T.D. 3/98

Decision rendered on March 11, 1998

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

PETER and TRUDY JACOBS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MOHAWK COUNCIL OF KAHNAWAKE

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Stanley Sadinsky Q.C., Chairperson
Lise Leduc, Member

APPEARANCES: Peter and Trudy Jacobs, in person
Helen Beck and Odette Lalumière for the Commission
Murray Marshall and Stephen Ashkenazy for the Respondent

DATES AND LOCATION OF HEARING: August 24, 1995, November 28, 29, 1995
December 11, 12, 1995
May 21, 1996
September 8,9,10,11,12,15,16, 1997

November 21, 24, 25, 26, 27, 1997.
Montreal, Quebec

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I. INTRODUCTION

This matter has occupied the Human Rights Tribunal for 18 days of hearing extending over a period from August, 1995, to November, 1997. Overall, 13 witnesses gave evidence and there were 71 Exhibits filed. In all, there were 2,828 pages of transcript. The time involved in completing this matter was punctuated by five interlocutory proceedings before the Tribunal and

two separate Applications to the Federal Court of Canada including one appeal to the Federal Court of Appeal.

It all began with the written Complaint of Peter Jacobs (Peter) on his behalf and on behalf of his family against the Mohawk Council of Kahnawake (MCK) dated October 22, 1991, (Exhibit HR-1) alleging that it was engaging in or had engaged in a discriminatory practice since 1986 and ongoing on the grounds of national or ethnic origin, race, colour and family status. The particulars contained in the Complaint are as follows:

"The Mohawk Council of Kanawake is discriminating against me (Peter Jacobs) and my family in the provision of services by refusing us benefits and privileges including residency, land allotment and land rights, housing, medication and dental privileges because of my race, colour, national or ethnic origin and family status in violation of section 5 of the Canadian Human Rights Act.

I was legally adopted by two Indians from Kahnawake when I was a baby. My biological parents were of black and jewish descents. At my 2lst anniversary, I lost my membership status as an Indian of Kahnawake because of my biological origins. I recovered my Indian status only in 1988. In April, 1988, the Mohawk council of Kahnawake informed me that even though I was entitled to be registered as an Indian with the Department of Indian Affairs, I did not meet the criteria for becoming a registered Indian with the Mohawk of Kahnawake under the Mohawk Law of Kahnawake. Furthermore, my wife Trudy Jacobs, who is originally a Mohawk from Kahnawake and to whom I am legally married since 1986, lost her Kahnawake's membership status because of our relationship. Thus, in July 1990, my wife Trudy Jacobs received a letter from the Council of Kahnawake stating that our family could not be registered on the Kahnawake Mohawk List. Therefore, because we are not registered on the Kahnawake Mohawk list based on my biological origins and on my wife family status, the Band Council deprived us of many services and benefits. Among other things, the Mohawk Council of Kahnawake continue to deny our requests for the housing assistance program, even though I own a piece of land given by my foster-mother."

What might appear to be a rather straight forward matter is anything but that. What lies at the heart of this Complaint, particularly from the MCK's perspective, is the entire question of native rights to self-determination within the Canadian framework. Particularly at issue is the right of a native community to determine its own membership and the resulting entitlement to certain services, benefits and privileges. The question is complex as it rests within a web of legal, political and social considerations that are continually evolving. The matter is further complicated by the checkered history of the long-term relationship that has existed between the Government of Canada and its aboriginal peoples.

The Human Rights Tribunal (HRT) is a creature of statute with a limited mandate. When requested, it must inquire into a Complaint and make a determination as to whether there has been an act of prohibited discrimination within the meaning of the Canadian Human Rights Act, (CHRAct) and if so, the nature of the remedy or remedies that should be granted. All parties agree that the Tribunal must apply Canadian law and jurisprudence. It is not the function of this Tribunal to solve the problem of aboriginal rights in Canada. However in this case in particular, it is impossible for the Tribunal to divorce itself from the context of the realities that currently exist within the Canadian federation.

II. THE FACTS

While there is much in dispute in this case, there is little in dispute with respect to the basic facts.

A. THE COMPLAINANTS

The evidence of Peter and Trudy Jacobs indicated that Peter was born on March 2, 1955, of black and Jewish ancestry. He was adopted as an infant pursuant to the laws of Quebec by Vernon and Catherine Jacobs, his father being a Mohawk by birth and his mother having acquired that status when she married his father. (Exhibit HR- 11)
Peter was given a Mohawk name by his grandmother when he was adopted, Peter Charles Guy Karaienton Jacobs.

Peter grew up as a Mohawk at Kahnawake with his parents, grandparents, adopted brother and extended family. He attended the local primary school where communication in the Mohawk language was not allowed but he learned the language and Mohawk customs at home. As a young boy he participated in the activities of all of the Mohawk children and was treated the same as everyone else. He attended high school in Chateauguay and experienced racism as a native person. In his late teens, Peter applied to the MCK and was permitted to attend Manitou College, an all native school which taught the Mohawk language and culture.

At approximately age 12, Peter stopped going to church and began to attend one of the Longhouses at Kahnawake, the 207 Longhouse. Among other things, the Longhouse is a meeting place which is frequented by the traditionalists in the community who are intent upon promoting traditional and customary values. There he learned about the Great Law of Peace, Mohawk history, traditions and customs and he was accepted as a native person and again, treated like everyone else. This was confirmed by the evidence of Kenneth Deer, a life-long resident of Kahnawake and the publisher and editor of the local community newspaper, the Eastern Door.

After attending Manitou College for one year, Peter joined the United States Army for two years and subsequently became a high steel worker like so many other men from Kahnawake. He was trained in this trade by a man from Kahnawake and his obligation, in turn, was to train others in the future. He worked away from Kahnawake for extended periods of time but always returned to the community.

