T.D. 14/95
Decision rendered on October 11, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DARLENE MACNUTT
LOLITA KNOCKWOOD
JOHN B. PICTOU JR.

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CHIEF AND COUNCIL OF THE SHUBENACADIE INDIAN BAND

Respondents

- and -

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Interested Party

DECISION OF TRIBUNAL

TRIBUNAL: Gillian D. Butler, Chairperson
Marie Crooker, Member
Kent Morris, Member

APPEARANCES: Margaret Rose Jamieson, Counsel for the Canadian Human Rights Commission

David English, Counsel for the Respondents

Michael F. Donovan, Counsel for the Interested Party

DATES AND LOCATION OF HEARING: August 23 to 25, 1994
August 30 to September 2, 1994
September 19 to 23 and 26 to 28, 1994
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January 11 to 13, 1995
HALIFAX, NOVA SCOTIA

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INTRODUCTION

The complaints of Darlene MacNutt, Lolita Knockwood and John B. Pictou, Jr. together with the complaint of James S. Pictou II were originally set to be heard by a Human Rights Tribunal sitting in Truro, in the Province of Nova Scotia on the 23rd day of August, 1994. At the opening of the hearing, on the request of counsel for the Commission, and with the consent of all other parties, the Tribunal granted an Order adjourning the complaint of James S. Pictou II, sine die.

On the same date, also with the consent of the parties, the Tribunal granted Interested Party status to the Department of Indian Affairs and Northern Development (Canada), referred to hereinafter as DIAND, with full right to participate in the hearing, call witnesses, cross-examine witnesses, and present argument.

THE COMPLAINTS

Darlene MacNutt

On April 24, 1987, Darlene Copage, a native, member of the Shubenacadie Indian Band, married Gordon MacNutt (a caucasian) with whom she had lived on the Shubenacadie Reserve since 1980. On May 13, 1987 Darlene MacNutt attended at the Band Office, met with Elizabeth Michael, (Social Development Administrator) and advised her of her marriage. She inquired whether Mr. Gordon MacNutt qualified for social assistance benefits from the Reserve. Mrs. Michael's notes indicate that she made the appropriate inquiries of DIAND and advised the Chief and Council of her interpretation of the Native Community Services Guidelines, Policies and Procedures. In her opinion, these guidelines enabled Mr. MacNutt to qualify but the Chief (John Knockwood) and Council declined benefits and Mrs. Michael so informed Mrs. MacNutt (See Exhibit A-2, Page 370). In declining benefits, Chief John Knockwood did not consult with DIAND but one of his Councillors, Alan

Knockwood, testified that Council had directed the Band manager check with DIAND. No minutes are available to confirm the accuracy of this evidence.

From 1987 to 1994, Mrs. MacNutt included her husband on her annual applications for social assistance benefits presented to the Indian Band (see Exhibit A-2, pages 375, 368, 344, 328, 322, 318 and 303 and Exhibit A-4).In each case, she claimed she was refused benefits for her husband on the basis that "Indian moneys" were for Indian people. Although evidence on this point differed, the Tribunal is satisfied that the position expressed by former Chief Julian at a later hearing on August 7, 1991 reflects the official position of Band and Council from 1987 to 1994. At Exhibit A-12, Tab 7, page 35, former Chief Julian is quoted as saying "Chief and Council denied assistance by way of the fact that Gordon was non-status ....". The Tribunal recognizes also that (at least in 1991) Council also "voiced concerns over Gordon's ability to work" and their belief he had "income from other sources (bootlegging)."

During the same period, Mr. Gordon MacNutt applied to the Department of Community Services for the Province of Nova Scotia through the Municipality of East Hants for welfare benefits. Although records of his efforts in this regard are not totally complete because records prior to 1992 were destroyed, the testimony of Mr. James Ferris, case worker, confirms the evidence of Mr. MacNutt in this regard. All applications were refused for two reasons. Firstly, because Mr. Gordon MacNutt was residing on an Indian Reserve and the unwritten policy of the Department of Community Services was that the Reserve should be responsible for welfare benefits of all individuals residing thereon. This policy is confirmed in a letter to Mr. Ferris from the Department of Community Services dated August 23, 1994 (see HR-1). Secondly, because the amount of benefits being received by Mrs. Darlene MacNutt, disqualified Mr. MacNutt. In other words, the family did not have a budget deficit.

For a one year period between April, 1990 and April 1991, Mr. Gordon MacNutt and one of the family's three children (namely Rachel, aged 4) resided in Dartmouth and drew welfare benefits from the Department of Community Services there. No documents relevant to his application were presented to the Tribunal.

On June 26, 1991 Darlene MacNutt appealed the decision of the Shubenacadie Indian Band not to pay welfare benefits for her husband (see Exhibit A-1, page 6), and on August 8th, 1991, DIAND's Social Services Appeal Board Decision was given in Mr. Gordon MacNutt's favour (See Exhibit A-1, page

7). Notwithstanding that the Native Community Services Guidelines provides that the decision of such an Appeal Board is final, the Chief and Council refused to act upon the Decision, (See Exhibit A-1, page 257).

On August 26, 1991, Darlene MacNutt filed her original complaint with the Canadianl Human Rights Commission claiming discrimination in the provision of a service normally available to the public (social assistance) on the basis of her marital status and sex insofar as she was married to a caucasian male. (See Exhibit A-1, Tab A, Page 1). Following the lodging of her complaint, the Tribunal learned that there was a meeting held on the Shubenacadie Indian Reserve as part of an "investigation" by the Canadian Human Rights Commission. Subsequently, on October 25th, 1991 another meeting was held on the Reserve which the Tribunal accepts was part of the conciliation process. Mrs. MacNutt testified that it was clear following the meetings that no settlement was possible and that a Tribunal would be appointed. On November 21, 1991 Darlene MacNutt amended her complaint with the Canadian Human Rights Commission (see Exhibit A-1, Tab B, Page 3).

On August 24, 1992 Mr. Gordon MacNutt filed another application for municipal assistance with Mr. James Ferris at the Enfield office of the Municipality of East Hants. (See Exhibit A-1, pages 149-150). Once again, Mr. Ferris concluded that Mr. MacNutt was ineligible and he provided Mr. MacNutt with an appeal card explaining the availability of an appeal procedure. The next meeting between Mr. MacNutt and Mr. Ferris occurred on August 20, 1993 when Mr. Ferris once again advised Mr. MacNutt of the Department's policy, the lack of a budget deficit, and the availability of an appeal procedure.

In September, 1993 Gordon MacNutt appealed the Decision of the Department of Community Services (Municipality of East Hants) which refused him benefits (See Exhibit A-1, pages 154-159). At a hearing held November 23, 1993 the Appeal Board dismissed Mr. MacNutt's appeal citing as its two reasons that Mr. MacNutt should be covered by the Social Assistance benefits available on the Shubenacadie Reserve and as a second reason, the lack of a budget deficit.

In the communication of the Decision to Mr. MacNutt, the Department of Community Services indicated its understanding that DIAND recognized its obligation to pay benefits to Mr. MacNutt and that the difficulty arose with the Chief and Council's refusal to make these payments.

John B. Pictou, Jr.

In January of 1990 the Complainant, John B. Pictou, Jr. arrived on the Shubenacadie Indian Reserve from the state of California, U.S.A. where he testified he had resided all his life. He was, however, a native and a

member of the Shubenacadie Indian Band as were his parents and brother, James S. Pictou II.

In March of 1990 Mr. Pictou's daughter, Anna, aged 2, together with his parents, joined him on the Reserve. In applications for social assistance filed with the Band Office in this period, Mr. Pictou filed as a single person and Anna was put on his parents' claim for benefits.

In July of 1990, Mr. Pictou's common-law wife, Christine, arrived on the Reserve (also from California) and they were married on the Reserve on July 29, 1990. All applications for social assistance benefits of relevance to the Tribunal thereafter, included Christine Pictou and their one child (subsequently two children) (See Exhibit A-2, pages 411, 407 and 395).

Benefits for Christine Pictou were approved by Chief Reg Maloney and also by Chief and Council in a regular meeting. Christine Pictou was included in the budget for John B. Pictou thereafter until April, 1992. In addition, during the period August 9, 1990 - April 1992, all special needs' requests presented to the Band for medical transportation costs and other, were honoured (See Exhibit A-2, pages 399 and 400).

In April, 1992 on a bi-weekly Thursday when Mr. Pictou would regularly have attended at the Band Office to obtain his social assistance cheque, he realized the cheque had been reduced. Soon after he returned to the Band Office and spoke to Ms. Elizabeth Michael who referred him to Chief Reg Maloney. In the conversation which followed, Mr. Pictou was advised that Christine Pictou had been removed from his budget because she was a non-native.

Mr. Pictou testified that he questioned the Band's Decision because they had been paying benefits on Christine's behalf for almost 2 years and further that the family had not been given the benefit of any notice of the Band's Decision. In this conversation it was agreed that one more cheque (including Christine Pictou) would be issued to the family and thereafter the cheques would be in the reduced amount.

Of some interest to the Tribunal, Mr. Pictou also testified that on his arrival in 1990 from the state of California he had certain immigration concerns which he raised with Chief Reg Maloney. In the conversation which took place Mr. John B. Pictou Jr. was assured that Christine would not be removed from the Reserve by immigration Officials. Mr. Pictou took from this that the Band had elected to treat Christine as a Band member.

Following the April, 1992 conversation with Chief Reg Maloney concerning the removal of Christine Pictou from Mr. Pictou's budget, Mr. Pictou was advised of his right to appeal to the DIAND Social Services Appeal Board. At this hearing which was held in Truro on July 14, 1992 no one attended on behalf of the Shubenacadie Indian Band (See Exhibit A-2, page 385). Similar to the Decision given in the case of Gordon MacNutt, the Pictou appeal was successful and Christine Pictou was ordered to be placed back on Mr. Pictou's budget effective the date of his appeal (See Exhibit A-1, page 171). Nevertheless, Social Assistance benefits for Christine Pictou have been refused since that date on the basis that she is "white".

Mr. Pictou's only attempt at collecting Social Assistance benefits for his wife through the Department of Social Services for the Province of Nova Scotia was a telephone call placed some time after April, 1992 on which occasion he was advised that since Christine resided on the Reserve the Department could not assist the family.

All subsequent applications for Social Assistance benefits filed with the Reserve have included Christine Pictou as a dependent but no benefits have been paid. In addition, sometime after April of 1992 when a request for drugs was presented to the local pharmacy, the family was advised that Christine Pictou's name no longer appeared on the list of individuals covered by the plan and therefore the cost of her drugs would not be paid.

Notwithstanding the foregoing, Mr. Pictou advised the Tribunal that Mr. Peter Julien (Acting Chief) had increased Mr. Pictou's social assistance cheque by the sum of $40.00 (from $367.00 to $407.22) for compassionate reasons between 1991 and 1992 (See Exhibit A-2, pages 376, 422 and 423). It was later explained by Mrs. Michael that Mr. Pictou was mistaken on this point. The overpayment resulted from an error and it was decided between

one of the Councillors (Richard Sack), the Band Manager and Elizabeth Michael that there would be no recovery of this overpayment.

Lolita Knockwood

In March of 1985 Lolita Knockwood moved from her Dominion Street, Truro address to the Shubenacadie Indian Reserve to take up residence with her common-law husband, Garfield Knockwood. Lolita and Garfield Knockwood were married on the Reserve on August 24, 1985 and have lived on the Reserve since that date. In the intervening period, they had three children, Megan born in 1987, Caitlin born in 1989 and Michael born in 1993. Mr. Garfield Knockwood is a native and a member of the Shubenacadie Indian Band. All

three children are Band members under Mr. Knockwood's number until they reach age 18 when they will receive their own Band number. Lolita Knockwood, however, is a caucasian.

Lolita Knockwood has Grade XII education and is a softly spoken and extremely articulate young woman. Her husband is a shy and unassuming young man with a very strong work history in jobs that offered him either seasonal or part-time employment notwithstanding some ill health associated primarily with diabetes. Without any hesitation, the Tribunal accepts the evidence of Mr. and Mrs. Knockwood that they have made valiant efforts to escape the welfare system believing that there is a much better way to raise their family. It is not by virtue of any lack of effort on the Knockwood's behalf that the employment opportunities which Mr. Knockwood has sought as a helicopter pilot, in tractor trailer operation, the police/security field, fishing and hunting outfitting store, ambulance attendant, and other have been unable to give him the economic self sufficiency which he seeks.

On August 29, 1985 Garfield Knockwood presented the first of his applications for social assistance including his wife. In fact this application represented the first application ever presented to the Shubenacadie Indian Band for social assistance benefits for a non-Indian spouse. As explained by Mrs. Michael, prior to Bill C-31 (effective July, 1985) caucasian female spouses of Indians had become band members so there would not have been any cases in this category prior to July, 1985.

Because the Band Manager (Doreen Knockwood) was Garfield Knockwood's sister, Mrs. Michael brought the Application to the Chief and Council (then, Chief Peter Julian) for approval and it was granted. This evidence is denied by Mr. Julian but the Tribunal accepts Elizabeth Michael's evidence on this point for two reasons. Firstly, former Chief Julian could neither recall Council considering Darlene MacNutt's Application for her husband in the period 1988 - 1990 nor the Application of John Pictou for his wife in 1990. However, another Councillor, Alan Knockwood confirms the discussions at Council. Secondly, Mr. Julian's evidence, generally, was vague and confused in stark contrast to that of Mrs. Michael which, as stated earlier, was presented in a straightforward and credible manner. Mrs. Knockwood was included in the budget and benefits were paid on behalf of Garfield and Lolita Knockwood until Mr. Knockwood obtained employment on September 2, 1985. On each subsequent application for social assistance benefits (see Exhibit A-2, Tab Q, pages 415-488), the Chief and Council approved Mrs. Knockwood on Garfield Knockwood's budgets. The milk and juice program on the Reserve for pregnant women was available to Lolita Knockwood for her pregnancies for Megan and Caitlin and special needs requests (for furnace repairs, a chrome set and washer, etc) were all

approved by the Band Manager on recommendation of Mrs. Michael. On the next application for social assistance benefits in September, 1989, Lolita

Knockwood was once again included and benefits remained payable on her behalf until 1992.

