingly claim compensation for the increased value of a house of which she is not the owner. Furthermore, no evidence was adduced of the amount by which a house on the Pointe-Bleue Reserve would have increased over the years.

Third, if the complainant had been admitted to the Band Council's Social Housing Program, she would have had to pay a monthly rent equivalent to 25% of annual family income.

Evidence was adduced (Exhibit I-36) of what the rental cost to be paid by the complainant would have been in light of her annual income if the respondent had provided her with a house under its Social Housing Program during the period from February 12, 1986 to December 31, 1993 in comparison with the monthly rent of $250 which she paid during the same period.

By residing in housing provided by the respondent, she would have achieved monthly savings of $70 starting in February 1986, $55 in 1987 and $50 in 1988 for total savings of $2,100.

Again given her annual income, the complainant would have had to pay the respondent a higher monthly rent of $70 in 1989 and $75 in subsequent years, than her actual rent.

The Tribunal finds that by failing to provide the complainant with a house, the respondent caused her material damages of some $2,100.

(b) Damages for the respondent's refusal to allow Louise Philippe to take a Montagnais language course

The evidence showed that the respondent acted in a discriminatory manner by depriving the complainant of a service that it offered to the members of the community.

The Tribunal feels that the respondent should give Louise Philippe priority in taking a Montagnais language course as soon as it offers this service again to members of the band and subject to the same conditions of eligibility as any other candidate registered in this language course.

(c) Damages for hurt feelings

Following the respondent's refusal to provide her with a house, the complainant lived with her husband, her son and her daughter in a two (2)-bedroom house. Her children had to share a room while her son suffered from asthma.

When he suffered an attack, she was upset because he disturbed the family. These inconveniences could have been avoided if the Band Council had provided her with a house.

Given the respondent's refusal to give her a house, she stated the following: (Volume 14, page 2039)

[TRANSLATION]
I felt victimized and then depressed. My physical health ... it is certain that in the house we did not have air, we always felt suffocated; then the children did not have ... none of the four of us had our own living space.

For the complainant the fact that she lived in such a limited space made her married life very difficult.

Life in the community was very hard for the complainant during the period of the moratorium. (Volume 14, page 2052)

[TRANSLATION]
Finally, I think that during the moratorium we only had the right to breathe the air.

Louise Philippe wished to learn her mother tongue out of concern for her personal culture and also to share with her children who enjoyed this opportunity at school and she is still suffering from the fact that she was not able to do so.

The Tribunal finds that Louise Philippe experienced pain and suffering directly related to the discriminatory practices of the respondent against her.

Consequently, the Tribunal assesses at $4,000 the compensation to which Louise Philippe is entitled for hurt feelings.

3- Complaint of Marie-Jeanne Raphaël

(a) Material damages for the respondent's refusal to allow Marie-Jeanne Raphaël to live on the Reserve in her son's home

Since she was forced to leave her son's home at the request of the respondent and because of the moratorium, Marie-Jeanne Raphaël requested that the respondent pay the cost of her housing, electricity and heating from October 1, 1986 to December 31, 1989 as well as the moving and telephone installation costs.

The respondent submits that the complainant is not entitled to any material damages since she did not intend to live permanently with her son Jean-Marc when she was asked to stop living in his house.

In support of its argument, the Band Council stated that Jean-Marc Raphaël had welcomed his mother to his home with five (5) children because his wife had left him to return to live with her parents at OBEDJIWAN and this had had the effect of reducing the monthly welfare payments he received. If he let his mother live with him, she could have helped him meet his obligations.

Furthermore, although the complainant was asked by Danielle Paul, the respondent's Housing Officer, to leave her son's residence, no real action was taken to evict her.

Finally, the respondent argued that it was not plausible that the complainant and seven (7) children as well as her son with his wife and three (3) children could all live in a house with only four (4) bedrooms.

The preponderance of the evidence is to the effect that in the late summer of 1986 the complainant found herself with nowhere to live and her son took her into his home, on the one hand to provide her with housing and, on the other hand, because he was preparing to leave his home with his family for a period of approximately six to eight months to go hunting, while his mother took care of his home. Thus, the complainant could live in her son's home at the very least during the hunting period and he welcomed her there free of charge.