Whether or not Peter understood it at the time, for most purposes the community of Kahnawake was prepared to treat him as it did all other Mohawk children until he was age 21 (in 1976) but from that time on, he ceased to be considered a Mohawk and 'covered' as a dependent of his parents. This practice was consistent with the position that existed at that time under the Indian Act (pre-Bill C-31, 1985). There was a conflict in the evidence as to whether this practice conformed to the Great Law of Peace.

While working as a high steel worker, Peter married Trudy Jacobs (Trudy), a Mohawk woman, on August 16, 1986. Trudy, the daughter of Mohawk parents was born on August 22, 1963, and grew up and went to primary and secondary school at Kahnawake. She went on to attend a CEGEP in Ste. Anne de Bellevue and attended McGill University for one year. When she was 19, she was issued her own status number by the Department of Indian Affairs and Northern Development (DIAND) which would entitle her to rights and privileges provided to native persons by the Federal government.

The evidence of both Peter and Trudy dealing with their up-bringing in the Kahnawake community was confirmed by the evidence of their friend, Elena Mayo Diabo who is also a member of the School Committee at Kahnawake.

As of the date of the completion of this Hearing, Peter and Trudy had three children although Trudy was expecting their fourth child within the next few days. Their three children are Jessica Erin Katsitsirio Jacobs, born July 1, 1987, Mark Ryan Kenwenteshon Jacobs, born June 20, 1989, and Adam Atemho:kteh Brent Daniel Jacobs whose date of birth was not provided in evidence.

It was when Peter was approximately 17 years old that he first encountered the issue of his status in the Mohawk community. At that time, he applied for welfare but was refused because he was adopted. He did not pursue the matter at that time. It was only after his daughter Jessica was born in 1987, that he began to think again about his status.

He began by writing to the MCK in September, 1987, while he was working in Virginia in order to obtain a statement about his status. (Letter dated September 25, 1987 - Exhibit HR-13) He finally learned that he could be listed on the Band List kept by DIAND under the Indian Act but was not on the List kept by the MCK. (Letter dated April 20, l988- Exhibit HR-13) Peter sought to clarify the matter with DIAND which advised that he was in fact on the DIAND List at that time. (Letters dated July 18 and August 4,1989 - Exhibit HR-14)

That there appears to be two "Lists" requires some explanation. Pursuant to the provisions of Section 8 of the Indian Act, DIAND is required to keep a Band List of all members of a native band who satisfy the membership criteria contained in Section 6 of the Act. This provision is the statutory embodiment of the Federal government's control over membership of a native band. The Indian Act contemplates that it is possible for a band to assume control of its own Band List by creating a membership list provided it is done pursuant to the provisions of Section 10 of the Act. Should a band assume such control, the Band List kept by DIAND would no longer apply. The importance of being on either the DIAND Band List or the membership list created pursuant to the Act is that those on a list are entitled to the benefits and privileges provided for in the Indian Act.

There is no dispute that the Mohawks of Kahnawake are a "band" within the meaning of the Indian Act and that DIAND maintains a Band List for that Band. However, following the enactment of the Moratorium of 1981, (described below) the Mohawks of Kahnawake have also created a membership list for themselves (sometimes referred to as the "Mohawk List", the "Mohawk Membership List", the "Kahnawake Membership Register", or the "Mohawk Registry") but they have not done so pursuant to the provisions of the Act. They refrained from doing so as part of a deliberate act to assume control of their own membership notwithstanding the requirements of the Indian Act.

When initially created, the Mohawk List included all people who were on the DIAND Band List and according to the evidence of Shari Lahache, the Membership Administrator for the MCK, the names of non-Indian women who married Indian men

were included in the Mohawk List. The attitude in the community was that it would be too disruptive and inhumane to exclude those who did not satisfy the new Membership criteria set out in the Moratorium but who had been previously accepted as part of the community. The Moratorium and Mohawk Law that followed in 1984 (also described below) were intended to apply in the future and not retroactively.

However, Peter's name did not appear on the Mohawk List as it was not on the DIAND list in 1981. While Trudy's name did appear on the Mohawk List in 1981, it was removed in 1986 when she married Peter.

Peter, Trudy and their children now appear on the DIAND Band List but do not appear on the Kahnawake Membership List. They allege that they have been discriminated against by the MCK which administers the Kahnawake Membership Register in that they have been denied certain benefits and privileges. Simply stated, the MCK asserts that it is entitled to create its own Membership List according to criteria that the community has accepted and that as the Jacobs family are not considered members of the community within the scope of those criteria, they are not entitled to such benefits and privileges. The MCK asserts that this does not constitute prohibited discrimination within the meaning of the CHRAct.

While we shall deal with this point in greater detail later in this Decision, it is important to note that as a result of certain funding arrangements made between DIAND and the MCK, the Jacobs family found itself in a "Catch 22" situation. Because Peter, for example, was not on the Mohawk List, he was refused certain benefits by the MCK.
When he turned to DIAND for relief, he was advised that because of these funding arrangements, he must seek those benefits from the MCK. In a real sense, he had nowhere to turn except perhaps to the Courts or to the Human Rights Commission.