On or about April 30, 1992 the family discovered that their welfare cheque had been reduced and rather than confront Elizabeth Michael in anger, the family elected to talk the matter over themselves and then stop back at her office. Presumably in the meantime the issue of lack of notice had been raised between Mr. John Pictou and Chief Reg Maloney and therefore on attending at Elizabeth Michael's office, an additional cheque in the amount of $60.12 was provided to the family to represent "notice". However, they were advised that thereafter Lolita Knockwood would not be included on the family's budget for the purposes of social assistance benefits.

A few days later, the Knockwoods learned that an Appeal was available to them and they took advantage of this process. This resulted in a hearing in Truro on July 14, 1992 which, similar to the cases of Mr. Pictou and Mr. MacNutt, was successful. Notwithstanding the letter which was received from the DIAND (which Mrs. Knockwood testified gave her some relief and caused her to believe that the matter would be rectified), benefits have still not been payable on behalf of Lolita Knockwood. Further, on Mrs. Knockwood's pregnancy for Michael (born November 25, 1993) she was denied access to the milk and juice program on the Reserve.

The Knockwood's only attempt at obtaining social assistance benefits from the Department of Social Services, Province of Nova Scotia was a telephone call which they made to an office in the Town of Truro which referred the family to the Winsor office. Consistent with other testimony heard by the Tribunal from Mr. James Ferris, the Winsor office advised Mrs. Knockwood that since she was residing on the Reserve her application for benefits must be presented at the Reserve.

On November 24, 1992 Lolita Knockwood filed a complaint with the Canadian Human Rights Commission because the Chief and Council of the Shubenacadie Indian Band would not honour the results of an Appeal Tribunal requiring them to include her in the budget of Garfield Knockwood in claims for Social Assistance benefits (See Exhibit A-1, Tab L).

NOVA SCOTIA'S SOCIAL ASSISTANCE PROGRAM

Evidence concerning Nova Scotia's Social Assistance Program was received from Mr. James Ferris, a case worker for the Municipality of East Hants, employed with the Department of Community Services for the Province of Nova Scotia. He testified that it was his responsibility to distribute social assistance benefits to individuals who qualified within the Municipality primarily under the Social Assistance Act, but if appropriate, also under the Family Benefits Act.

Mr. Ferris explained the two tiered system of social assistance available in the Province of Nova Scotia. On the one hand municipal assistance under the Social Assistance Act is designed for emergency short term assistance whereas provincial assistance under the Family Benefits Act is designed for longer term benefits usually restricted to two types of cases, separated adults with dependents and/or disabled adults.

It is the benefits payable under the Social Assistance Act which is of interest to these complaints.

Mr. Ferris further explained that each municipal unit sets its own policy

and guidelines in relation to benefits payable. For example, Mr. Ferris' office is in the Town of Winsor but his caseload covers five separate municipalities each with their own policy on benefits which policy is submitted and pre-approved by both the municipal council and the Province of Nova Scotia.

In the case of the Municipality of East Hants, the policy in question was presented to the Tribunal as Exhibit A-1, Tab G. In addition, he identified the manual prepared by the Province of Nova Scotia and containing program standards and legislation which together explain what is required in order to qualify for municipal social assistance benefits (See Exhibit A-1, Tab H).

A review of the guidelines and manual allows the Tribunal to conclude the following:

1. In order to receive benefits from the Municipality of East Hants, an individual must be resident in that municipality for at least two nights (Exhibit A-1, Page 33).

2. In addition, the individual must be "in need" in accordance with the Social Assistance Act (See Exhibit A-1, Page 58) with need defined by the Social Services Committee of the Municipality. In the case of the

Municipality of East Hants, the definition of "in need" contains some flexibility (See Exhibit A-1, Page 96, Paragraph 2.3.1).

3. The guidelines enable the municipality to pay benefits to status Indians who are not residing on the Reserve (See Exhibit A-1, Page 97, Paragraph 2.3.2).

4. Neither the guidelines, the legislation, nor the manual, contains any reference to the practice which Mr. Ferris claimed had developed, namely that municipal benefits were not payable to non natives residing on a Reserve.

Notwithstanding the foregoing, Mr. Ferris refused benefits to Gordon MacNutt on each of his applications in 1987, 1988, 1991, 1992 and 1993. As previously indicated, an Appeal was launched and a decision given November 23, 1993, dismissing the Appeal on the basis that Mr. MacNutt's application should be presented to the Chief and Council of the Shubenacadie Indian Band (See Exhibit A-1, Page 153 and 157).

The Tribunal questioned Mr. Ferris with respect to Section 25(1) of the Social Assistance Act (See Exhibit A-1) which permits a municipality to seek reimbursement from another municipal unit for benefits paid to an individual temporarily residing in the municipality of East Hants. Mr. Ferris admitted that the Department's unwritten policy of denying benefits to non natives living on Indian Reserves effectively meant that the Department of Community Services was treating an Indian Reserve as a separate "municipal unit" for the purposes of social assistance benefits. Presumably therefore, under the guidelines it would have been possible for Mr. Ferris to advance benefits to either Mr. MacNutt, Lolita Knockwood, or John Pictou and bill these benefits back to DIAND as the responsibility of a Reserve. However, it was Mr. Ferris' evidence that he did not do so because this would be in contravention of an unwritten departmental policy, although not in contravention of Section 25 of the Social Assistance Act.

One final point of interest follows from Mr. Ferris' testimony. When questioned by the Tribunal on the quantum of social assistance benefits it

became clear that the benefits payable through the band office on the Shubenacadie Indian Reserve were far in excess of those payable through the municipality of East Hants. For example, in August, 1993 on the Shubenacadie Reserve, Mrs. MacNutt and her three children received $683.29 per month for food, clothing, personal allowance, household supplement and transportation. From the Department of Community Services, Municipality of

East Hants, Darlene MacNutt would only have qualified to receive $400.00 per month representing food and miscellaneous personal essentials (See Exhibit A-1, page 162).In addition, the Municipality would cover transportation for medical reasons, for job assistance, and repatriation approved by the Province of Nova Scotia.

The differences in rates for food and miscellaneous personal essentials and the Reserve's policy to pay extra funds for household supplements and transportation (categories not recognized by the Department of Community Services) could only be explained by Elizabeth Michael by reference to the Guidelines which provide as follows:

"1.00" The Department of Indian Affairs and Northern Development (DIAND) has no specific legislation enabling it to provide a Social Assistance program. However, the Federal Government believes that Indian people should benefit from all social services programs available to Canadian citizens. Because certain programs are not available to Native communities, and in order to meet Canada's special obligations to status Indians, DIAND has implemented a Social Assistance Program. The resources to provide this service are secured each year through the Canadian Parliament. Treasury Board Minute No. 627879, dated July 16, 1964, authorizes DIAND to adopt provincial and municipal welfare rates and conditions in the administration of welfare programs.

The DIAND Social Assistance Program adheres to a framework of National Standards and is based on the Nova Scotia provincial Social Assistance Rates and Conditions modified to meet special circumstances on Reserve. The rates payable will be adjusted when provincial Social Assistance rates are announced. This enables Indian individuals and families to receive benefits which compare to non-Indians living in similar circumstances. The provision of Social Assistance to Indian reserve communities is complimented by other government sectors (i.e. CEIC, NH & W, DIAND housing, education and economic development)."

(See Exhibit A-1, page 187)

THE FEDERAL GOVERNMENT'S SOCIAL ASSISTANCE PROGRAM FOR RESERVES

Elizabeth Michael

Elizabeth Michael is the Social Development Administrator for the Shubenacadie Indian Band and has been in this position or its predecessor position for 23 years. She is a native, a member of the Shubenacadie Indian Band and has resided on the Reserve all her life.

The primary responsibility of the Social Development Administrator is to administer the Native Community Services Guidelines, Policies and Procedures prepared by DIAND. These Guidelines appear as Exhibit A-1, pages 181 - 302 and were the subject of detailed and lengthy testimony by Mrs. Michael.

On the Shubenacadie Indian Reserve, Mrs. Michael's case load consists of 425 families and Mrs. Michael maintains individual files for each of her clients. In each file appears the standard application (presented annually by the client usually at the commencement of the Band's fiscal year in April), the budget approved by the Social Development Administrator or the Chief and Council (in the case of requests requiring their approval), special needs requests, and notes referred to by Mrs. Michael as case histories. Mrs. Michael indicated that all files pre-dating 1980 would have been shredded so any evidence which she was able to give to the Tribunal pertaining to this period would have been given from memory only.

With respect to the complaint of Darlene MacNutt, Mrs. Michael confirmed that her application dated April 7th, 1987 was filed as a single person with dependent children. She testified that, however, even if Mrs. MacNutt had at that time included reference to her common-law spouse, Gordon MacNutt, given later events, in her opinion no benefits would have been paid on behalf of Gordon MacNutt. Immediately following her marriage, however, Mrs. MacNutt made contact with Mrs. Michael to advise her of her marriage and on all subsequent applications, Mr. MacNutt's name appeared as her spouse.

Mrs. Michael testified that she sought the Band's approval for the inclusion of Gordon MacNutt on the budget for social assistance benefits for the MacNutt family believing that under the Guidelines he would be a dependent. In this regard she referred the Tribunal to paragraph 2.10 which provides as follows:

"Dependent" means the spouse or a person living with an applicant or recipient as a spouse, or any person under 18 years of age".

(See Exhibit A-2, page 195)

The Chief and Council, however, directed Mrs. Michael that she could not pay benefits to Darlene MacNutt which would include Gordon MacNutt on her budget. Mrs. Michael informed Darlene MacNutt of the Band's decision and her right to appeal. On all subsequent applications for social assistance benefits presented by Darlene MacNutt, she included Gordon MacNutt; Mrs. Michael sought Band approval to pay social assistance benefits for Gordon MacNutt in each case but always received the same direction, namely that no benefits would be payable. She was left to communicate this decision to Mrs. MacNutt.

Mrs. Michael testified about the effect that the Band's decision had upon Darlene MacNutt and her family. She advised the Tribunal that she felt Mrs. MacNutt was using her budget to cover the expenses of 6 people instead of 5 and as a result experienced considerable economic hardship. In fact, she recalled that Mrs. MacNutt had to receive an advance from the Band to

purchase winter clothes for the children which advance was later repaid by deduction of a modest sum from future social assistance benefits. In addition, Mrs. Michael referred Mrs. MacNutt to the MicMac Children's Foundation and a group in the City of Halifax who provided drycleaned second-hand winter outerwear to children. Finally, Mrs. Michael included the MacNutt family on the Christmas fund as a family in need.

The testimony of Elizabeth Michael lended a great deal of credibility to the testimony of Darlene MacNutt and her husband, Gordon MacNutt. From Mrs. Michael's viewpoint, Darlene MacNutt had always reported to the Social Development Administrator when she obtained employment, a training course, or when Mr. MacNutt or one of the children was no longer resident on the Reserve. This would be required of any applicant under paragraph 3.11 of the Guidelines (See Exhibit A-1, page 235).

Mrs. Michael was summonsed to the MacNutt appeal hearing before the DIAND Social Services Appeal Board and gave testimony on Mrs. MacNutt's behalf (See Exhibit HR-2). Following the hearing, Mrs. Michael received a letter directly from the DIAND Social Services Appeal Board advising that the appeal had been successful and confirming that Mr. MacNutt was to be included on Mrs. MacNutt's budget retroactively.

Mrs. Michael also recalled that in August, 1991 Darlene and Gordon MacNutt attended at her office to inquire when they might expect their social assistance benefits to be increased. In response to this Mrs. Michael made the appropriate inquiries of Council and through Mr. Peter Julian was advised that the outcome had to be presented to Chief and Council in a

meeting of September 1st, 1991 (See Exhibit A-2, page 340). In the months and years which followed, Mrs. Michael testified that there were many meetings at which either Mrs. Michael presented Darlene MacNutt's request for inclusion of Gordon MacNutt on her budget, or Darlene MacNutt on her own initiative called a meeting of Chief and Council to present her own request. In each case the answer was always the same and no benefits have ever been paid on behalf of Gordon MacNutt.

The Tribunal was moved by Mrs. Michael's evidence in relation to her support of Darlene MacNutt's attempts to include Gordon MacNutt in her budget. Clearly Elizabeth Michael was caught between the Social Services Appeal Board ordering retroactive benefits for Gordon MacNutt on the one hand and the Chief and Council (her employer) refusing to allow her to include Mr. MacNutt on Darlene MacNutt's budget on the other hand. In fact, Mrs. Michael testified that she felt her 23 years of service with the Shubenacadie Indian Band were in jeopardy as a result of her support of Mrs. MacNutt's position and that the Band would have fired her "if they could have". The Tribunal accepts that this evidence relates to a by-law enacted October 14, 1969 protecting Band employees from dismissal except for cause (See A-10, Tab 2).

Sometime in April, 1992, Mrs. Michael recalled that she was summonsed to a Band Council meeting and asked if the Band was paying social assistance benefits for any individuals in situations similar to that of Gordon MacNutt. She was ordered to go to her office, make a list and discontinue assistance to all individuals who fell in this category immediately. This evidence confirms why it was that Lolita Knockwood and Christine Pictou were removed from the budgets of Garfield Knockwood and John B. Pictou, Jr. late in April, 1992.