A few weeks after he left to go hunting, he had to return with his family for personal reasons. He stated that he was prepared to keep his mother and the children who accompanied her, despite the respondent's request that she leave.

Although it may seem unusual to some people that 10 or 12 persons would live in a house, Jean-Marc Raphaël who had grown up living with his brothers, sisters, parents and grandparents saw nothing abnormal in this. (Volume 11, pages 1695-1696)

[TRANSLATION]
Q. So if we take 5 brothers and sisters plus your mother, that makes 6 persons, plus yourselves, you were about 10 or 11 persons in your house. Do you agree with me that this was not a house that was made for 10 persons? Ten persons may be a temporary situation but not a permanent situation?

A. You can see that every day at Pointe-Bleue ... 10 or 12 persons.

Q. But do you agree with me in saying, Mr Raphaël, that this was not, in quotation marks, a normal, usual, usual situation? I mean by that for you with your mother living in the house, it was primarily to be on the look-out, but it was a situation that was not permanent?

A. She was outside. I am not going to leave my mother outside ...

The complainant herself stated that she could easily adapt to living with her children in the basement of her son's residence and that he had said to her that she could always live with him. The evidence shows that it is an aboriginal custom to share one's residence with one's brothers and sisters as well as one's parents and grandparents.

The evidence also shows that the complainant wished to live on the Pointe-Bleue Reserve. When she had to leave her residence in St-Prime, she came to live on the Pointe-Bleue Reserve with the very firm intention of remaining there. (Volume 12, pages 1763 to 1764)

[TRANSLATION]
Q. Is it correct to say, Mrs Raphaël, that the primary reason why you left was because of the repairs in that house?

A. Because he sold the house.

Q. He sold it. Was there also a question of repairs that came into play?

A. Perhaps that was why they made me get out, in order to repair it.

Q. OK. But could you have continued to be a tenant at that place?

A. No.

Q. Why?

A. Because I always wanted to stay at Pointe-Bleue, in my community.

Q. Oh, OK. I understand that you no longer wanted to live in Saint-Prime.

A. I never wanted to live there anyway.

Q. But Mr Simard, would he have agreed, Mr Simard, to your remaining in the house any longer?

A. No.

Q. Why?

A. Because of the repairs.

Q. And could you have come back after the repairs?

A. No.

Q. Why?

A. Because I already wanted to live at ... I already wanted to live at Pointe-Bleue.

After her forced departure from her son's home, she increased her applications to the respondent for inclusion in the Social Housing Program so that she could return to live on the Reserve. (Exhibits C-24-26) Her wish was granted by the Band Council on April 11, 1989 (Exhibit I-10) and she came to live on the Reserve in December 1989 in a house belonging to the respondent.

The Tribunal finds that Marie-Jeanne Raphaël intended to live permanently with her son if she had not been required by the respondent to leave his residence.

Consequently, the complainant is justified in claiming the expenditures she had to incur in order to find accommodation with her family from the time she left the home of her son Jean-Marc in October 1986 until she returned to the Reserve in December 1989 to a residence belonging to the respondent, namely the cost of housing and related expenditures. The parties admitted the following expenditures: (Volume 11, pages 1666 and 1667)

- Electricity and heating, rent St-Prime and St-Félicien (October

1986 to December 1989) $2,357.97

- Moving expenses $ 700.00

- Telephone installation expenses $ 100.00

- Long-distance charges and travel to find accommodation $ 250.00

Total $3,407.97

Furthermore, the complainant is justified in claiming the cost of her rent for this period, the details of which are as follows: (Exhibit C-22)

- October 1, 1986 to September 1, 1987 $2,750.00
- September 1, 1987 to June 30, 1988 $ 830.00
- July 1, 1988 to June 30, 1989 $1,152.00
- July 1, 1989 to December 31, 1989 $ 642.00

Total $5,374.00

The Tribunal finds that the respondent must pay Marie-Jeanne Raphaël a sum of $8,781,97 for the damage she suffered as a result of its refusal to allow her, because of the moratorium, to continue to reside in the house occupied by her son Jean-Marc Raphaël on the Pointe-Bleue Reserve.