B. THE MOHAWK COUNCIL OF KAHNAWAKE (MCK) AND THE COMMUNITY

The MCK is the Council of the Mohawk Band of Kahnawake within the meaning of the Indian Act. Prior to l990, elections to Council were conducted in accordance with the provisions of Section 74 of the Act but in May, 1990, Council adopted its own regulations governing elections. (Exhibits R-27, R-28) By Ministerial Order dated May 27, 1992, DIAND permitted the Kahnawake Band to conduct its elections to Council pursuant to its own "Regulations Governing the Mohawk Council of Kahnawake Elections" and no longer pursuant to Section 74 of the Act. (Exhibit R-29)

The Grand Chief of the MCK, Joseph Norton gave extensive and helpful evidence in this matter. Among other things, he traced the historical presence of his Band in the lower St. Lawrence River Valley. He described the structure and functions of the

MCK, its relationship to the community and the nature of the Clan system that exists within the Mohawk Nation. In addition, Gerald Alfred, an assistant professor in the School of Public Administration, Department of Political Science at the University of Victoria, was called by the MCK and gave expert evidence on the historical, political and social evolution of the Mohawks of Kahnawake and particularly on the membership issue. Also, Professor Elizabeth Jane Dickson-Gilmore, an assistant professor in the Department of Law, Carleton University, was called by the HRC to give expert evidence on the history and culture of the community of Kahnawake, the Mohawk Nation and the Iroquois Confederacy. She also gave evidence on early historic adoptions of non-Indian individuals by Mohawk communities. (Exhibit HR-29)

The Mohawks of Kahnawake are steeped in a rich and colourful history. They are descended from people who came to the St. Lawrence / Mohawk Valley (New York) some 2,700 years ago. More specifically, they can be identified as part of a larger group that was initially concentrated in the Mohawk Valley of present day New York State. These people eventually became part of a group comprising the Iroquois Confederacy which was made up of the Mohawk, Seneca, Cayuga, Oneida, Onandaga and subsequently, the Tuscarora Nations. Prior to the arrival of the French in North America in 1609, they dominated this region and interacted with neighbouring Indian Nations such as the Algonquins. (Exhibit R-35), Alfred, Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism)

In approximately 1680, the community that can now be identified as the Mohawks of Kahnawake moved to an area (LaPrairie) which is near its present geographical location. Following the first contact between the Mohawks and the French in 1609 at Ticonderoga (New York), a period of hostility developed between them. Other Europeans who had also arrived in the region, the Dutch and the English, sought to exploit this situation by developing friendly trading and military relations with the Mohawks. In the meantime, several other Iroquois nations were developing peaceful relations with the French who had established a presence in the St. Lawrence River Valley. Eventually, the Mohawks also made peace with the French following their military defeat in l667 and were increasingly lured to migrate north to be nearer to their new ally. This migration was furthered by the ever growing influence of the Jesuit missionaries who were part of the French colony along the St. Lawrence River Valley.

When the French settlements fell to the English in the 1760s, the Mohawks became allied with the English. They subsequently assisted the English in resisting the efforts of the Americans in the early 1800s to conquer what had become British North America but as they did so, they increasingly became the colonial subjects of the British. This relationship eventually became defined in various statutes culminating in the Indian Act of today.

It is fair to conclude that while allied with both the French and then subsequently the English, the Mohawks endeavoured to retain their independence and autonomy as a Nation. This was embodied in a concept known as the Two Row Wampum. This concept is founded in an understanding, sometimes in the form of treaties, with the English and previously with the French and Dutch. It is based on the idea of mutual co-existence, respect and non-interference in each others' internal affairs. Hence, the Mohawks sought to assert their traditionalist approach to the maintenance of sovereignty over their own affairs while at the same time they found themselves subject to an increasing degree of control by the Government of Canada under the regime contained in the Indian Act.

The entire scheme of the Indian Act is somewhat paternalistic/maternalistic in nature. It seeks to place a large degree of administrative control of Indian Bands under DIAND. It creates an Indian Register that records the names of all persons entitled to registration as an Indian through legislative definition. It creates Band Lists. It establishes geographical Reserves and controls the registration of all lands within those Reserves. It deals with the descent of property, testamentary dispositions, mentally incompetent Indians, infants and their property, the provision of moneys for capital and operational purposes including education, and the elections to Band Councils. Simply stated, the Act can be seen to be the vehicle for controlling Indians while at the same time compensating them on an ongoing basis for the loss of their lands and traditional means of sustenance.

Both Professors Alfred and Dickson-Gilmore provided a comprehensive overview of the revival of the traditionalist spirit at Kahnawake, which included as a major component its modern day efforts to reassert sovereignty and control over its own membership. They described it as an overall move by the community to free itself from the colonial model.

Professor Alfred identified the mid 1920s as a focal point in time when so many men from Kahnawake were being integrated into North American society partly as a result of their high steel construction work in urban centres. At the end of World War II, many enlisted Indian men returned with non-native wives thereby further increasing the level of assimilation. There was a reduction in adherence to traditional values, a decrease in the use of the Mohawk language and an increase in social problems many of which were related to the consumption of alcohol. These trends led some to reassert traditional values with the revival of attendance at one of the Longhouses, the meeting place of the traditionalists.

Professor Dickson-Gilmore chose an earlier date, 1850, for what she referred to as the juncture at which the Mohawks of Kahnawake lost control over the definition of their own people and citizenship. She attributed this move to the institution by the Federal government of legislation that took control over the definition of who was an Indian. This was done primarily for the purpose of defining who would be entitled to

monetary and other benefits that would flow as a result of being a status Indian within the legislation. However, Professor Dickson-Gilmore largely agreed with Professor Alfred as to the consequences of that loss of control.

The expropriation of lands from the Territory of Kahnawake associated with the construction of the St. Lawrence Seaway in the 1950s focussed the attention of the community on its vulnerability. This provided a major incentive for the pursuit of nationalist ideals. The 1960s and 1970s saw an ongoing clash within Kahnawake between the philosophies of the traditionalists and of those who accepted the reality of dependency.

According to Professor Alfred, beginning in 1979 and continuing in the early 1980s, the community had come to a point where it was prepared to take concrete measures to reassert control over its own affairs and particularly, over its own membership. Professor Dickson-Gilmore felt that this had begun as early as 1972. In all events, this was seen to be absolutely essential in order to promote sovereignist ideals and to prevent further cultural erosion. This was prompted in part by pressures which were being exerted on the Federal government to amend the Indian Act by granting status to Indian women who married non-Indian men. At that time, such women lost their status on marriage and this was greatly resented especially because non-Indian women who married Indian men had status under the Act.