A great deal of the cross-examination of Mrs. Elizabeth Michael by counsel for the Shubenacadie Indian Band was devoted to whether Mrs. Michael had

administered the services provided for in the Native Community Services Guidelines, Policies and Procedures as required under Section 2.06 (See Exhibit A-1, page 194) and in particular whether she and her clerk had been meticulous in their record-keeping including:

(1) deducting all amounts required to be charged against Mrs. MacNutt's budget for pay received from Manpower training courses;

(2) deducting potential unemployment insurance benefits which Mrs. MacNutt could have drawn following her six month Manpower training course; and

(3) cancelling social assistance benefits for all periods when the MacNutt family were residing off the Reserve (for example the two month period between July and September, 1987).

The Tribunal accepts the evidence of Elizabeth Michael (which is substantiated by the budget sheets and case notes in Exhibit A-2, Tab 0, pages 303-383) that she has been and remains vigilant in her efforts to issue social assistance benefit cheques to her clients that are accurate. The Tribunal accepts that she has assisted Darlene MacNutt in a form similar to other clients by the advance of social assistance benefits on occasions when other sources of income otherwise due to the family were delayed; the Tribunal is also satisfied that Mrs. Michael recovered such advances from later social assistance cheques payable to the MacNutt family (although she was not always directed to recover such payments from other clients). The evidence of Elizabeth Michael leads to no other conclusion but that she would never issue a cheque to a client that would knowingly represent an overpayment of social assistance benefits.

In carrying out her duties, however the Tribunal is also satisfied that there was not always strict adherence to the Guidelines in the case of many applicants, not limited to Darlene MacNutt. Specifically, although Mrs. Elizabeth Michael did not deduct unemployment insurance benefits that Mrs. MacNutt could have collected but did not seek, Mrs. Michael testified that she would have been "laughed out of a Council meeting" if she forced one of her clients to draw unemployment insurance benefits instead of paying them social assistance benefits from the Reserve.In giving this evidence Mrs. Michael was giving her impression of Chief and Council's reaction to such a proposal drawn over her 23 years of experience as the Social Development Administrator of the Shubenacadie Indian Band; her conclusion was not one which she reached lightly.

Elizabeth Michael's evidence in its totality was given in a straightforward and precise manner. She had clearly prepared herself thoroughly for her testimony and impressed the Tribunal as being extremely competent in her duties as the Social Development Administrator. There was not the slightest suggestion that her evidence was prone to exaggeration nor was there any indication that she had stretched the Guidelines to benefit Mrs. MacNutt any more than she had ever been directed to stretch the Guidelines to benefit any other applicant. Despite her own interpretation of these Guidelines (which she felt would permit including Gordon MacNutt, Christine Pictou and Lolita Knockwood on the family budgets) and despite the direction of the DIAND Social Services Appeal Board, she abided by the Chief and Council's direction that she not pay benefits to or for these non-natives. In summary, Mrs. Elizabeth Michael gave her testimony as an impartial and credible witness.

It was clear to the Tribunal from the evidence of Elizabeth Michael (corroborated to a degree by Doreen Knockwood) that the Chief and Council

of the Shubenacadie Indian Band have developed verbal policies on how welfare is to be paid on the Reserve and these verbal policies include (but are not limited to) the following directions to Elizabeth Michael:

(1) not to inquire about seasonal employment;

(2) not to inquire about income earned by ambulance drivers;

(3) not to inquire about the availability of undrawn unemployment insurance benefits;

(4) not to always recover advances for clothing or other emergency essentials advanced to applicants but instead to treat these on a "special need" basis;

(5) to pay welfare benefits to natives off Reserve if they were on a training course notwithstanding that this training course provided them with another source of income.

Through Elizabeth Michael's evidence it became clear that while the Shubenacadie Indian Band may not have a written policy permitting non-Indians the right to reside on the Shubenacadie Reserve, nor a policy on the payment of social assistance benefits to non-Indian spouses living on the Reserve, the Band had an unwritten policy (or perhaps a policy by default) on these issues because:

(a) in Elizabeth Michael's 23 years as a welfare officer/social development officer living on the Shubenacadie Indian Reserve, she was aware that non-Indians had always been permitted to reside on the Reserve; and

(b) Lolita Knockwood and Christine Pictou (the white spouses of Indians residing on the Reserve) had been paid social assistance benefits for years prior to April, 1992 after Elizabeth Michael had obtained approval for payment of these benefits from the Chief and Council.

These facts must be considered in light of Section 3.01 (2)(e) of the Guidelines which provides as follows:

"Social Assistance may be provided to:

(2) specific categories of non-Indians permitted to reside on a Reserve as per the Band's policy regarding residency status provided such assistance is not available from other sources, eg:

(e) other non-Indians who reside on- Reserve in accordance with Band policy."

(See Exhibit A-1, page 199)

Since assistance for Mr. Gordon MacNutt was "not available from other sources" i.e. the Municipality of East Hants, and since he resided on the Reserve clearly in accordance with an unwritten Band policy, it is the Tribunal's finding that article 3.01 would have covered Mr. Gordon MacNutt, as well as Mrs. Lolita Knockwood, and Mrs. Christine Pictou.

Through the evidence of Elizabeth Michael it also became clear that the Department of Community Services' unwritten policy of refusing social assistance benefits to non-Indians living on reserve had become effective within the last two years.Further, she testified that it was only the

"municipal" social assistance benefits payable by the Department of Community Services (through each municipality) that were considerably less than those payable on Reserve. Mrs. Michael testified that the native social assistance benefits payable under the Guidelines were modelled after the "provincial" social assistance benefits payable by the Department of Community Services and therefore were roughly equivalent. Further, she admitted that there were to her knowledge natives on her Reserve in receipt of provincial social assistance benefits instead of the equivalent benefits from the Reserve. This anomaly apparently occurred because their applications had been presented to the Department of Community Services prior to the change in the Department of Community Services unwritten policy referred to above.

In Mrs. Michael's opinion, there was also a substantial difference between eligibility criterion for social assistance benefits payable on reserve and those "municipal" benefits payable off-Reserve. On Reserve (in her opinion, because of the isolation, shortage of motor vehicles and generally low rate of employment) applicants for social assistance benefits were not required to prove that they were actively seeking work.Off Reserve, the payment of "municipal" social assistance benefits required such proof.

The real effect upon Mrs. Elizabeth Michael of the Chief and Council's decisions became poignantly clear when Mrs. Michael testified in relation to Lolita Knockwood's file. In essence, Mrs. Michael testified that these complaints caused her workplace to be very uncomfortable particularly by Band councillors, Debra and Thomas Maloney, who shared the social assistance benefits portfolio. They, together with Chief Reg Maloney, had in fact made a motion for Mrs. Michael's dismissal. She further testified that she gave considerable thought to quitting her position but then she concluded that there would be nobody left to help her clients. She went so far as to contact DIAND (per Mr. Brian Skabar) who assisted her by providing a copy of a job description of a position that was becoming available. Some time in this period, elders from the Reserve and other members of her community contacted her suggesting that to quit her position would be to give the Band and Council exactly what they wanted. As a result, Mrs. Michael remained in her position although the Tribunal accepts that it has been an extremely stressful and frustrating time for her.

Craig Hinchey

The first witness to testify from the Department of Indian and Northern Affairs (DIAND) was Mr. Craig Hinchey of Sackville, New Brunswick who is currently a Policy Analyst (Social Development Operational Policy) with DIAND. Mr. Hinchey has been employed with DIAND since 1982 in various capacities in the Western region, Ontario region, and since 1990 the Atlantic region. The management and operation of the Social Development Program for the Atlantic Region falls within Mr. Hinchey's responsibility.

Mr. Hinchey spoke of the historical constitutional basis for the Guidelines which appear in Exhibit A-1 at Tab N. In this regard, he introduced Exhibits A-5 and A-6, being Treasury Board Minutes numbered 547716 and 547716-1 dated 1960 and 1961 respectively. These Minutes confirm that Treasury Board did authorize the Department (at that time Citizenship and Immigration) to provide welfare and educational services to certain categories of non-Indians living on Indian Reserves or in Indian communities. By virtue of the first Treasury Board Minute, (Exhibit A-5) this was restricted to

"....women of Indian status, who, through marriage or

enfranchisement, lose their Indian status but subsequently return to their families on the reserve because of desertion, death of husband or for other reasons, including the children of these women. In addition it would include

non-Indian children of women of Indian status, i.e., illegitimate children of non-Indian fathers or non-Indian children of a woman who becomes Indian by marriage".

In the second of these, (Exhibit A-6) the categories were broadened such that Treasury Board approved the Department of Citizenship and Immigration's proposal to extend the provision of welfare and educational services to the following categories of non-Indians:

"(1) children legally adopted by Indian families living on Reserves or in Indian communities, and

(2) others living on reserves or in Indian communities for whom assistance in the opinion of the Minister of Citizenship and Immigration, is justified."

In Mr. Hinchey's opinion, the interpretation of paragraph 2 above was such that anyone resident on an Indian Reserve who otherwise met the "needs test and other qualifying requirements" would be eligible to receive social assistance benefits funded by his Department. His opinion in this regard is embodied in a facsimile message dated September 23rd, 1992 to Chief Ben Paul of the Pabineau First Nation in response to an inquiry from that Indian Band (See Exhibit HR-5). Mr. Hinchey further agreed that it was the interpretation of this Treasury Board Minute which in his opinion led to the wording of the current guideline 3.01(e) (See Exhibit A-1, page 199).

Mr. Hinchey's office is not only responsible for the funding of the Social Assistance Benefit Program to all individuals resident on Reserves, but also audits the policy, program, and interpretation of the guidelines in relation to this program on reserve. In this sense, DIAND's involvement with the program exceeds its involvement with other social programs (i.e. child welfare) for which the Department's involvement is restricted to funding and management is the responsibility of each individual province. Therefore, despite the constitutional division of responsibilities that might otherwise assign responsibility for social welfare programs to provinces, the Federal Government has taken both funding responsibility for social assistance benefits available to all individuals on a Reserve who qualify and taken administrative responsibility for the appropriate implementation of these programs.

Although DIAND is not a signatory to the Settlement Act of the Province of Nova Scotia, Mr. Hinchey acknowledged that the practice has been that when an individual establishes residency under the Act, the municipality in question takes financial responsibility for the individual and bills back the "municipal unit" where the individual is normally resident. In

accordance with this, DIAND has reimbursed municipalities for Indians living off Reserve for the first 12 months and following the first 12 month period, the individual is considered as having "settled" within the municipality so there would be no reimbursement thereafter.

However, notwithstanding this practice, Mr. Hinchey confirmed that although DIAND could conceivably bill a municipal unit for non-native residents on a Reserve (for up to 12 months) DIAND has not established this practice. To further complicate matters, Mr. Hinchey also agreed that it has not been the practice for DIAND to reimburse a municipal unit for a non-native

living off Reserve for up to one year. In fact, a glaring example of this arose in the case of Gordon MacNutt who, while resident in Dartmouth from 1990-1991, received welfare benefits from the Town of Dartmouth Municipal Office. When attempts were made by that municipal unit to collect from DIAND the benefits paid to this non-native living off Reserve, DIAND refused reimbursement (See Exhibit A-15, page 208). Mr. Hinchey's position was that this refusal was based on other reasons and as only one example could not be said to have established a precedent. The Tribunal however finds that it does establish a very good example of the confusion which has arisen between DIAND, the Province of Nova Scotia and the respective municipalities, over how best to provide social benefit programs to individuals such as Gordon MacNutt, Lolita Knockwood and Christine Pictou living on and off Reserves.

Kevin Brian Dorey

Mr. Dorey has been the Acting Manager of Estates, Membership and Statutory Requirements Division of the Lands and Trusts Services Directorate of DIAND since 1990. As part of his responsibilities, he maintains the Register of all Indians and approves membership codes developed by individual First Nations as well as by-laws prepared by First Nations under Section 81 of the Indian Act.

In the development of by-laws, Mr. Dorey indicated that DIAND examines draft by-laws taking into consideration whether the by-law:

1. is within the powers authorized by Section 81 of the Act.

2. is consistent with the Canadian Charter of Rights and Freedoms.

3. is consistent with the rules of natural justice.

4. contains any unauthorized delegations of authority.

5. attempts to impose a penalty greater than that set out in Section 81(1)(r) of the Indian Act.

6. is seriously defective in its drafting.

7. purports to have retroactive effect.

8. attempts to oust the jurisdiction of the Courts.

With specific regard to the first criterion, namely whether the by-law is within the powers authorized by Section 81 of the Act, it was Mr. Dorey's opinion that Band Councils do not have the authority to pass by-laws which touch the issue of social assistance benefits at all. More will be said about this point in later sections of this Decision.

Further, according to Mr. Dorey, if a First Nation does not pass a by-law on a given subject matter that nevertheless must be managed (for example, zoning) the result is a "void" since DIAND would have no authority to intervene in such circumstances. On the particular topic of "residency" it was Mr. Dorey's opinion that if a First Nation did not pass a by-law concerning residency, DIAND's only intervention would be pursuant to Section 28(2) which allows the Minister to permit any person (for a period not exceeding one year, or with the consent of the Council of the Band for any longer period) to occupy or use a Reserve or to reside or otherwise exercise rights on a Reserve.

As part of Mr. Dorey's statutory requirements' function, he is responsible to oversee all Band elections under Sections 74-80 of the Indian Act. Under Section 82 of the Act, a copy of each by-law passed by the elected Council must be submitted to DIAND following which DIAND has 40 days to disallow the by-law if found to be inconsistent with the policy criteria referred to earlier. In this regard, Mr. Dorey referred to the Indian Band Council Procedures Regulations and in particulars Sections 6 and 18(2). In his opinion, which opinion the Tribunal accepts, under these Sections of the Regulations read with Section 2(3)(b) of the Act, the following process would apply to the development of a by-law:

1. A by-law would be presented to the Chief and Council at a general or special meeting.

2. At the meeting, a quorum must be present (in the case of the Shubenacadie Band, in recent years, a quorum would be 5 members).