(b) Damages for hurt feelings

The evidence showed that the complainant lived the traditional life of the Montagnais. She grew up in the bush without receiving an education. However, she acquired knowledge and experience of hunting and trapping as well as life in the bush. For her, living in a tent in the bush and subsisting on the products of hunting and trapping were her normal way of life which continued even after her marriage and until her children had reached school age. Then she returned to settle on the Reserve to enable her children to obtain an education. She continued to go into the bush frequently in the company of her children whom she taught the arts of hunting and trapping as well as the way of life in the bush.

Since life in the bush was of primary importance for her and she was removed from it by her departure from the Reserve, she expressed her feelings as follows: (Volume 12, page 1722)

[TRANSLATION]
Do you know how I felt when I was kicked out? It was like being something that's thrown on the ground. There were also my children. However, my parents, my father and also my mother never threw me out.

Because of her lack of education, she expressed herself in the Montagnais language and she succeeded nevertheless in explaining, with the help of an interpreter, the hurt and inconvenience she was caused by her departure from the Reserve. (Volume 12, pages 1726-1727)

[TRANSLATION]

Even though from time to time at Pointe-Bleue, when I went there, it was as if I was doing so secretly because I had been sent away. But I went there anyway.

After it had done that to me, I often went up into the bush with my parents anyway. My parents always accepted me as I was. They always loved me all the same ... Even though I was living outside the Reserve, my heart was not there. My heart was at Pointe-Bleue and also in the bush. However, I did not want my children to stop going to school for all that. It is difficult to go through what I have gone through, especially when you have a lot of children.

The Tribunal feels that the complainant is entitled to compensation for hurt feelings, which it sets at a sum of $3,500.

4- Complaint of Nellie Cleary

(a) Material damages following the respondent's refusal to give her a house

The evidence showed that the complainant had applied to the Band Council for a grant in order to build a house on a lot that she owned on the approaches to Lac St-Jean and her application was turned down because of the moratorium.

For the same reasons as were given in the case of Louise Philippe, the Tribunal acknowledges that the complainant would have been able to benefit from the funding program available in DIAND for women who had regained their status if the respondent had applied for it and she could have obtained a house from the respondent under its Social Housing Assistance Program.

At the time of her application to the Band Council for financial assistance, she had a sum of $25,000, part of which, namely $5,000 to $6,000, was devoted to the unfinished construction of a building called a "shed" but which was in fact a cottage, given its dimensions. She spent her savings and subsequently received welfare benefits.

If she had obtained financial assistance from the respondent, she claims that she could have kept her savings. She accordingly claimed a sum of $20,000 from the respondent.

The evidence showed that the complainant lost her employment at the "Le Refuge" Crisis Centre on July 4, 1986. On July 8, 1986 the respondent informed the tenants in its housing that a person who was not a member of the Band was not authorized to occupy the said housing units.

When questioned on this subject, the complainant stated: (Volume 9, page 207)

[TRANSLATION]

... I did not stay with him all the time. I could not, because I was on welfare. [Tribunal's emphasis.]

Consequently, prior to her application on January 15, 1987 for financial assistance to build a house (Exhibit C-1 - Tab D - Document 2) she had kept her savings and was already receiving welfare benefits. It is accordingly reasonable to believe that the respondent's refusal to give her a house did not force the complainant to dispose of her savings in order to become eligible for welfare benefits.

However, when she made her application, Nellie Cleary was living in a Band Council house at a monthly cost of $120 and if she had been accepted into the Social Housing Program, it would have cost her $200 per month.

Consequently, the complainant did not suffer any material damage following the respondent's refusal to act on the application for a building permit that she had made on January 15, 1987.

(b) Damages for hurt feelings

Nellie Cleary was born on the Pointe-Bleue Reserve, which she left at the age of fifteen, and she dreamt of ending her days in her own house near the lake, She stated the following: (Volume 9, pages 1209, 1210 and 1211)

[TRANSLATION]
The Chairman: Explain to me, Madam, when you said "I dreamt about it so much", why did you dream about it.