Following a series of community meetings (which were not well attended), the MCK enacted a Moratorium effective May 22, 1981 which is reproduced in its entirety (Exhibit HR-2):

" MORATORIUM

Definition of moratorium

An authorized delay of any activity regarding Indian status.

TO THE PEOPLE OF KAHNAWAKE:

As per Band Meeting of May 22, 1981, a moratorium has been placed on all mixed marriages (Indians marrying non-Indians, both male and female) and adopted non-Indians.

As of that date, any Indian man or woman who marries a non-Indian man or woman is not eligible for any of the following benefits that are derived from the Kahnawake Mohawk Territory and/or as administered by the Mohawk Council of Kahnawake. As well, status cards will not be issued to divorced non-Indian women or renewed if lost.

- Band number
- Residency (to live in Kahnawake)
- Land allotment
- Housing assistance - loan or repair
- Welfare - in Kahnawake only
- Education - in Kahnawake only
- Voting privileges - in Kahnawake only
- Burial
- Medicines - in Kahnawake only
- Tax privileges - in Kahnawake only

The moratorium will not apply to any mixed marriages of Indian men to non-Indian women, who are presently residing on the Territory, whose marriage took place before the date of May 22, 1981 and will not affect the status of those marriages.

The status of Indian women who have married non-Indian men will remain as such until such time as a decision is made by the Mohawk people of Kahnawake.

All non-Indian women shall, upon divorce, be deleted.

Because of the many concerns that have been expressed by the people of Kahnawake and the necessity of maintaining Indianism in the Kahnawake Mohawk Territory it is imperative that this moratorium be implemented until such time as the whole membership situation is clarified.

It will be difficult for this moratorium to be accepted by some of the people, but everyone must try to understand that certain steps must be taken in order that future generations will survive as Indian People. For further information, please do not hesitate to contact the Mohawk Council of Kahnawake.

CRITERIA

1 . In order to be recognized by the Kahnawake Mohawk Territory as being Indian, a person must possess 50% or more Indian blood.

2. Any person who meets the above requirements shall be entitled to all rights and benefits derived from the Kahnawake Mohawk Territory.

3. Those Indians who choose to marry a non-Indian after May 22, 1981 will relinquish all rights and benefits derived from the Kahnawake Mohawk Territory.

4. The children of a marriage between an Indian man or woman and a non-Indian will not be entitled to such benefits, provided, however, that if such a child marries an Indian, that child and his or her spouse and their children shall be entitled to apply to the Band Council for reinstatement of benefits are determined by the Band Council to be bona fide they shall be entitled to the Benefits.

5 . A non-Indian woman and her children who have gained status and eligibility for Band Council benefits through her marriage to an Indian, shall in the event of a divorce from such Indian, no longer be entitled to all rights and benefits derived from the Kahnawake Mohawk Territory. Provided that any such children may upon marriage to an Indian re-apply to Band Council for entitlement.

6. Mohawk Indians residing on the American portion of the Akwesasne reserve who are by descendancy and bloodline, at least 50% Indian, shall be considered Indian whether or not they are listed on the Band register.

7. Those who we deem to be Indian, who have never been considered Indian through the Indian Act, will regain their rights and privileges subject to review of their ancestry.

Adoption

All adopted non-Indian children are not entitled to any of the rights and benefits derived from the Kahnawake Mohawk Territory.

An Indian child who is adopted by non-Indians shall retain all rights and benefits derived from the Kahnawake Mohawk Territory subject to review of ancestry. "

The content of the Moratorium itself provides some explanation of its purpose. It appears that the greatest problem that was addressed in the Moratorium related to mixed marriages although it dealt with the adoption of non-Indian children as well.

Following the enactment of the Moratorium in 1981, the Mohawks of Kahnawake maintained a Mohawk List which had been created in consultation with the elder women of the community. It is to be noted that Indian society is matriarchal and not patriarchal in nature. The Mohawk List contained the names of those persons who met the criteria set out in the Moratorium. All the while, DIAND maintained its own Band List which now differed in content from the Mohawk List.

According to both Grand Chief Norton and Professor Alfred, the Moratorium sought to permit the community of Kahnawake to regain control of its own affairs, a most important element of which was the assertion of control over membership. The criteria of membership based on blood content and quantum appeared to be objective and relatively easy to apply. The status quo regarding marriages between Indian men and non-Indian women was not disturbed partly because of the large numbers involved but also as a result of the desire not to be overly disruptive.

The Moratorium was also seen as accommodating the basic Mohawk principle that the overall good of the collectivity was more important than the rights of the individual.

As the prospect of the amendments to the Indian Act loomed larger, the Moratorium was replaced by the Kahnawake Mohawk Law on December 11, 1984. (Exhibit HR-3) That Law is as follows:

" KAHNAWAKE MOHAWK LAW

Definition of Law: All the rules of conduct established by the authority or custom of a Nation.

Kahnawake Mohawk Law: Applies to customs and traditions of the Mohawks of Kahnawake.

It is agreed to by the People and the Mohawk Council of Kahnawake that all who are born Mohawk will forever be recognized as such.

It is agreed to by the People and the Mohawk Council of Kahnawake that Mohawks of Kahnawake are entitled, as to their birthright all rights, priviledges and benefits as Onkwehonwe of the Mohawk Territories including but not limited to the following rights:

Mohawk registration
Residency (to live in the Kahnawake Territory)
Land allotment and land rights
Welfare
Education
Voting
Burial
Medication and dental
Tax priviledges
Housing

12.

It is agreed to by the People and the Mohawk Council of Kahnawake that as of May 22, 1981, any Mohawk of Kahnawake, male or female who marries, co-habitates, lives in common-law with a non-Indian, will be deprived of the following benefits and priviledges, excluding burial rights.