3. The majority of those present decide the issue by a general vote.

4. The Chief would not vote except in the case of a tie in which case he would have the deciding vote.

With respect to by-laws which have been submitted to DIAND in accordance with Section 82 of the Act, only one is of particular relevance to this Tribunal. The Shubenacadie Band By-Law No. 82-4 was passed by the Council of the Shubenacadie Band on September 23rd, 1982 to deal with the subject of trespassing on the Reserves in accordance with Section 81(p) of the Indian Act. Under this by-law, the Shubenacadie Indian Band proposed to permit visitors or guests to "Band owned housing" (but not "individual owned housing") for only 2 weeks of every 12 month period and further proposed a fine of $100.00 for violations. Since the fine proposed exceeded the fine permitted under Section 30 of the Indian Act and its proposed application would amount to discrimination, the Minister disallowed the by-law and communicated his decision to the Band by order dated October 28th, 1982. No further efforts were made by the Shubenacadie Indian Band to pass a by-law on this topic. Further, according to Mr. Dorey, no attempts whatsoever were made by the Shubenacadie Band Council to pass a by-law dealing with the issue of social welfare benefits for residents on the Reserve. Indeed, as indicated earlier, in Mr. Dorey's opinion, such a by-law would not be within the authority of the Band Council.

One final point deserves attention from the evidence of Mr. Dorey. This relates to the issue of retroactivity. According to Mr. Dorey, since an Act cannot have retroactive effect unless specifically stated and since Section 82(2) of the Indian Act provides that a by-law made under Section 81 comes into force 40 days after a copy is forwarded to the Minister, it was Mr. Dorey's opinion that by-laws purporting to have retroactive effect would be disallowed. This point will become relevant later in the remedy section of this decision.

At the close of Mr. Dorey's evidence it appeared to the Tribunal that a quagmire existed. Mr. Dorey's opinion was that Band Councils do not have the authority to pass by-laws in relation to social welfare benefits. However, Mr. Dorey was unaware that Mr. Hinchey of his Department had earlier testified that it was DIAND's position that applications for social welfare benefits for non-natives living on Reserves must be brought on the Reserve. As will be seen in later portions of this decision, the evidence of these two gentlemen was not necessarily inconsistent.

Francis Lamont

Mr. Lamont is Acting Manager Financial Arrangements Management Division of DIAND and as such is responsible for the management of the financial arrangements between DIAND and First Nations in the Atlantic region. In the Atlantic region, there are 31 Indian Bands of which 13 are in the Province of Nova Scotia, 1 in the Province of Newfoundland and 17 in the Province of New Brunswick.

Mr. Lamont described the different types of funding authorities under which DIAND has in the past and does at present fund essential services on Indian Reserves. Amongst these authorities are models referred to as contributory authorities, grant authorities and ultimate funding authorities. In Exhibit A-14, Mr. Lamont described the transition DIAND has made with its funding authorities through consolidating various program-specific agreements destined for First Nations, standardizing its series of funding arrangements, adjusting the terms and conditions of funding arrangements and introducing new funding authorities. The result has been a reduction in the administrative burden on DIAND since most programs to First Nations have been funded on a fixed budget to encourage the sound management of funds.

Essentially, for those First Nations which have elected master funding arrangements, social assistance (basic needs) budgets are viewed as a "contribution" arrangement whereby any deficit would be covered by DIAND whereas social assistance (special needs) are a flexible transfer payment arrangement whereby any deficit cannot be covered by DIAND and the First Nation is required to meet any deficit from other programs.

In comparison, for those 13 of the 31 Atlantic Region Bands who have elected Alternate Funding Arrangements (AFA's) which must meet DIAND's minimum criterion, such Bands do not receive the same monitoring as those Bands which have Master Funding Arrangements (MFA's).

The Shubenacadie Indian Reserve has elected a Master Funding Arrangement and therefore social assistance and other programs funded by DIAND must be administered in compliance with the Program Administration manual (See Exhibit A-12, Tab 13, page 61).

Mr. Lamont identified the 9 conditions which apply to the advance of funds for social development. It is essential that three of these be set out below:

"1. Types and levels of services and resulting expenditures shall be in accordance with policy and procedural standards of the Department's Social Assistance Program of the Atlantic Region.

2. Individual case eligibility and entitlement, shall be determined through the application/budget-deficit needs testing process.

3. Services will be provided to those On-Reserve residents who qualify in accordance with 1) and 2), being those persons who are normally residents on Indian Reserves No. "

Mr. Lamont indicated that by 1991 the manual no longer set forth individual conditions but rather referred to the "Social Assistance Manual" which was earlier identified as Exhibit A-1, Tab N by Mr. Hinchey. This manual was replaced by a revised manual in June of 1994 (See Exhibit A-13). Of interest to the Tribunal there does not appear to have been any change in the requirement that "services will be provided to those on-Reserve

residents who qualify".

Similar contribution arrangements and program administration manuals were identified by Mr. Lamont in Exhibit A-12 for each of the years up to and including the fiscal year 1994-1995. Within this fiscal year, the funding arrangement between DIAND and the Shubenacadie Indian Band requires DIAND to pay $4,467,702.00 of which $3,264,635.00 is for social maintenance.

Each of the program manuals requires payments of social assistance benefits to "on-Reserve residents" notwithstanding Mr. Lamont's evidence that DIAND's authority is first and foremost for "registered Indians on and sometimes off-Reserve". Mr. Lamont's evidence in this regard was consistent with that of Craig Hinchey since both agreed that in the event the Complainants (or either of them) were successful, social assistance benefits should be paid by the Chief and Council of the Shubenacadie Indian Band to the Complainants. Further, if the funds allocated to the social assistance program for the 1994/1995 fiscal year should prove insufficient, DIAND would amend the contribution arrangement appropriately.

In answer to questions from the Tribunal, Mr. Lamont was not as equivocal about DIAND's position in the event that the Tribunal ordered retroactive benefits to the Complainants and the Band chose not to comply with the Tribunal's order. On the happening of such an event, Mr. Lamont was not at all clear that the "remedial" section of the program administration manual could be used to prevent an injustice. That is to say, notwithstanding

that Exhibit A-12, Tab 19, page 112 provides for intervention by DIAND in the event of a "service delivery problem" Mr. Lamont felt that DIAND would be cautious not to intervene unilaterally and that such a decision would be made only at the regional director's level.

At the close of Mr. Lamont's evidence it was clear that confusion exists even within DIAND with respect to the amount of authority which may be exercised by Chief and Council of First Nations with respect to the delivery of social assistance benefits. Essentially, although the Indian Act defines "Indian" and DIAND has jurisdiction over Indians, Treasury Board minutes have historically extended DIAND's authority to "all persons on Reserve" at least in relation to social assistance benefits. Notwithstanding this, it was Mr. Lamont's view that an Indian Band had discretion to pay or refuse to pay benefits for non-natives on Reserve as long as the Band policy was consistent. In taking this view, it was Mr. Lamont's opinion that Bands had the ability to make their own policy on social assistance benefits. This runs contrary to the evidence of his colleague, Mr. Brian Dorey, who testified that First Nations do not have authority to pass by-laws on social assistance benefits. Whether a decision to pay benefits to non-natives or refuse to pay benefits to non-natives would be considered a by-law or a policy would appear to the Tribunal to be insignificant. The results would be the same.

If indeed a First Nation has no authority to pass by-laws on social assistance benefits, the Tribunal questions how it is that DIAND has permitted Alternate Funding Arrangements with First Nations. For the 13 Atlantic Region Bands who have elected AFA, social assistance policies are established by the Band and are approved by DIAND if consistent with departmental requirements set out in Exhibit R-1, page 5 of Appendix "B". This requires "equitable treatment of all Reserve residents". The Tribunal notes that this does not require the "consistent" treatment of "non-native Reserve residents" which would be the wording required in order to accord with Mr. Lamont's view.

Further, provided that the "policy" developed by the AFA Band is consistent with the 5 requirements established by DIAND, the policy would be approved and would be akin to passing a by-law.

In conclusion, the Tribunal accepts the evidence of Mr. Craig Hinchey on this point for 2 reasons:

1. he is employed in the policy division of DIAND and

2. his job requires interpretation of the Indian Act and in particular 81 thereof whereas Mr. Lamont's position is restricted to financial matters.

The Tribunal concludes that the Chief and Council of the Shubenacadie Indian Band do not have the discretion to refuse to pay social assistance benefits to qualified non-natives on Reserve once they have signed the Master Funding Arrangement. This MFA requires the Band's adherence to the guidelines incorporated by reference into the Master Funding Arrangement and these guidelines themselves require "equitable treatment of all Reserve residents".

However, the Tribunal disagrees with Mr. Hinchey's suggestion that DIAND should have reimbursed the municipality of Dartmouth for social assistance benefits paid on behalf of Gordon MacNutt in 1990/91. The Indian Act, Master Funding Arrangements and Native Community Policy Procedures and Guidelines all require Chiefs and Councils to pay social assistance benefits to "all residents" who qualify. Once a resident who is Indian moves off the Reserve, DIAND may reimburse a municipality for payments made during the first 12 months until the Indian has established settlement. DIAND need not reimburse a municipality for payments made to a non-Indian during this 12 month period or thereafter.

John Brown

The first witness called on behalf of the Respondent was Mr. John Brown who occupies the position of Director of Education and Social Development for the Atlantic Regional Office. The education and social development directorate of the Atlantic Region had, as part of its mandate, the task of completing the devolution process respecting Federal Government funding to Reserves for programs operated primarily for the benefit of Indians. Mr. Brown was able to provide some history with respect to this devolution process since he has worked with DIAND since September of 1976 and during his childhood his father was in fact an "Indian agent". Although an Indian agent was an employee of the Crown, the Brown family were assigned to the Shubenacadie Reserve where this witness in fact resided for 4 years.

Mr. Brown explained that since Treasury Board is a Committee of Cabinet to whom all departments seek policy and spending authority, a review of the Treasury Board minutes included in Exhibit A-12 at pages 1 - 28 would provide some sense of the history which led to the provision of social assistance benefits to Reserves. Mr. Brown testified in a very general way that the social assistance safety net developed with provincial legislation in the 50's and 60's; previous to this era, municipal and provincial charities provided relief to Canadian people who were in need. In this same era, the Federal Government agreed to cost share social assistance

plans. Since the Federal Government wished to provide a similar plan to natives who would not otherwise qualify for the provincial social assistance benefits, a social assistance program was developed for reserves.

Within the same time period, many Indian women who had lost their status due to marriage were returning to Reserves. Their children had no status and there were other people on Reserves who lacked status for other reasons (i.e. they had served in the Canadian Armed Forces and were therefore "disenfranchised".) These circumstances led to discussions within DIAND and agreement to provide programs to non-Indians on Reserves in certain categories. According to Exhibit A-12, pages 5-7 these categories were as follows:

"(i) Category A
Women of former Indian status who returned to reserves because of the desertion or death of their husbands, or for other good reasons.

(ii) Category B
Non-Indian children of women described in (i), either living with their mothers or in the care of friends and relatives on a reserve.

(iii) Category C
Illegitimate non-Indian children of Indian mothers, either living with their mothers or in the care of friends or relatives on a reserve.

(iv) Category D
Non-Indian children whose mothers become Indian by marriage.

(v) Category E
Non-Indian children legally adopted by Indian families living on reserves or in Indian communities.

(vi) Category F
Other non-Indians living on reserves or in Indian communities for whom assistance, in the opinion of the Minister of Indian Affairs and Northern Development, is justified."

Mr. Brown spoke of the Band Council's role in a social assistance benefits program as being one of management and delivery. For example, the Band

would be responsible for the hiring and training of staff, they would provide office space and tools and equipment for the job. In comparison, the Department's general role is to provide the funding necessary for the operation of the programs.

Questioned by the Tribunal, Mr. Brown admitted that the Band's role is to meet its obligations under the Master Funding Arrangement just as DIAND's role is to meet its obligations under the Master Funding Arrangement. He further acknowledged that these Master Funding Arrangements incorporate by reference the Program Administration Manual (See Exhibit A-12, Tab 22, paragraph 2) which (after April of 1991) incorporates by reference the terms and conditions of the Native Community Services Guidelines Policies and Procedures (See Exhibit A-12, Tab 23, page 178). Consistent with the Treasury Board minutes referred to earlier, these guidelines have provided since 1991 that social assistance benefits may be paid to "other non-Indians who reside on-Reserve in accordance with Band policy". (See Exhibit A-1, Tab N, page 199).

In comparison to the obligations of Bands who have elected Alternate Funding Arrangements and therefore are on a fixed budget from DIAND and completely manage their own programs the Tribunal pointed out to Mr. Brown

that under the terms of the standard Alternate Funding Arrangement, Bands are required to provide "equitable treatment of all Reserve residents" (See Exhibit R-1, Appendix B, page 5, paragraph 2.6). Notwithstanding the difference in the wording of the guidelines by which Master Funding Arrangement Bands are bound, Mr. Brown did not feel that a greater discretion existed with Master Funding Arrangement Bands. Stated otherwise, this witness believed that all Bands were required to provide "equitable treatment of all Reserve residents".

Also noteworthy was Mr. Brown's testimony that Bands who have elected Master Funding Arrangements with DIAND and are therefore bound by the Native Community Services Guidelines Policies and Procedures have as a condition of their agreement a clause which provides that "program integrity depends on no interference from other officials" (See Exhibit A-1, Tab N, Page 192, Paragraph 1.10). Once again, in comparison, Alternate Funding Arrangement Bands are bound in a different manner and Exhibit R-1 contains no such clause but instead provides only that the social assistance program developed by the Band must "ensure equitable treatment of all Reserve residents" (See Exhibit R-1, page 5).