The witness: Well, Mr Chairman, beside the water, we were brought up there, we were, then I always ... it was always a dream for me. You know that if I had ... that has always been my dream. Even when I arrived at Pointe-Bleue, there was a little bit of racism, as is well known. They said: "This is not your place, you are not an Indian" ... people who had seen me growing up told me that. Well, I said: "Listen." I said: "Me, I am like an old salmon; I swim upstream and I have come to die at home." That was my home, Pointe-Bleue.

It was my intention, after I had purchased that lot, it was my future home. It was for ... I don't know, beside the lake and all that. You know that I have always dreamt of that. Moreover, I said to Danielle the other day, I asked her ... because there, I am living in the 31 units, but I live in the back. I said: "There, there should be someone else who sees the trees instead of me. Before I die, I should like to see the lake." I asked her for a place at the front. I am still waiting. I know she'll give it to me.

The Chairman: When you were growing up, Madam, you said that you grew up at Pointe-Bleue.

The witness: Yes.

The Chairman: Did you grow up with a view over the lake ...

The witness: Oh, yes, yes.

The Chairman: ... from where you lived when you were young?

The witness: Yes, we just had to cross the road, then the lake, you could see it well ... certainly you could see it. The lake, it was ... I remember when I was young, then there were great storms; we used to go to the edge of the rock to watch them. That was always our life, my life. I have always loved ... I can tell you, after I finished building the shed, I went there with my sister to hear the rain falling on our canvas cover. I had been brought up like that, I had. There is nothing that I find more beautiful than that.

Oh yes, it was really my dream. That means that there, I hope that I shall see the lake at least a little, still.

And then my daughter, she is going to have a little house built... that is to say that she will finish it in order to make a little house for herself. Then I put a small house trailer on her lot and then after that I shall be able to go there.

The complainant was personally affected by not being able to go and live near the lake where she had grown up and the Tribunal finds that the complainant is entitled to compensation of $3,000 for hurt feelings.

(c) Letter of apology

The complainants requested that the respondent be ordered to send them a letter of apology, given the discrimination of which they were the victims as a result of the moratorium, and that this letter of apology, in both the French and the Montagnais languages, be sent to all the homes on the Pointe-Bleue Reserve and posted in public places for a period of thirty (30) days.

The evidence showed that when the Band Council decided to implement a moratorium on Bill C-31, it did not act in bad faith and with the very firm and even malicious intention of depriving the complainants in particular of the services it offered to its members.

Rather, it acted out of fear of the impact of Bill C-31 on the community as a whole and, in its view, in the community's best interests.

Mr Jacques Cleary explained in his testimony, which we find credible: (Volume 15, page 2305)

The witness: Also it is possible to add an interpretation to the effect that the moratorium could have been

seen as an act against those who had newly regained their status.

The Chairman: Exactly.

The witness: ... whereas -- in any event in my personal opinion -- if that was the case, those were isolated cases, I think. But generally, in my view, it was not an act against those who had newly regained their status, it was an act that was carried out at a particular time in relation to a situation

that was already not easy in terms of the unknown and we wished to know before doing anything. Personally, that is my interpretation of the moratorium.

It emerged from the testimony as a whole that the complainants were injured, provoked and humiliated by the actions and deeds of the members of the community and not solely by the members of the Band Council who held office at that time.

To require the respondent to send a letter of apology to all the members of the community and to post it publicly for events that occurred between eight and ten years ago while peace now prevails on the Pointe-Bleue Reserve with respect to this controversy resulting from the enactment of Bill C-31 would not have the effect of repairing the harm that the complainants suffered because of the moratorium but rather would run the risk of reviving this controversy among the members of the community with respect to the C-31 women, especially since the members of the Band Council, with one exception, are no longer the same.

Consequently, the Tribunal dismisses the request for a letter of apology to be sent by the respondent to the complainants.

(d) Interest

The complainants properly requested that the respondent pay interest on the compensation that the Tribunal might order it to pay. According to the authorities on the subject, the calculation of interest must begin on the date on which the harm suffered by the complainants began.

Given the many fluctuations in the Bank of Canada interest rate since 1986, the Tribunal sets the interest rate to be paid on the compensation that the respondent is ordered to pay to the complainants at 9 per cent per annum.