- Residency
- Land allotment and land rights
- Voting priviledges

and/or

Any other benefits and priviledges under the jurisdiction of the Mohawk People of Kahnawake.

She:Kon; December 11, 1984

The attached is the result of many years of discussion and more specifically, since the implementation of the May 22, 1981 Moratorium on Mohawks married to non-Indians in the Kahnawake community. The attached document deals with one aspect of being Onkwehonwe and is not the answer to the whole issue which is at times very complex.

As you will all recall, the Moratorium was put in place as a short term mechanism to put a freeze on non-Indians (specifically non-Indian women) from gaining status through marriage to a Mohawk man.

Since the inception of the Moratorium of May 22, 1981, we are convinced that it has had the effect that it was created for. There is a need now to further expand/evolve the Moratorium into Mohawk Law. Everyone must be reminded that what is taking place in Kahnawake is not something new. What is happening is simply the revival of an ancient custom and tradition that predates the appearance of the Whiteman on the North American continent.

What Kahnawake is presently involved in is not racism, not discrimination nor is it sexism. It is plain simple survival of a distinct and unique culture that requires some very strong laws and regulations to protect the future.

Present Band List & Retroactivity pre May 22, 1981

The Mohawk Law (formerly Moratorium) was not created to remove non-Indian women from the present Band List and strip them of their acquired priviledges as per the Indian Act pre May 22, 1981 date.

The Mohawk Law is not retroactive as long as the Mohawk man and the non-Indian woman's marriage remains intact. The children of such marriages (pre May 22, 1981) will continue to enjoy the benefits and priviledges as Mohawks, regardless of parent's marital status.

Definition of Mohawk and non-Indian

For the purpose of clear understanding there needs to be a definition of what criteria will be used to define who is affected or not affected by the Mohawk Law.

Non-Indian - Any person, male or female, whose name does not appear on the present Band and Reinstatement Lists and whose blood quantum is less than 50%.

Mohawk - Any person, male or female, whose name appears on the present Band and Reinstatement Lists and whose blood quantum is 50% and more.

Less than 50% but on present Band List

As you can see 50% is always the bottom line in the Mohawk Law, except in some cases where, on the present Band List, there are persons (both male and female) who do not meet the criteria of 50% or more. Therefore, persons who have been classified in this category (less than 50%) may remain as such due to previous acceptance by our community and are presently residing in the Kahnawake Territory.

Screening & Procedure Policy

Having Mohawk Law in place concerning mixed marriages is not enough. There also needs to be a screening and procedure involved. A Committee made up of Council and community members needs to be established as soon as possible to oversee that the criteria established in the Mohawk Law is adhered to. In the meantime, the Mohawk Council of Kahnawake will be the official Committee to continue the screening and procedure policy.

Non-status Mohawk Women and Children

Mohawk women who have lost status according to the Indian Act through marriage and have become widowed and divorced or left destitute by the non-Indian spouse and who wish to return to Kahnawake will be subject to future discussion.

The children of the above, upon marriage to someone who meets the definition of a Mohawk of Kahnawake as established in the Definition of a Mohawk will have the opportunity to become part of the community upon screening/procedure process and public ratification.

Mohawk Law (formerly Moratorium) and
Widowed, Divorced, Destitute Mohawk Men & Women

Similarly with the Mohawk Law in place, Mohawk men and women who become widowed, divorced or destitute by the non-Indian spouse, who wish to return to Kahnawake will be subject to future discussion. Their children will have the same opportunity as in the previous paragraph. (Non-status Mohawk women and their children).

Conclusion

In order for the Kahnawake Mohawk Law to be effective there is a need for the people of Kahnawake to honor, respect and recognize the need to have this type of law in place.

There is a need for us all to understand that we are truly at the crossroads in our history and that the opportunity to have our future generations flourish as Mohawks is at hand.

There is a need for us to realize that external forces have caused a great deal of, if not all, of the problems related to this issue. There is a need now to find the will and the fortitude to begin implementing and developing our laws according to our customs, traditions and wishes of our people.

In ending, we request that your utmost attention, cooperation and adherence to the Kahnawake Mohawk Law is given so that our responsibility as a Council in this matter will not require directives for the removal/evictions of those that are presently and will be affected in the future by this Law. "

It is to be noted that there is no mention of "adoption" in the Mohawk Law. Presumably, the provisions as to blood quantum would cover matters regarding non-Indians such as Peter Jacobs who were adopted. Again, it appears that the main focus of the Mohawk Law was on mixed-marriages.

The Moratorium and Mohawk Law were not submitted to DIAND for approval under Section 10 of the Indian Act. This was done deliberately and in defiance of the Federal authority in this respect but very much in keeping with the overall political initiatives that were being undertaken by the community to acquire rights to self-government and self-determination. The community considers it to be of fundamental importance that only it can determine issues relating to the definition of who was to be considered a member of its community. Control of membership is seen to be the core power necessary to recreate a community based on traditional Mohawk values.

In his evidence, Grand Chief Norton made it clear that subsequent to the enactment of the Mohawk Law of 1984, the Mohawks of Kahnawake have continued the policy of pressing the Federal and Quebec governments for greater control over their own affairs. This has been evident in the areas of elections to Band Council, control over funds earmarked for education, welfare, housing and other social benefits, the acquisition of land for the Territory or compensation for land taken, an aboriginal justice system and self-policing. These efforts have been accelerated by the events of 1990 commonly referred to as the Oka Crisis and the blockading by the Mohawks of Kahnawake of the Mercier Bridge leading from their Territory to the Island of Montreal. The politics surrounding the relations between the Federal government in particular and the Mohawks of Kahnawake have escalated to the point where they have clearly impacted on the lives of ordinary people such as the Complainants in this case to an unprecedented but not unpredictable extent.