In apparent contradiction, Mr. Brown indicated that the official DIAND position is that social assistance benefits for non-Indians on Reserve are the responsibility of the Province and not DIAND. However, consistently over the last 10 years, he acknowledged that this official position has not been followed in all regions of Canada.Indeed, the Tribunal sees this official position as a contradiction of the terms of the Treasury Board minutes from 1960 and 1961 (See Exhibit A-12, pages 5-7) and a contradiction of the Native Community Guidelines Policies and Procedures (See Exhibit A-1, page 199, paragraph 3.01(e)) as well as the terms and conditions of the terms of the Alternate Funding Arrangements (See Exhibit R-1, page 5).

Some discrimination does exist in at least one other program on reserve. The seniors' program (which represented an amendment to the social assistance manual) restricts itself to "native elders" (See Exhibit A-1, Tab N, page 174-175) and Counsel for the Respondent suggests that this should be taken as somewhat corroborative of the Band's ability to refuse social assistance benefits to the Complainants.

When asked specifically whether there was divergence of opinion within DIAND on the issue of eligibility for social assistance benefits on Reserve, Mr. Brown acknowledged that the Department does not have a clear and unequivocal policy dealing with eligibility of non-Indians on Reserve for social assistance benefits. The Tribunal accepts this fact since it was clearly corroborated by the evidence of other witnesses but notes that it is almost incomprehensible that this statement could be accurate given the commitment of DIAND to non-Indians on Reserve as early as the 1960's (See Exhibit A-12, pages 1-7) and the clear and unambiguous wording of paragraph 3.01 of the social assistance manual for Master Funding Arrangement Bands.

In essence, Mr. Brown indicated that social assistance benefits would be payable to an individual if the Social Development Administrator on Reserve felt the individual qualified and the decision was approved by the Chief and Council. Mr. Brown felt that Council had discretion over payment of social assistance benefits to non-natives on Reserve because although they have no authority to pass by-laws concerning social assistance benefits, they have authority to pass by-laws concerning residency.

The Tribunal agrees that the Chief and Council have discretion on residency insofar as paragraph 3.01 of the Social Assistance manual provides that social assistance may be paid to other non-Indians who reside on Reserve "in accordance with Band policy". However, once an individual has taken up

residency on Reserve, the Tribunal concludes that the Chief and Council have no discretion in relation to social assistance benefits. Chief and Council's option in relation to such an individual would be to remove him or her from the Reserve. This situation has existed since 1991-1992. Before that time, the Program Administration Manual incorporated by reference into the Master Funding Agreement did not refer to the Native Community Policy, Procedures and Guidelines. It was argued therefore that the Guidelines just provided "advice" and were not binding on the Band but the Tribunal concludes that the Band and Council could provide social assistance benefits to "other non-Indians for whom assistance, in the opinion of the Minister of Indian Affairs and Northern Development is justified" (See Exhibit R-3, paragraph 3.01(g)) and therefore prior to 1991/1992, any discretion would have rested with the Minister and not with the Band.

In answer to questions presented by Counsel for DIAND, Mr. Brown acknowledged that when the original Treasury Board minutes came out in 1960-61, a "married couple" could not consist of an Indian and a non-Indian because if an Indian woman married a white man, she lost her Indian status. If an Indian man married a white woman, his wife became Indian. Therefore it was only with the advent of Bill C-31 (1985) that it became possible to have mixed families. This evidence becomes particularly important in appreciating later testimony.

John Higham

Mr. Higham is the Manager of Operational Policy for the Atlantic Region of DIAND. In this position, since December, 1991, he has been responsible for research, analysis and evaluation of all policies in the Region focusing on:

(a) tailoring practices of the Department for the Atlantic Region; and

(b) advising the National Office of practices in the Atlantic Region that may affect other regional or national policies.

Mr. Craig Hinchey, a witness earlier referred to in this Decision who testified before the Tribunal on September 1st and 2nd, 1994, is one of Mr. Higham's policy analysts responsible for social policy.

Mr. Higham explained the need for a regional policy office. Insofar as each region of the country has a unique political history, DIAND recognizes that although national standards exist, they must be tailored to fit each region, and this requires policy advice at a regional level. Mr. Higham explained that policy development is constantly emerging and evidence of

this appears in Exhibits A-1 and A-13. Exhibit A-1 at Tab N contains the Native Communities Services Guidelines Policies and Procedures in effect since 1991 and Exhibit A-13 represents the 1994 version of these policies. In between these two dates, Mr. Higham indicated that there was a process of amendment led by himself and which involved a working committee of social development administrators from the various Reserves in the Atlantic region. Of these SDA's the four most active were Tom Christmas, Joan Denny, Debbie Pictou and Elizabeth Michael (from the Shubenacadie Reserve). This group tabled proposed amendments which were reviewed by DIAND to

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determine if they were consistent with the Department's mandate and a response was prepared. Of the 31 amendments to the 1991 policies which were requested, Mr. Higham testified 30 were in fact granted as evidenced in Exhibit R-7. The effective date of the amendments to the 1991 manual was April 1st, 1994 notwithstanding that the letter of reference is dated June 27th, 1994.

When questioned by the Tribunal Mr. Higham acknowledged that notwithstanding the existence of a new manual (Exhibit A-13) the practice of all First Nations in the Atlantic region is not necessarily consistent. For example, in an earlier portion of this decision, we noted that Elizabeth Michael had testified that she felt she would have been "laughed out of a Council meeting" if she proposed requiring an applicant to seek UIC benefits instead of Indian welfare benefits. However, the 1991 and 1994 manuals clearly require unemployment insurance income to be considered by the Social Development Administrator in establishing eligibility for Indian welfare.While the Tribunal has no means of knowing whether Elizabeth Michael's speculation was accurate, Mr. Higham was aware that not all Bands strictly adhered to the policy manual in this regard.

The one amendment requested by the FDA's which was not made by the Department was the insertion of the word "cohabitant" to questions 18 and 19 of a form (See Exhibit A-1, Tab N at page 268). DIAND declined this amendment indicating instead that DIAND was committed to a wholesale revision of all forms and any recommended changes to the forms was deferred to another date. The Tribunal notes however that the term "cohabitant" appears in questions 6, 8 and 13-16 of the same form at least back to 1991. This is relevant when considered in light of the Complainants' evidence that the income and resources of their spouses was considered by the Respondent in some cases but not in others.

Mr. Higham describes in a fashion consistent with that of Mr. Francis Lamont, John Brown, Brian Dorey and, to an extent, Craig Hance, DIAND's

current practice of transferring money to First Nations by either a Master Funding Arrangement or Alternate Funding Arrangement and the control which is exercised by his department when the program manual (incorporated by reference into the Master Funding Arrangement) is not followed. The Tribunal readily accepts that DIAND would not reimburse a First Nation for an expenditure made by the Band which was not authorized by the program manual or the Native Community Guidelines Policies and Procedures (incorporated by reference into the program manual). Where, however, a First Nation refuses to pay social assistance benefits to an applicant and therefore spends less than what the program manual and guidelines require, the Tribunal concludes that DIAND has chosen not to exercise control over such situations. Instead, although it is open to DIAND to step in and pay the applicants directly, beyond appointing a social services appeal board with a decision that Mr. Higham recognized as "binding" and final, DIAND has done nothing further to ensure compliance with the Master Funding Arrangement, program manual and guidelines.

Mr. Higham's evidence was also useful to the Tribunal in determining the relevancy of categories of non-Natives referred to in the original Treasury Board minutes of 1960 and 1961. Mr. Higham testified that the need for those first six categories (see Exhibit A-12, Tab 1, page 5) was eliminated by Bill C-31 effective 1985. Category 7, however, "other non-Indians ...." was not a category that was covered by the 1985 amendments to the Indian Act.

With respect to the payment to non-Natives of non-insured health benefits

and the apparent discrepancy between Exhibit HR-6 written by Craig Hinchey and Exhibit R-5 written by Susan Williams, Director General of the Social Development Branch, DIAND, Mr. Higham testified that both documents essentially said the same thing, namely that non-Indians on Reserve are eligible for non-insured medical benefits if they qualify for social assistance benefits. Notwithstanding that this direction is not contained in the policy manual, Mr. Higham was prepared to acknowledge that it was the policy and that in fact the policy was being followed in the Atlantic region.

With respect to a First Nation's ability to pass by-laws concerning residency, Mr. Higham readily admitted that they have this authority.In comparison, he also readily admitted that First Nations do not have the ability to pass by-laws with respect to social assistance benefits. The Tribunal accepts the witness's answer but once again is surprised that this is so since DIAND itself has suggested that the problem raised by the

Complainants could be resolved by "removing DIAND from the appeal process" (see Exhibit A-20, paragraph 1(a)). Effectively, however, the Tribunal pointed out to Mr. Higham that this option would have the same result as allowing First Nations to pass by-laws with respect to social assistance benefits.

Finally, with respect to some inconsistencies between the evidence of Mr. Craig Hinchey and other representatives of DIAND Mr. Higham stated unequivocally that a non-Indian off Reserve who receives social assistance benefits from a municipality would not have his social assistance benefits reimbursed by DIAND. In comparison, however, a non-Indian on Reserve who received social assistance benefits from the Band would have his social assistance benefits reimbursed by DIAND.

Also worthy of note, Mr. John Higham sat on the social services appeal board for both John B. Pictou Jr. and Lolita Knockwood (See Exhibit A-2, Tab P, page 386). When testifying about this hearing, Mr. Higham acknowledged that the reasons given by the Board implied that the Shubenacadie Band were attempting to use social assistance benefits to control residency of non-Natives on their Reserve. He further acknowledged that the appeal board's decision had been that by allowing a non-Native to reside on Reserve, the Shubenacadie Band had made a policy on residency under Section 3.01(2)(e) of the guidelines (see Exhibit A-1, Tab N, page 199). The Tribunal accepts this finding and finds corroboration for this finding from the evidence of many witnesses before the Tribunal.

Mr. Higham also acknowledged that a Master Funding Arrangement Band is required to meet the same objectives as an Alternate Funding Arrangement Band, namely "the equitable treatment of all Reserve residents" although it may not be specifically stated in the Master Funding Arrangement contribution agreement, program manual or guidelines.

Philip Adams

Mr. Adams has worked with DIAND since March 26, 1976 and is currently the manager of Lands, Resources and Trusts Division of DIAND at the Amherst, Nova Scotia Office. Mr. Adams testified that there were only three means by which non-native persons could lawfully reside on Reserve Lands. The first of these is by virtue of Section 18.1 of the Indian Act which states:

"A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody."

The second of these is by virtue of Section 28(2) which provides:
"The Minister may by permit in writing authorize any
person for a period not exceeding one year, or with the
consent of the council of the band for any longer period,
to occupy or use a Reserve or to reside or otherwise
exercise rights on a reserve."

The third means is by virtue of Section 58(3) of the Indian Act which provides:

"The Minister may lease for the benefit of any Indian, on
application of that Indian for that purpose, the land of
which the Indian is lawfully in possession without the
land being designated."

Mr. Adams explained that a Certificate of Possession cannot be issued to a non-Indian. A Certificate of Possession represents the highest form of ownership of land on a Reserve which is permitted under the Indian Act and Section 20(2) of the Act provides as follows:

"The Minister may issue to an Indian who is lawfully in
possession of land in a reserve a certificate, to be
called a Certificate of Possession, as evidence of his
right to possession of the land described therein."

Even if, as a result of a Last Will and Testament or the intestacy of a native person, a Certificate of Possession should happen to devolve to a non-Indian, Sections 49 and 50 of the Indian Act would apply and a sale of the Certificate of Possession would be required. These Sections provide as follows:

"49. A person who claims to be entitled to possession
or occupation of lands in a reserve by devise or
descent shall be deemed not to be in lawful
possession or occupation of those lands until
the possession is approved by the Minister.

50(1) A person who is not entitled to reside on a
reserve does not by devise or descent acquire a
right to possession or occupation of land in
that reserve.

50(2) Where a right to possession or occupation of
land in a reserve passes by devise or descent to
a person who is not entitled to reside on a
reserve, that right shall be offered for sale by

the superintendent to the highest bidder among
persons who are entitled to reside on the
reserve and the proceeds of the sale shall be
paid to the devisee or descendant, as the case
may be."

The Tribunals only hesitation in accepting the position expressed by Mr. Adams in relation to the Sections of the Indian Act quoted above stems from Section 50 which refers to "a person who is not entitled to reside on a reserve" since the Shubenacadie Indian Band has allowed non-native persons to "reside" on their reserve for many years. When asked to address this point, Mr. Adams confirmed that DIAND does not interfere with the presence of non-Indian persons on Reserves and leaves this to the discretion of the

Chief and Council. Further, Mr. Adams confirmed that the Band has the right to pass by-laws on residency and trespass pursuant to Section 81(1) P and P.1 of the Indian Act. In the absence of by-laws passed under these Sections, but with full knowledge that non-Indians reside on the Reserve, Mr. Adams confirmed DIAND view of this situation as simply being a matter within the discretion of the Chief and Council.

Relevant to this point, Mr. Brian Dorey of DIAND was recalled and entered into evidence two by-laws which are currently in effect. The first of these was submitted to DIAND by the Horton Band pursuant to Section 81(1) P.1 and was marked Exhibit R-13. The second of these was submitted by the Kingsclear Band pursuant to Section 81(1) P.2 of the Indian Act in relation to child welfare. The second of these was intended to be disallowed by the Minister in accordance with the Act but, due to a bureaucratic mistake, the disallowance was not communicated to the Band within the 40 day period allowed and therefore it became effective as a result of the department's failure to comply with the terms of the Act.