CONCLUSION

GIVEN THE FACTS SUBMITTED AT THE HEARING, THE TRIBUNAL:

- ALLOWS the complaint of Marthe Gill;

- DECLARES that by refusing to provide Marthe Gill, who was then a member of the Band after marrying someone who was not a member of the Band prior to April 17, 1985, with a house and a hunting permit and to allow her to stand for election to the Membership Code Committee, the Montagnais du Lac St-Jean Council engaged in discriminatory practices against her based on a prohibited ground of discrimination, in contravention of the provisions of sections 3 and 5 of the Canadian Human Rights Act;

- ORDERS the Montagnais du Lac St-Jean Council to pay Marthe Gill a sum of $5,000 in damages for hurt feelings, plus interest at the rate of 9 per cent per year from February 12, 1986;

- ALLOWS the complaint of Louise Philippe in part;

- DECLARES that by refusing to provide Louise Philippe, who was then a member of the Band after marrying someone who was not a member of the Band prior to April 17, 1985, with a house and to allow her to take a Montagnais language course, the Montagnais du Lac St-Jean Council engaged in discriminatory practices against her based on sex and marital status and based on a prohibited ground of discrimination, in contravention of the provisions of sections 3 and 5 of the Canadian Human Rights Act;

- ORDERS the Montagnais du Lac Saint-Jean Council to pay Louise Philippe compensation of $2,100 in material damages plus interest at the rate of 9 per cent per year from February 12, 1986;

- ORDERS the Montagnais du Lac Saint-Jean Council to give Louise Philippe priority in taking a Montagnais language course as soon as it offers this service to Band members again and under the same conditions of eligibility as any other candidate registered in this language course;

- ORDERS the Montagnais du Lac Saint-Jean Council to pay Louise Philippe compensation of $4,000 in damages for hurt feelings plus interest at the rate of 9 per cent per year from February 12, 1986;

- DISMISSES the complaint of Louise Philippe alleging that the Montagnais du Lac Saint-Jean Band Council has from 1986 to the present time used criteria for selecting candidates for the housing program that are discriminatory since no points have been awarded for the spouse or child of a Montagnais woman who has regained her status as

an Indian and as a member of the Band following the enactment of Bill C-31;

- ALLOWS in part the complaint of Marie-Jeanne Raphaël;

- DECLARES that by refusing to allow Marie-Jeanne Raphaël, who was then a member of the Band after marrying someone who was not a member of the Band prior to April 17, 1985, the Montagnais du Lac Saint-Jean

Council engaged in discriminatory practices against her based on a prohibited ground of discrimination, in contravention of the provisions of sections 3 and 5 of the Canadian Human Rights Act;

- ORDERS the Montagnais du Lac Saint-Jean Council to pay Marie-Jeanne Raphaël compensation of $8,781.97 in material damages plus interest at the rate of 9 per cent per year from October 1, 1986;

- ORDERS the Montagnais du Lac St-Jean Council to pay Marie-Jeanne Raphaël compensation of $3,500 in damages for hurt feelings plus interest at the rate of 9 per cent per year from October 1, 1986;

- DISMISSES the complaint of Marie-Jeanne Raphaël alleging that the Montagnais du Lac St-Jean Council refused to admit her children to the Reserve School and required her to pay for their transportation to attend school outside the Reserve;

- ALLOWS the complaint of Nellie Cleary in part;

- DECLARES that by refusing to provide a house to Nellie Cleary, who was then a member of the Band after marrying someone who was not a member of the Band prior to April 17, 1985, the Montagnais du Lac St-Jean Council engaged in discriminatory practices against her based on a prohibited ground of discrimination, in contravention of the provisions of sections 3 and 5 of the Canadian Human Rights Act;

- ORDERS the Montagnais du Lac Saint-Jean Council to pay Nellie Cleary compensation of $3,000 in damages for hurt feelings plus interest at the rate of 9 per cent per year from January 29, 1987;

- DISMISSES the complaint of Nellie Cleary alleging that the Band Council refused to continue her employment at the "Le Refuge" Crisis Centre and to let her partner continue to share with her the residence belonging to the Band Council that she occupied.

(signed)
ROGER DOYON, Chairperson

(signed)
ANDRÉE MARIER, Tribunal member

(signed)
GRÉGOIRE MPUTU-BIJIMINE, Tribunal member
v