As it turned out, the Indian Act was amended in 1985 by the famous Bill C-31. This Bill had the effect, among other things, of granting status to Indian women such as Trudy Jacobs who married non-Indian men. The community of Kahnawake advised the Federal Government that it would not accept these provisions as they were in conflict with the Mohawk Law of 1984. (Exhibits R-7, R-8, R-9 and R-11) DIAND replied that the Mohawk Law was in conflict with the Indian Act and so a "stand-off " existed. (Exhibits R-10 and R-12)

III. THE COMPLAINTS OF PETER AND TRUDY JACOBS

It is within the context of the above that we return to the Complaints of Peter and Trudy Jacobs.

Peter and Trudy are not on the Mohawk List of Kahnawake and are not considered members of the Kahnawake community as they do not satisfy the membership criteria set out in the Moratorium and Mohawk Law. Peter was excluded because he was a non-Indian with no Mohawk blood content. According to Mohawk Law, he was not entitled to any of the rights, privileges and benefits available to a Mohawk. Trudy was excluded because she married a non-Indian after the Mohawk Law was enacted. According to the Mohawk Law, she was deprived of residency, land allotment and land rights and voting privileges and any other benefits and privileges that fell under the jurisdiction of the Mohawk people of Kahnawake. The Jacobs children were also excluded from membership.

A. PETER JACOBS

When Peter was 16 or 17 years old, he applied to the MCK for welfare but it was denied because he was "adopted". As mentioned earlier, he did not pursue the matter at that time.

Peter testified that in 1991 he began to have problems with his child's right to schooling on the Mohawk Territory but due to public pressure from the people of Kahnawake, the Band Council backed off. In fact, the Jacobs children have continuously attended a Mohawk immersion school on the Territory without interruption. Elena Mayo Diabo testified that the School Committee at Kahnawake takes the position that all children who reside in the community are entitled to an education notwithstanding the directions of the MCK.

Prior to October, 1992, Peter had applied to the Water and Sanitation Committee of the MCK for a $10,000 grant toward the cost of water and sewage installation at a new house that he was building on the Territory. By letter dated October 5, 1992, he was advised that his application for a grant was refused because he was not on the Mohawk Citizenship Register. (Exhibit HR-18)

By a separate letter dated October 5, 1992, Peter was advised by the MCK that he should cease building the house because he was not of Indian descent and was not on the Membership Register. (Exhibit R-2) Peter was given the land on which the house was located by his mother (Exhibit R-3) and he simply ignored the letter and completed the building.

There have been no other specific applications by Peter for rights, benefits and privileges but he testified that he knows that he would be refused as a result of not being on the Membership Register if he made application. He feels that he would be denied the right to vote although as a traditionalist, he does not wish to exercise that franchise. He is most concerned about how his children will be treated should it become necessary for him to assert any claims on their behalves or as to their rights in the future.

Peter understands that he is listed on the DIAND list and eligible for any benefits provided by DIAND. However, to the extent that DIAND may have delegated to the MCK through financial arrangements made pursuant to the Indian Act any responsibility that it might have in this respect, he feels that neither the MCK nor DIAND will provide him with the rights, benefits and privileges to which he considers himself entitled.

B. TRUDY JACOBS

Trudy first confronted the Mohawk Law of 1984, following her marriage to Peter in 1986. She testified that on July 7, 1990, she was not permitted to vote in the MCK elections due to the fact that she was not registered on the Mohawk List. By letter dated July 9, 1990, she complained to the MCK and asked that she and her family be placed on the Mohawk List. She received a reply by letter dated July 11th. (Exhibit HR-6) and was advised that she did not meet the criteria set out in the Mohawk Law of 1984. She was advised that she became ineligible for registration as a result of her marriage to Peter, a non-Indian. As a result, she proceeded to file a Complaint with the Human Rights Commission by letter dated March 20, 1991. (Exhibit HR-7)

Prior to 1991, Trudy and Peter had decided to build their own home on the Territory and for the purpose of securing a low interest loan, Trudy testified that she went to the MCK office to secure an application form. She was denied the form because she was not on the Mohawk List. She wrote a letter dated July 18, 1991, to Nelva Diabo (Exhibit HR-8), the person in charge of housing in the MCK office seeking a written explanation but she never received a reply.

Trudy also testified that she is concerned about whether her children would be funded in the future should they seek to attend private schools.

Trudy further testified that in December, 1996, following a serious flooding problem in the community, she was not notified by Community Services of Kahnawake that there was a danger in drinking well water. She said that other members of the community received a written notification of the danger and she believes that she was

omitted because she was not on the Mohawk List. (Exhibit HR-25) She testified that as a result, she and her children became ill. While she believes that there was a connection between Community Services and the MCK, that may not have been the case.

Finally, Trudy testified that she recently had sewage back-up problems at her home but was unable to get a company to come in and rectify the problems. She believes that it is necessary to be on the Mohawk List in order to get a service person to come onto the Territory to remedy such problems.

C. THE JACOBS CHILDREN

Having regard to the Form of Complaint itself and to the manner in which this case was presented, we have no doubt that Peter and Trudy were bringing this matter forward on behalf of their children as well. The MCK was well aware of this from early correspondence from Peter and Trudy (Exhibits HR-13 and HR-6). Furthermore in our view, the Complaint should be given a broad interpretation so long as procedural fairness exists and we find no basis for concluding that it does not exist in this case. (See Canada (Attorney General) v. Robinson, [1994] 3 F.C. 228

IV. THE ISSUES

Having regard to the manner in which the case for the Complainants was presented and the defences were raised by the MCK, the following are the issues in the form of questions for our determination:

1. Have the Complainants and the Commission established a prima facie case that the Respondent has engaged in discriminatory practices in that it has denied or continues to deny access to the Complainants of services or has differentiated adversely in relation to the provision of services to the Complainants that are customarily available to the public on prohibited grounds of discrimination within the meaning of Sections 3(l), 5(a) and 5(b) of the CHRAct ?