The terms of both by-laws, however, confirm to the Tribunal that provided the subject matter of the by-law is a matter within Band Council authority, and otherwise is not discriminatory, the Minister should have no reason to disallow the by-law.

Exhibit IP-1, Page 4, contains a letter to the Chief and Council of the Kingsclear Indian Band from the manager, Band Governance, Department of Indian and Northern Affairs setting forth DIAND's comments or objections to their draft by-laws. With respect to the by-law concerning child welfare, the following objections were made:

"We note that the Indian Act provision cited as authority for the by-law is paragraph 81(1)(P.2) which provides for by-laws 'to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the Band'.

Although there is no judicial interpretation of the scope of paragraph 81(1)(P.2), the plain meaning of the words suggests that a band council may enact by-laws which extend to certain non-members, namely spouses and children, any rights conferred by by-law to band members. In other words, the legislative power with respect to the rights of spouses and children in paragraph 81(1)(P.2) is limited to matters which are already within the council's delegated jurisdiction under the Act. Nowhere does the Act delegate by-law making authority with respect to child welfare or spousal abuse. These are areas dealt with under provincial legislation and the Criminal Code of Canada."

Once again, this evidence confirms the Tribunal's finding that it is within the discretion of the Chief and Council whether non-Indians will reside on their Reserves but if they allow non-Indian residents they cannot deny them access to Social Welfare Programs available on Reserve through DIAND.

THE BAND'S REFUSAL OF BENEFITS FOR NON-NATIVES

Former Chief John Knockwood

Former Chief John Knockwood was the Chief of the Shubenacadie Indian Band for 14 years between 1964 and 1990. In addition, he was a representative on the federal commission which studied the impact of Bill C-31 and the federal commission on the Canadian constitution for native rights. Mr. Knockwood is a status Indian and a member of the Shubenacadie Indian Band. Aside from a term during which he served with the Canadian Armed Forces and was stationed outside the Province or lived in the United States for eight years, he has lived on the Shubenacadie Band Reserve all his life.

Mr. Knockwood spoke first of the election process and the involvement of DIAND representatives in the election and subsequently the training of new councillors. He also spoke of the practices followed while he was Chief in relation to the Indian Band Council procedure regulations and in this regard cited numerous examples where the Chief and Council would not strictly follow these regulations. Worthy of note are the following:

1. Although Section 6 of the regulations requires a quorum of 5 councillors, the Shubenacadie Indian Band insisted upon a quorum of 7 councillors.

2. Although Section 74(2) of the Indian Act requires 1 elected councillor for every 100 "members of the Band" and does not require these Band members to be resident on the Reserve, the Shubenacadie Band Council only permit Band members on Reserve to vote.

3. Section 8 of the regulations provides only that the Chief or the Superintendent can preside at Band Council meetings but at the Shubenacadie Reserve in his experience other councillors could preside over Chief and Council meetings.

4. In his experience if a councillor did not raise a conflict with an issue but refused to vote, the councillor's abstinence was counted as a vote in favour of the resolution. The Tribunal notes that this is not what is required by Section 20 of the Regulations which states:

"A member who refuses to vote shall be deemed to vote in the affirmative."

5. He testified that historically the Band's attempts at passing a residency policy were meant to correct what the Band saw as an injustice which would arise when an Indian woman cohabitated with a white man on Reserve and his income was not considered in her application for social assistance benefits whereas an Indian couple on Reserve would be compelled to report the income of both spouses on an application for social assistance benefits. As a result, the Shubenacadie Indian Band Council under Chief John Knockwood passed a trespassing by-law (see Exhibit A-10, Tab 7) which ultimately was disallowed by DIAND for the reasons stated in an earlier portion of this Decision. A subsequent Exhibit, R-12, was entered through Mr. Knockwood being a letter from District Superintendent D.N.Paul of Indian and Northern Affairs Canada to R.D. Campbell, Director, Reserves and Trusts, Atlantic Region, Indian and Inuit Affairs, Amherst, Nova Scotia which indicates DIAND's position in relation to the Shubenacadie Indian Band's proposed by-law as follows:

"Section 28(1) states that a permit of any kind issued to a person by a Band or Band member is void. However, a Band or Band member that has legal possession of a

Reserve or a parcel of a Reserve may permit a member of that Band to reside, occupy or use Reserve Land."

"Section 30 (Trespass) cannot be used when a non-Indian is a guest of a Band member who is legally occupying a home on-Reserve ..."

"Trespass means entering the land of another person without lawful justification. Section 88 means that Indians have all the rights of a citizen of a province except where curtailed by treaty or act of parliament, therefore, Indians have the right to invite guests into their homes although located on-Reserve."

"My suggestion to the Shubenacadie Band was for them to hire a competent lawyer to write a comprehensive By-Law that would entail, incorporating several Sections of the Act, including Sections 2, 28, 30, 31, 81, 83 and other Sections that may be relevant."

Attached to this letter and forming part of Exhibit R-12 is a second letter from S.A. Roberts, Acting Chief, Statutory Requirements Division, Reserves and Trusts, DIAND to D.N. Paul, Acting District Superintendent, Reserves and Trusts, Nova Scotia District, DIAND which provides as follows:

"1. Section 81(p) of the Indian Act can be used. Some years ago Legal Services reviewed this section in detail. Their opinion, at that time, was that although it could be used it could not be effective until a person had been charged and found guilty of trespass under sections 30 or 31 of the Act. In other words, the Council could not by law declare who is or is not a trespasser. Unfortunately since that time one or two court cases have put even that interpretation in doubt...

3. The biggest problem with trespass actions, and to an extent one of the problems with the Shubenacadie by-law, is that it will not likely be successful if the person being charged is on the Reserve with the expressed or implied invitation of an individual (e.g. a band member) who has the right to be on the reserve. This is generally, and I take it from your correspondence to be, the situation. A band council cannot deny a band member the right to have visitors, even though those visits may be of some duration. The Council does not, of course, have to consider that visitor as a band member or

otherwise entitled to receive the benefits/programs etc. applicable to the Band members although I realize this is not always that easy to enforce.

4. The other serious flaw with the by-law was that much of it applied only to guests of families residing in band owned housing. This is discriminatory and would probably have failed in any court action."

The letter from S.A. Roberts attached a copy of draft wording for a by-law

respecting the removal and punishment of persons trespassing upon a Reserve which provided in paragraph 3 "where any person not being a member of the Band has been convicted of trespassing on the Reserve under Section 30 of the Indian Act the Band Council may, by resolution, order that person to vacate the Reserve and to remain off the Reserve".

What the foregoing indicates to the Tribunal is the difficulty which the Shubenacadie Indian Band faced in attempting to remove Gordon MacNutt from the Reserve. On the one hand, although the Band had the right to pass a by-law concerning residency, the Band's attempt in this regard had been disallowed by DIAND as discriminatory and for other reasons. In addition, legal opinions quoted in the letters circulating within DIAND indicated that a trespass action would not be capable of being taken against Mr. MacNutt since he was the invited guest of a Band member. On the other hand, the Band did not have the ability to pass by-laws concerning social assistance benefits. In the end, the Tribunal concludes the Shubenacadie Band and Council ultimately used peer pressure and the refusal of benefits to attempt to control residency on the Reserve.

The best example of this in the case of Gordon MacNutt arose in relation to an issue of housing. In 1986 Darlene MacNutt was allotted a new house for occupancy by herself and her children. Before she actually took possession of the house, she married Gordon MacNutt and at a special meeting of the Band and Council convened some time after April 24, 1987 the Band and Council revoked her entitlement to the new house, assigned it to another family and left her, her husband and children in a home that was in extremely bad condition. Subsequently, the Tribunal learned that as a result of separate complaints made by Darlene MacNutt to the Canadian Human Rights Commission, a settlement was achieved and Darlene and Gordon MacNutt together with their children were allotted a new home on the Reserve. This kind of behaviour on behalf of the Shubenacadie Band and Council represents

the lengths to which they were prepared to go to eliminate the problem which they felt Mr. MacNutt presented.

Although former Chief Knockwood had no clear recollection whatsoever of Darlene MacNutt's request for social assistance benefits on behalf of her husband being brought to him by Elizabeth Michael, he was prepared to admit that this issue had been brought to him by the social development administrator and from there was raised at a Council meeting. In cross-examination it became unclear whether the issue was ever voted upon at a council meeting. Firstly, no minutes exist of the meeting in question (or indeed of any other meetings of relevance to the Tribunal). Secondly, Mr. Knockwood testified that very often such an issue would not even be the subject of a vote in the meeting since all councillors may be unanimous that they simply have no jurisdiction to deal with the issue of social assistance benefits for a "non-Indian".

Alan Knockwood and Peter Julian

The evidence of these two individuals is summarized together because collectively they were able to assist the Tribunal in a determination of what had actually occurred when each of the complainants first brought their request for Social Assistance benefits for their non-native spouses to the Chief and Council.

In July of 1985, as has already been stated, Elizabeth Michael brought the request of Garfield Knockwood to include his common-law spouse, Lolita Knockwood on his Social Assistance application to the Chief and Council. At that time, Mr. Peter Julian was Chief but in his testimony on November

8, 1994, he claimed that he was not present at this meeting having been "ousted" by his Councillors the month previous after 14 months in office. He claimed that all meetings after June 1985 were therefore chaired by another individual. No other Councillor present at the meeting was called to testify before the Tribunal. Therefore, the evidence of Elizabeth Michael on this point is accepted.

In 1987, Elizabeth Michael first presented the request of Darlene MacNutt to include her husband, Gordon MacNutt on her Social Assistance application. At this time, Mr. John Knockwood was Chief and, as previously stated, in his evidence he confirmed that in the discussions which were held on this point, he maintained that Council had no jurisdiction whatsoever to consider the issue since Mr. MacNutt was not a native person. Later, in the period 1988 - 1990, Elizabeth Michael indicated that annual

requests were brought by her to Chief and Council for the same purpose. During this period, Mr. Knockwood remained as Chief and Mr. Alan Knockwood was one of the Councillors. Mr. Alan Knockwood recalls the matter coming to Chief and Council at that time but his recollection was that the matter was referred back to Doreen Knockwood (Band Manager) to obtain DIAND clarification. No other Councillor was called to testify on this point and Doreen Knockwood herself had not recollection of the matter being referred back to her. Instead, she indicated that she believed the matter had been left with the Social Assistance Administrator, Elizabeth Michael, to obtain further information respecting Mr. MacNutt's income.

In August of 1990, the request of John B. Pictou Jr. for inclusion of his common-law spouse on his Social Assistance application was brought by Elizabeth Michael to Chief and Council at a time when Mr. Reginald Maloney was Chief but Peter Julian was one of the Councillors. Mr. Peter Julian maintained that he had no recollection of this request. Chief Reginald Maloney had not been on Council since 1982 until his re-election in the month of February 1990; therefore the Tribunal accepts that he had no means (through Council) to have known that a request made by Garfield Knockwood had been approved by a previous Chief and Council.

In August of 1991 after the DIAND appeal board decision had been given, the matter was referred back to Chief and Council at a time when Reginald Maloney was Chief but Peter Julian was also a Councillor. Mr. Julian did recall this matter coming back to Chief and Council at that time and confirmed that Chief and Council declined to pay benefits preferring instead to leave this matter to this Tribunal for determination.

Doreen Knockwood

Doreen Knockwood is a status Indian who has resided on the Indian Brook Reserve all her life and who has occupied the position of Band Manager for the last 19 years and who prior to that time served five years as a Band Council Clerk.

Doreen Knockwood was able to confirm that when Elizabeth Michael brought Darlene MacNutt's application to include Gordon MacNutt on her Social Assistance claim to Chief and Council in 1987 that Council had discussed the concern that Mr. MacNutt had other income which was undisclosed. She later confirmed that in this discussion reference was indeed made to "Indian money being for Indian people". Mrs. Knockwood was not, however, able to confirm that Ms. Michael had indeed consulted with DIAND and obtained their views on whether Gordon MacNutt could indeed be included on Mrs. MacNutt's application although she was prepared to admit that this would be consistent with Elizabeth Michael's practice.

While the Tribunal has been able to appreciate why some councillors may not have been aware that white wives were included on applications for social assistance benefits prior to 1992, the same cannot be said of Doreen Knockwood, Band manager. Clearly, she was aware in 1985 that Elizabeth Michael was seeking Council approval to have Lolita Knockwood included on her husband's budget and she completed part of an application for social assistance benefits for her brother/sister-in-law in 1987 (See Exhibit A-2, Tab Q, page 482). If indeed she knew, which she denied (see Transcript, Volume 16, page 2506), why she failed to advise Chief and Council of this fact remains a mystery.

Mrs. Knockwood also confirmed that it was indeed Chief and Council's policy not to consider summer employment income (i.e. berry picking) for Social Assistance benefits purposes, not to consider income earned by medical drivers for the same purpose and not to consider training allowances for courses held in Halifax since in Council's view the amount paid as a training allowance would only cover the cost of transportation.

Chief Reginald Maloney

As previously indicated, Chief Maloney has been Chief of the Shubenacadie Indian Band since February of 1990 and previously had experience as either Chief or Councillor predating 1982. As a result of the break in his service as Councillor, he was not nor could he be directly aware of Elizabeth Michael's inquiries of Chief and Council in July of 1985 on behalf of Lolita Knockwood nor in 1987 on behalf of Gordon MacNutt. However, Chief Reginald Maloney was able to shed a great deal of light respecting requests that had been made on behalf of Christine Pictou in August of 1990, Gordon MacNutt in the Spring of 1991, and the result of the DIAND appeal board decisions in August of 1991.