Sections 3(l), and 5 of the Act read as follows:

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

19.

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

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

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

2. If the answer to question 1 is "yes", were the discriminatory practices justified on the grounds of bona fide justification within the meaning of Section 15(g) of the CHRAct?

Section 15(g) of the Act reads as follows:

15. It is not a discriminatory practice if

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

3. If the answer to question 1 is "yes", were the discriminatory practices exempt from scrutiny under the CHRAct by virtue of the provisions of Section 67 of the Act in that the discriminatory practices were carried out pursuant to a "provision" made under or pursuant to the Indian Act ?

Section 67 of the CHRAct reads as follows:

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

4. If the answer to question 1 is "yes" and the answers to both questions 2 and 3 are "no", what remedy, if any, should be granted to the Complainants and the Commission pursuant to Section 53 of the CHRAct?

V. THE ISSUES, THE FACTS AND THE LAW

A. THE GENERAL LAW IN RELATION TO HUMAN RIGHTS CASES

The purpose of the CHRAct is found in its Section 2 as follows:

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

Human rights legislation has been described as having a "special nature, not quite constitutional but certainly more than the ordinary..." (Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536 at 547). The Supreme Court of Canada has elaborated further on the purpose and objectives and on the general approach to its interpretation in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1134 (sub nom: Action Travail des Femmes), per Dickson C.J.:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

As to the proper approach that should be taken when interpreting the scope of the exceptions or exemptions to the application of human rights legislation, the Supreme Court of Canada provided guidance in Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321 at 339 per Sopinka J.:

One of the reasons such legislation has been so described ... [as having a special nature, not quite constitutional but certainly more than ordinary]... is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed (Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279, at p. 307; see also Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, at pp. 567 and 589).

(see also Canada (Attorney General) v. Rosin, [1991] 1 F.C.391 (C.A.))

If the complainant in a human rights case can establish on a balance of probabilities a prima facie case of discrimination, they are entitled to relief in the absence of justification by the respondent. The burden of proof of establishing justification rests with the respondent according to the ordinary civil standard of proof, that is upon a balance of probabilities. (see Ontario Human Rights Commission et al. v. The Borough of Etobicoke, [1982] 1 S.C.R. 202 at 208.

B. THE PRIMA FACIE CASE

ISSUE # 1 - HAVE THE COMPLAINANTS AND THE COMMISSION ESTABLISHED A PRIMA FACIE CASE THAT THE RESPONDENT HAS ENGAGED IN DISCRIMINATORY PRACTICES IN THAT IT HAS DENIED OR CONTINUES TO DENY ACCESS TO THE COMPLAINANTS OF SERVICES OR HAS DIFFERENTIATED ADVERSELY IN RELATION TO THE PROVISION OF SERVICES TO THE COMPLAINANTS THAT ARE CUSTOMARILY AVAILABLE TO THE PUBLIC ON A PROHIBITED GROUND OF DISCRIMINATION WITHIN THE MEANING OF SECTIONS 3 (1), 5 (a) and 5 (b) OF THE CHRAct ?

In our view, the evidence establishes three and only three clear instances when the Respondent either directly or through one of its Administrators or Committees denied a service to either Peter or Trudy. In Peter's case this occurred in l992,when he applied to the Water and Sanitation Committee of the MCK for a grant toward the cost of water and sewage installation for a new house that he was building. He was refused because he was not on the Mohawk List. He was not on the Mohawk List because he failed to satisfy the membership criteria set out in the Mohawk Law as to blood content and quantum. The issue never became one of entitlement to the benefit on the merits according to the criteria of the program itself. That stage was never reached.

In Trudy's case, the MCK denied her the right to vote in the MCK election of 1990. In addition in July, 1991, she sought to secure a low interest loan for the purposes of building a new home and she was denied the right to apply. Trudy was denied these rights because she was not on the Mohawk List. She was not on the Mohawk List because she failed to satisfy the membership criteria set out in the Mohawk Law in that she married a non-Indian.

These denials by the MCK constituted direct acts of discrimination against Peter and Trudy respectively on the respective prohibited grounds of race, national or ethnic origin (Peter) and family status (Trudy). We are satisfied that by being married to Peter who was not recognized as a Mohawk due to his race, Trudy has been discriminated against because of her family status.

In our view, the term "family status" as set out in Section 3(l) of the CHRAct is broad enough to include situations such as this where a woman is discriminated against due to certain characteristics or attributes of her husband. Support for this view is found in Canada (Attorney General) v. Druken, [1989] 2 F.C. 24 (F.C.A.), where it was held that a discriminatory practice occurred when women was denied unemployment insurance benefits when their employers were their husbands or by companies controlled by their husbands.

We find as a fact that by not being on the Mohawk List, Peter, Trudy and their children would be denied most services should they make application in the future. We are satisfied that there has been and continues to be a denial of access to such services constituting a practice of direct discrimination based on race, national or ethnic origin and family status within the meaning of Sections 3 and 5 of the CHRAct. By not being on the Mohawk List, the Jacobs family is being effectively denied the right to apply to the MCK for such rights, benefits and privileges that the MCK is in a position to offer within the community of Kahnawake. Even though specific applications may not have actually been made, we are satisfied that direct discriminatory practices are nonetheless occurring because it is clear to us that the route to such rights, benefits and privileges has been effectively blocked.

Support for this conclusion is found in the case of Canadian Human Rights Commission v. Canada (Cranston), (1995),192 N.R.125 (F.C.A.). In that case, some pilots and flight attendants of the Executive Flight Service of the Federal Government complained that they were denied employment with the Department of National Defence when their Service was transferred to the Department. They were informed that they would not be employed because many of them were beyond the mandatory retirement age for the Armed Forces. Accordingly, the complaining parties who subsequently alleged discrimination on the basis of age, did not bother applying for a transfer.