On the first of these points, Chief Reginald Maloney testified that John B. Pictou Jr. approached him indicating that Elizabeth Michael could not include his spouse on his Social Assistance application since she was a non-native. In the discussion which followed between the two gentleman, Chief Maloney agreed to consult with Elizabeth Michael. During his consultation with the Social Development Administrator, he inquired about the usual process in such cases and testified that Elizabeth Michael had indicated that the request would go to Council and would usually be granted. In response, Chief Reginald Maloney indicated that he said "well, grant it, I guess". Thus, in this summary fashion, Christine Pictou was added to the applications of John B. Pictou Jr. effective August 1990. Although this would have been Chief Reginald Maloney's first term as Chief

or Councillor in many years, and therefore had no direct means of knowing about Gordon MacNutt's refusal or the benefits being paid to Lolita Knockwood at this time, Chief Reginald Maloney freely admitted that he had a feeling that there were white women for whom Council had approved Social Assistance benefits.

With respect to the continued attempts by Darlene MacNutt to include Gordon MacNutt on her Social Assistance application, and in particular in relation to the Spring of 1991 when Mrs. MacNutt's claim was brought directly to Chief and Council, Chief Reginald Maloney admitted that he recalled it being raised in Council at the request of Elizabeth Michael but that in the discussion which followed Council agreed that no benefits were to be payable.

On the third date of significance to the Tribunal, namely in August of 1991 after the DIAND Appeal Board decision had been given in favour of the

MacNutts, the decision was raised for discussion at a regular Council meeting. In this meeting, and notwithstanding Chief Reginald Maloney's understanding that DIAND would indeed reimburse the Band for Social Assistance benefits paid on behalf of non-native spouses and notwithstanding that the DIAND Appeal Board decision required the Chief and Council to pay benefits to the individuals, Council decided that no benefits should be paid to the non-native spouses of Band members. Chief Reginald Maloney's candid evidence on this point corroborates the very credible evidence of Elizabeth Michael referred to earlier.

Chief Reginald Maloney recognized the discriminatory practice which the Shubenacadie Indian Band had continued by paying Social Assistance benefits to white non-native female spouses and denying such benefits to the white non-native male spouses who had applied. In partial explanation as to why this discriminatory practice would have existed for as long as it had, Chief Reginald Maloney raised the legitimate concern over Bill C-31 passed in 1985.

The Tribunal accepts that prior to the passage of this Bill, non-native female spouses who married Band members, acquired full status under the Indian Act whereas non-native male spouses not only did not gain such status but their Indian wives, lost their status. Male and female Indians had therefore for centuries not been treated equally. In relation to the positive treatment afforded to non-native female spouses and denied to non-native male spouses, Chief Maloney saw this as an extension of the old gentlemanly rule of protection of the weaker sex. In deciding in August of

1991 that no non-native spouses of Indian members should be afforded these benefits, he saw that the discriminatory practice had ceased. Although Chief Reginald Maloney did not specifically state his evidence in this matter, it was clear to the Tribunal that he felt Bill C-31 had caused as many (if not more) problems than it had solved.

RESIDENCY ON INDIAN RESERVES

As a result of a combination of sections added to the Indian Act by virtue of Bill C-31, first generation offspring of mixed marriages obtained the benefits and protection of the Indian Act. In addition, Indian women who had married white men and lost their status, were free to move back to the Reserve but only if they were widowed or their marriage had failed. If their marriage was still intact, Bill C-31 did not anticipate that these women would return to the Reserves with their husbands. In reality, however, a great number of them did with the result that Reserve populations became more homogeneous.

The problem this presents to the Social Assistance Program on Reserves can best be reflected by means of an example. In the case of Darlene MacNutt, who had two children born before Bill C-31 while she was an unmarried person, these two children are status Indians. Regardless of the choice of partners which these children make (Indian or non-Indian) Darlene MacNutt's grandchildren from these offspring will be status Indians. Beyond this generation, however, such status is not guaranteed. The same is true also of Darlene MacNutt's third child, born after 1985 but before Mrs. MacNutt's marriage. This child is likewise a status Indian, her own children will be status Indians but the status of her grandchildren will be dependent upon the choice of partner made by their Indian parent.

In comparison, Darlene MacNutt's one remaining child born after her marriage to Gordon MacNutt is a status Indian but her children will not be status Indians.

Since many families share accommodation on Reserves, the Tribunal anticipates that within a very short period of time First Nations will have to confront the issue of Social Assistance benefits for children who are "non-Indian" just as the Shubenacadie Band currently faces the issue of Social Assistance benefits to non-native adults. It could therefore be possible within one household to have some children who are status Indians and others who are not. In these circumstances, it would seem completely impractical that some family members within the household would be entitled

to the on-Reserve Social Assistance benefits whereas others would be required to obtain Social Assistance benefits under the Municipal or Provincial scheme. This would require considerable duplication in home visits and paper work through two separate offices for the same purpose and likely with different rates applicable to the two classes of children.

APPLICABLE LAW

General

It has long been accepted that the Canadian Human Rights Act is quasi-constitutional in nature and that it is intended to give rise to individual rights of vital importance (Reference: Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al [1985] 2 S.C.R. 536 and Canadian National Railway Co. v. Canada [1987] 1 S.C.R. 1114). This flows from Section 2 which describes the purpose of the Act as extending the laws in Canada to give effect to the principle that individuals should have equal opportunity to make for themselves the life that they wish without being hindered by discriminatory practices based on any of the enumerated prohibited grounds.

In order to better understand the concept of discrimination, Tribunals and Courts have recognized two distinct types of behaviour. In this regard, the Supreme Court of Canada held in O'Malley:

"Direct discrimination occurs .... where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no black employed here'. There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force". (Reference: O'Malley, page 551).

The discrimination alleged here is direct and the group of individuals claiming to have been negatively affected were those non-native spouses of resident Indians who sought Social Assistance benefits on the Shubenacadie Indian Reserve. Of this group, three individuals have brought complaints to the Canadian Human Rights Commission on four separate prohibited grounds, namely race, national or ethnic origin, sex and marital status.

The complainants rely upon section 5 of the Act which provides that:
"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".

In order to succeed in a complaint under Section 5, it is incumbent upon the complainants to prove:

1. discrimination;

2. that the discrimination relates to a service in respect to which the public is customarily admitted or which is offered to the public;

3. that the discrimination related to one of the prohibited grounds provided for in the Canadian Human Rights Act.
(Reference: Saskatchewan Human Rights Commission and Huck v. Canadian Odeon

Theatres Limited (1985) 6 C.H.R.R. D/2682).

If these three elements are proven, the only defence available to the Respondent is one of bona fide justification for the discrimination under either Section 67 or 15(g) of the Canadian Human Rights Act.

Discrimination on one of the Prohibited Grounds

The Social Development Administrator, Mrs. Elizabeth Michael, was aware that Lolita Knockwood had been included on Garfield Knockwood's budget in 1985 two years prior to Darlene MacNutt applying for benefits for Gordon MacNutt in 1987. She was also aware that Christine Pictou had been included on John B. Pictou, Jr.'s budget since 1990 notwithstanding that

she made her application after Darlene MacNutt had been refused benefits for her husband.

However, the Tribunal accepts that because of the changes to Council through the election process, the Chief and Council in 1990 were unaware that they were paying benefits to non-native wives while denying benefits to a non-native husband. Chief Reginald Maloney, however, had personally approved Christine Pictou for benefits in 1990 and had been party to the decision to deny benefits to Gordon MacNutt between 1990 and 1992.

The only possible reason for the practice of permitting social assistance benefits for non-native female spouses while denying similar benefits to a non-native male spouse was discrimination on the basis of Mrs. MacNutt's sex or marital status.If Darlene MacNutt had been a man seeking to include his non-native wife for Social Assistance benefits, she would have been approved. Therefore, Darlene MacNutt has proven her allegation of discrimination. Indeed, Chief Reginald Maloney admitted that he considered the practice before May 1992 to have been discriminatory.

The Chief and Council's decision in April of 1992 to deny social assistance benefits to all non-Indian spouses may have been perceived by them as a progressive step insofar as it eliminated the practice of discriminating on the basis of sex.By replacing it with the practice which they did, however, they made a conscious decision to discriminate on the basis of race and/or marital status since, from and after April 1992, Social Assistance spousal benefits were denied to applicants if their spouse was non-native.

While the complainants were all treated equally insofar as all were denied benefits for their non-native spouses the Supreme Court of Canada has held that "mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions" (Reference: The Law Society of British Columbia et al v. Mark David Andrews [1989] 1 S.C.R. 143 at page 167). Therefore, discrimination on the basis of either race or marital status is made out on behalf of all three complainants from May 14, 1992.

Service customarily available to the Public

The Tribunal accepts that "every service has its own public". (Reference: British Columbia Council of Human Rights and Berg v. University of British Columbia (1993) 18 C.H.R.R. D/310 (S.C.C.)) and finds that the "public" in this case consists of the residents of the Shubenacadie Indian Reserve.

This interpretation is not inconsistent with the policies which the Indian Act seeks to promote. (Reference: Mitchell et.al. v. Peguis Indian Band et.al. (1990) 71 D.L.R. (4th) 193). Firstly, in Courtois and Raphael v. Department of Indian and Northern Affairs, (1990) 11 C.H.R.R. page D/363, it was held that a Reserve school was a service customarily available to the public even though it may have been originally designed for Indians. Secondly, in the Saskatchewan Human Rights Commission and Murray Chambers v. The Government of Saskatchewan, Department of Social Services (1989)10 C.H.R.R. D/6434, it was held that Social Assistance benefits were a service customarily offered to the public. The Tribunal therefore has no difficulty in concluding that the Social Assistance program funded by DIAND for Reserves is a service customarily available to the public.

The limited discretion which the Shubenacadie Indian Band may exercise in the administration or delivery of this service to residents on Reserve does not take away from its characterization as a service customarily available to the public (See Berg supra at pages 388-389).Although Counsel for the Respondent argued that programs on Reserve are for the "legal" residents of the Reserve and therefore restricted to its Band members, the Tribunal notes that were it so, the Indian Act would make no reference to the presence of others permitted to reside on Reserve. In fact, the Act makes several such references not the least of which are Sections 18.1,

81(1)(p.1) and 81(1)(p.2).

Counsel for the Respondent also argued that the "supplier" of the service was not the Shubenacadie Indian Band but rather DIAND. With respect, the Tribunal disagrees. In Courtois, supra, at page D/382, a Human Rights Tribunal determined that it was the Department of Indian Affairs (as it was known at that time) in whom powers and obligations relating to education were solely and expressly vested by virtue of the Indian Act. In comparison, in this case, the Social Assistance program on Reserve is not statutorily-based by rather flows from the terms of a contract entered into between DIAND and the Band through Chief and Council duly elected under the terms of the Indian Act. By virtue of this agreement, responsibility for funding, delivery and administration of the Social Assistance Program to the Reserve is divided or apportioned between DIAND and the Band. Therefore, the Tribunal is not able to say that under the expressed

provisions of the Indian Act the supplier of Social Assistance benefits is DIAND.

The existence of eligibility criteria on the basis of need does not detract from this finding (See Saskatchewan Human Rights Commission and Chambers v. Government of Saskatchewan, 9 C.H.R.R. D/5181 at page D/5188, paragraph 39367). Nor is there a necessity of a general statute. To quote Professor Greschner, in an article cited with approval by the Saskatchewan Court of Appeal in Chambers, this would "mean that Cabinet orders would not be covered by the code, and this is unacceptable in practice for it would give the government a means of circumvention. Second, no principled grounds exist for distinguishing between any forms of governmental action. A government by its nature has only public relationships with persons, regardless of the source of its authority or the means by which it exercises that authority".

In fact, any other conclusion would be inconsistent with the Native Community Services Guidelines Policies and Procedures, as well as the Treasury Board Authorities entered as Exhibits. It would also run contrary to the broad interpretation which is required to be given to human rights legislation generally.

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

Bona Fide Justifications
Section 67 - Canadian Human Rights Act

Section 67 of the Canadian Human Rights Act states that "Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act".

In Courtois & Raphael v Department of Indian Affairs & Northern Development (February 1990) it was held that when Section 67 of the Canadian Human Rights Act is raised, the inquiry must be twofold, namely:

1. Whether the acts or practices were carried out under the authority of the Indian Act; and

2. Whether they were consistent with the dictates of the Indian Act.

In order to make a decision on the application of Section 67 to this case,

the Tribunal recognizes that it must examine the circumstances in which the alleged discriminatory acts and practices occurred as well as the basis of the practices of which the band is accused.

The Courtois & Raphael case also stands for the proposition that Section 67 (as a limiting section) must be read very strictly and narrowly. In this regard, the Human Rights Tribunal in Courtois was asked to consider whether a moratorium having the effect of denying access to the Band school to any child who was a new admission and did not have a Band number, was a decision made "under or pursuant to" the Indian Act. The Tribunal held that there was no official document attesting to the moratorium and further that the moratorium could not exist unless, under Section 82(2) of the Indian Act, the Minister had received a copy which he had not. More importantly, the Tribunal held that the Band council had no rights regarding education on Reserves and therefore administration of the Pointe-Bleue School was not authorized by the Indian Act (see paragraphs 76 and 95). Similarly in Re Desjarlais, (1990) 12 C.H.R.R. D/466, the Federal Court of Appeal held that a motion made by the Chief and Council to dismiss Rose Desjarlais from her position on the basis that she was too old, was not expressly or by implication provided for by the Indian Act and was not a provision made under or pursuant to that Act (see paragraph 13-14).

In Prince v. Department of Indian Affairs and Northern Development, an unreported decision of the Federal Court of Canada, Trial Division, December 30, 1994, the child of Violet Prince had been attending a Roman Catholic School outside of the Reserve with expenses paid by the Department of Indian Affairs and Northern Development. She was left without the ability to attend the same school when the Department changed its policy to one that denied expenses for education sought off Reserve. The Federal Court held that the Department had exercised its authority under the Indian Act since the Minister had the power to replicate the Provincial dispositions in relation to education.

However, the complaint in this case is not made against the Department of Indian Affairs and Northern Development. Were it so, DIAND would have resolved the complaint and made payment to the complainants because it has admitted that they are eligible.

Instead, the complaint is against the Band who had limited authority in relation to the Social Assistance program on Reserves. What authority and discretion they had was limited to the terms of the Master Funding Agreement which incorporated by reference the Native Community Services Guidelines, Policy and Procedures and which clearly allowed payment of Social Assistance benefits to certain categories of non-Indians resident on Reserve.

As a result of the foregoing, the decision of the Federal Court of Canada, Trial Division in Prince can be distinguished.

Counsel for the Respondent argued quite appropriately that there is a competing interpretive rule to be considered by the Tribunal insofar as it has long been recognized that a broad interpretation is required to be given to legislation which addresses the topic of native rights. (Reference: Brooks v. Kingsclear Indian Band et al (1991)118 N.B.R. (2d) 290 page 299, paragraph 16). Further, any ambiguity in the provisions of the Indian Act must be resolved in favour of the Indians.

The Tribunal concludes however that a broad interpretation is not meant to arm Indians with "additional privileges" but rather is simply limited to

preventing non-natives from interfering with the ability of Indians to enjoy such duly acquired rights. (Reference: Brooks paragraph 18).

The Respondent's argument went further. It was suggested that a broad interpretation given to the terms of the Indian Act would enable the Chief and Council to enter into contracts with the Federal Government and any decisions made thereunder would be made "pursuant" to the Act.

Once again, with respect, the Tribunal disagrees. To give such a broad reading to the terms of the Indian Act could easily result in an illogical conclusion. For example, if the Band determined that only male residents could drive vehicles on Reserve, it would be recognized that the decision was one which Chief and Council could properly make under Section 81 of the Act, (traffic regulation) but would offend the provisions of the Canadian Human Rights Act as discrimination on the basis of sex. Section 67 of the Canadian Human Rights Act does not immunize Chief and Council from all decisions made or actions taken but will immunize them from those which flow strictly from or under the Indian Act and are consistent with its pith, substance and purpose.

Chief Reginald Maloney and Mr. Alan Knockwood (former Councillor) urged the Tribunal to consider the bigger picture. The Tribunal accepts that this is necessary in order to make a proper determination on the three complaints. The bigger picture is this. Reserves were traditionally set aside for the use and benefit of Indians. Indians are guaranteed the right of self-government and the Federal Government (through DIAND) funds programs on Reserve which are then administered by the Chief and Council of each Band.

The Band is free to make policy decisions and pass by-laws respecting items such as trespass (Section 81(1)(p)), residency (Section 81(1)(p.1)) and the rights of spouses and children who reside with members of the Band on the Reserve with respect to any matter in relation to which the Council may make by-laws in respect of members of the Band (Section 81(1)(p.2)).

In this regard, the Shubenacadie Indian Band has permitted and continues to permit non-native, non-registered spouses of Band members to reside on Reserve and DIAND does not interfere with the Band's policy in this regard. It is agreed by most, if not all, of the relevant witnesses, however, that notwithstanding the wording of Section 81(1)(p.2) of the Indian Act, Chief and Council may not pass by-laws respecting Social Assistance benefits. Further, the Social Assistance program must be administered in accordance with the Social Assistance Manual and the Native Community Services Guidelines Policies and Procedures. The Tribunal's Decision therefore requires a review of the agreements to which the Band and DIAND bound themselves in relation to service delivery on Reserve, portions of which agreements have already been cited herein.

Pursuant to paragraph 1.05 of the Native Community Services Guidelines Policies and Procedures, DIAND and the Band have bound themselves to a "needs test" as the sole eligibility criteria for all applicants/recipients (see Exhibit A-1, page 190). Pursuant to paragraph 3.01 of the same Guidelines, social assistance may be provided to specific categories of non-Indians permitted to reside on a Reserve as per the Band's policy (see Exhibit A-1, page 199).

Notwithstanding these provisions, the unwritten policy or practice of the Chief and Council of the Shubenacadie Indian Band has had the effect of imposing an additional eligibility criteria on the basis of race or marital status (since May 14, 1992) and sex (prior to May 14, 1992).

In the Remedial Action section of the Program Administration Manual, it states that "In all cases where Management/Financial difficulties are identified ... the Department agrees to work together with First Nation's officials to investigate ... and provide advice in developing a Financial Management Plan or Action Plan which will provide for continuation of essential and statutory services ... If agreement cannot be reached on the Financial Management Plan or Action Plan, the following remedial action procedures will be implemented.

-Conduct an indepth review and analysis of the situation and notify the First Nation of the finding of the review.

-Make every effort to limit intervention to the absolute minimum necessary to solve the problems while ensuring Federal responsibilities are met.

-Implement any required funding restrictions.

-Initiate action, such as the appointment of an administrator or the implementation of co-management regimes while ensuring control is returned to the recipient as soon as possible after the problems have been resolved. In extreme circumstances, a third party manager may be appointed. The Department will consult with the First Nation in an effort to jointly select a third party manager and funding for the third party manager will be determined by the Department in consultation with the First Nation.

-Terminate this arrangement upon giving such notice as the Department deems appropriate if other remedial action procedures are unsuccessful,"

see Exhibit A-12, page 112-113.

Following the DIAND Appeal Board decision in Mr. MacNutt's favour in 1991 and the Band's refusal to honour this decision, there was a meeting between DIAND (represented by Mr. John Brown) and at least one member of the Shubenacadie Band Council. The meeting did not achieve a resolution of the difficulty and despite the mandatory wording of the Program Administration Manual ("REMEDIAL ACTION PROCEDURES WILL BE IMPLEMENTED"), nothing further was done. When the Tribunal's attention was drawn to this section, the Chair enquired whether the complainants were seeking any remedy against DIAND as an interested party but Counsel for the Canadian Human Rights Commission advised that they were not.

In relation to Section 67 of the Canadian Human Rights Act, the Tribunal notes also that three appeal boards sitting August 7, 1991 (in the case of Gordon MacNutt) and July 14, 1992 (in the cases of John Pictou and Garfield Knockwood) appointed by DIAND determined that the complainants should have received benefits from the Band (See Exhibit A-2, Page 429 (Knockwood) and Exhibit A-1, Pages 7 (MacNutt) & 171 (Pictou)). Some weight must be given to the fact that these Tribunals concluded that the payment of social welfare benefits for non-native spouses of band members living on an Indian Reserve was not contrary to the Indian Act.

Despite the recommendation of the two Appeal Boards which sat on July 14, 1992 to the effect that DIAND and the Shubenacadie Band Council should meet to discuss matters including:

..."equitable delivery of Social Assistance during the period in which these decisions occur, including improvement of the appeal process."

the Chief and Council did not pass a by-law or make a policy for the benefit of non-native spouses who are non members.

The Band's decision or policy to deny such individuals from Social Assistance benefits otherwise payable on the Reserve cannot be justified by reference to any section of the Indian Act and therefore Section 67 of the Canadian Human Rights Act does not detract from the Tribunal's finding that the Shubenacadie Band's decisions contravened the Canadian Human Rights Act.

Section 15(g) - Canadian Human Rights Act

Section 15(g) of the Canadian Human Rights Act provides that "it is not a discriminatory practice if ... an individual is denied any good, services, facilities or accommodation or access thereto ... and there is bona fide justification for the denial or differentiation". A bona fide justification defence requires proof both of a subjective element (good faith) and an objective element (related to the provision of the service) (Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202).

The Tribunal is unable to say that the decision to refuse benefits to non-native spouses was made with a sincerely held belief that it was in the best interests of the Reserve residents, particulary prior to May 1992. If the Tribunal is wrong and the objective element requires consideration, the Tribunal notes that Counsel for the Respondent suggests that the evidence of the Chief, former Chief and Council members support concerns about the homogeneous population of Reserves and the First Nations desire to preserve their culture, traditions and language. This argument is not supported by the "strongest possible evidence". Further, there was no suggestion that the Respondent had attempted to accommodate non-native spouses within the Social Services program on Reserve. Both of these elements must be present if the Respondent is to succeed in proving the objective element of the bona fide justification defence. (Reference: Chiang v. Natural Sciences & Engineering Research Council of Canada (1992) 17 C.H.R.R. D/63, citing with approval Druken v. Canada Employment and Immigration Commission (1987) 8 C.H.R.R. D/4379).

RELIEF

The complainants seek an Order that the Respondent cease the discriminatory practice and pay damages to the complainants together with interest. The Tribunal accepts the complainants' entitlement to an Order that the

Respondent cease the discriminatory practice of denying Social Assistance benefits to non-native spouses of native Reserve residents. The Tribunal concludes that it is impossible to determine the income which the complainants and/or their spouses received in the relevant time periods. The Tribunal does not fault the witnesses for their lack of a specific independent memory of their employment histories particularly because the majority of the complainants and their spouses had seasonal, part-time and/or intermittent employment. However, the only income tax returns filed were those of Lolita Knockwood for 1991 - 1993 (See Exhibit A-18). No explanation was given for the other complainants' failure to provide similar information to the Tribunal.

In the case of the DIAND Appeal Board decision for Gordon MacNutt, the Board ordered that Mr. MacNutt was to be included in Darlene MacNutt's budget "retroactive to the date of the most recent application for social assistance prior to the request for appeal". (See Exhibit A-1, Page 7). The Tribunal concludes that this would have been March 22, 1991. (See Exhibit

A-2, Page 328).

In the cases of Lolita Knockwood and John B. Pictou Jr., the decisions of the Appeal Board were that the Shubenacadie First Nation should provide Lolita Knockwood and Christine Pictou with social assistance from the date of their appeal. (See Exhibit A-2, Page 428 & A-1, Page 173).

The dates of the Appeals of John B. Pictou Jr. and Garfield Knockwood are not apparent from Consent Exhibits A-1 & A-2 but evidence presented satisfies the Tribunal they were brought on or about March 1992. In any event their wives were not removed from their budgets until May 14, 1992.

The Tribunal would have been unable to precisely calculate the amount of each complainant's losses in relation to the exclusion of their spouse from Social Assistance benefits without the assistance of counsel and their witnesses primarily, Elizabeth Michael and Brian Skebar who compiled Consent Exhibits A-16 and A-17 to reflect benefits that would have been received but for the discriminatory practices.

These Exhibits reflect damages for Darlene MacNutt over the period May 13, 1987 to October 11, 1994. According to Exhibits A-16 and A-17, if retroactive benefits were ordered to May 13, 1987, the complainant, Darlene MacNutt, would be entitled to receive $11,675.66. However, Counsel for the Interested Party, DIAND, presented in his argument a guide suggesting that Darlene MacNutt's income in 1991 and 1992 would have disqualified her from

any benefits for herself or her spouse with the result that she owes back to the Band the sum of $17,514.15 and was only seeking $11,675.66 for the period 1987 - 1994. The Tribunal accepts this submission because it is supported by the evidence of Mr. & Mrs. MacNutt.

The Tribunal therefore declines to order that Darlene MacNutt receive retroactive Social Assistance benefits from the Chief and Council for the period May 13, 1987 until such date as the sum of $17,514.15 would have been set off against Social Assistance benefits otherwise due to her. Hopefully, Counsel can, with the assistance of their other witnesses, Elizabeth Michael and Brien Skebar, make this calculation. It is ordered that Darlene MacNutt receive Social Assistance benefits for her husband from and after the date when there would be an equitable set-off.

In the case of Lolita Knockwood, the Tribunal accepts that $4,926.89 represents retroactive benefits for the period May 14, 1992 to October 11, 1994. By agreement by all counsel, it is understood this figure does not include the $30.00 every two weeks that Lolita Knockwood would have been entitled to receive while breastfeeding. Although the Tribunal understands that Mrs. Knockwood continues to breastfeed and therefore may be entitled to this allowance for the period from the date of the birth of her child to the date this Decision is rendered, amendments to the Social Services Guidelines effective April 1, 1994 limited these benefits to four months following birth. The Tribunal believes that an award for a breastfeeding allowance is justified for the period from November 25, 1993 to June 27, 1994 ($270.00) for a total award of $5,196.80 plus such further benefits for regular Social Assistance from October 11, 1994 to the date this Decision is rendered.

In the case of John B. Pictou Jr. the Tribunal accepts that the sum of $5,565.07 calculated on Exhibits A-16 and A-17 requires no adjustment and it orders that these retroactive benefits be paid to him together with the other benefits to which he would have been entitled after October 11, 1994.

In addition, the Tribunal concludes that the complainants qualify for Section 53(3) damages. Section 53(3) of the Canada Human Rights Act allows the Tribunal to order special compensation if satisfied that the Respondent has engaged in a discriminatory practice wilfully or recklessly or the victim has suffered in respect of feelings or self-respect as a result of the practice.

The Chief and Council's decisions were made and their practices imposed wilfully and all complainants have suffered in respect of feelings with

self-respect as a result of their practices. This suffering continued for 7 years in the case of Darlene MacNutt.In the case of Lolita Knockwood the deprivation was for a period of only approximately 2 1/2 years but she had the additional loss of benefits from the milk and juice program.The Complainant, John B. Pictou, Jr., has suffered for the same 2 1/2 year period but without the additional degradation suffered by Lolita Knockwood.

For the reasons stated above the Tribunal orders the following Section 53(3) damages:

Darlene MacNutt - $5,000.00
Lolita Knockwood - $1,500.00
John B. Pictou, Jr.- $1,000.00

The Tribunal is also satisfied that interest is warranted on the Section 53(3) damages only and it orders that simple interest at the rate of 5% per annum be awarded on the amounts set forth above retroactive to May 13, 1987 for Darlene MacNutt and retroactive to May 14, 1992 for Ms. Knockwood and Mr. Pictou.

GILLIAN BUTLER

MARIE CROCKER

KENT MORRIS