In these circumstances, the Federal Court of Appeal held that an actual application for the positions was not a pre-condition and a discriminatory act could take place notwithstanding the absence of an application and a subsequent denial. The Court held that the government had created "an employment chill" which removed any argument based on a failure to apply. (see also Hill v. Misener, (1997), 28 C.H.R.R. D/355 at D/361, #s 60, 61)

The MCK further argued that there is no violation of Section 5 of the Act because the alleged denials of the provision of services were not in relation to services "customarily available to the general public" within the meaning of that Section. The MCK submitted that in this case "general public" should be defined as meaning the Mohawks of Kahnawake who satisfy the membership criteria established in the Mohawk Law of 1984 and whose names appear on the Mohawk List. In this respect, the MCK submits that the community of Kahnawake should decide the meaning of the term "general public" for these purposes, not the Federal government or this Tribunal .

The MCK argued that the Federal government itself has accepted a narrower definition of the "public" with respect to the provision of funded services and benefits by entering into Alternative Funding and Financial Transfer Arrangements with the MCK (Exhibits HR-30, HR-31 and R-37). The MCK submitted that this constituted acceptance by the government that the entitlement to services and benefits will be based on membership criteria as set out in the Mohawk Law of 1984. It further argued that by promulgating Ministerial Order dated May 27, 1992, which permits the Kahnawake Band to conduct its elections to Council pursuant to its own "Regulations Governing the Mohawk Council of Kahnawake Elections" (Exhibit R-29), the Federal government has similarly accepted that the right to vote in Council elections will be based on membership criteria as set out in the Mohawk Law.

In our view, it is the Tribunal and not the Federal government nor the MCK that must determine the meaning of the term "the general public" as set out in Section 5 of the CHRAct. The Tribunal accepts the argument of the Commission and the Complainants that "every service has its own public". In this case it is our view that the public means those persons ordinarily residing on the Kahnawake Territory and who were intended to benefit from the funds made available by the Federal government under the provisions of the Indian Act or as determined in any financial agreements or arrangement that may have been made. Being Federal funds, the govenment is entitled to determine the eligibility criteria as to whom they should benefit. We reject the argument of the MCK that it has the exclusive right to make that determination in accordance with its membership criteria based on lineage and blood content as adopted in the Mohawk Law of 1984.

This view is supported by a number of judicial authorities. In University of British Columbia v. Berg, [1993] 2 S.C.R. 353, the Supreme Court of Canada addressed this issue in a case where Berg, a master's program student at the School of Family and Nutritional Sciences of the University, was denied a rating sheet and a key to the faculty building because of a mental disability. The University argued that the provision of a key or a rating sheet did not constitute services "customarily available to the public". Keys were provided to all masters students in the program but were not available to members of the public at large.

While this case dealt with the interpretation of a section of the Human Rights Act of British Columbia, that provision is similar in language and intent to Section 5 of the CHRAct. In rejecting a definition of the public on the basis of a quantitative analysis, Chief Justice Lamer said the following at page 383:

Therefore, I would reject any definition of "public" which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public. Students admitted to a university or school within the university ..... become the "public" for that service. Every service has its own public, and once that "public" has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public. (emphasis added)

The Court opted for a relational approach and not a quantitative approach in defining the nature of the "public". It adopted the approach taken by the Saskatchewan Court of Appeal in Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services), [1988] 5 W.W.R. 446 which quoted with approval a passage from an article by Professor Donna Greschner, Why Chambers is Wrong: A Purposive Interpretation of 'Offered to the Public' (1988), 52 Sask. L. Rev. 161 at 182 where she argued:

... a purposive interpretation of s. 12 would define "public" not in terms of quantity, as the Chambers board did, but in relational terms. What s. 12 is about - its purpose - is the regulation of particular relationships between members of the Saskatchewan community, and members and their government... If we read the entire phrase as talking about a relationship, we would interpret "public" in relational terms: the public is that group with which the offeror has a public relationship. [Emphasis added: italics in original]

The Supreme Court of Canada adopted the relational approach and accepted Professor Greshner's conclusion in commenting on the Saskatchewan case that...

... any service or facility offered by a government should be considered a service or facility offered to the public.... (p. 385)

This approach was adopted by both the Federal Court of Canada, Trial Division and the decision of the Human Rights Tribunal in MacNutt et al. v. Canadian Human Rights Commission and Chief and Council of the Shubenacadie Indian Band and the Department of Indian Affairs and Northern Development, Federal Court Trial Division, October 30, 1997, T-2358-95 and H.R.T. decision, T.D. 14/95 rendered October 11, 1995, respectively; McKenna v. Canadian Human Rights Commission and The Department of the Secretary of State, Human Rights Tribunal, T.D. 18/93, decision rendered October 8, 1993, revs'd on other grounds [1995] 1 F.C.R. 694; and, Canada (Attorney General) v. Rosin, [1991] 1 F.C.R. 391 (C.A.) 391 at pp. 396 - 403.

In dealing with the arguments of the MCK that the Federal government itself narrowed the definition of the "public" by entering into the Alternative Funding and Financial Transfer Arrangements and by permitting the Kahnawake community to conduct its elections to Council in accordance with its own criteria for membership, some further explanation is required.

Dealing first with the funding arrangements, it appears that commencing in June 1990, the Minister of Indian Affairs and Northern Development (the Minister) entered into a three-year Alternative Funding Arrangement with the MCK whereby he agreed to transfer payments to the MCK which would, in turn, provide a variety of programs and services as described in the Arrangement (Exhibit HR-30). The ultimate recipients of the benefits resulting from the programs and services were described in a variety of ways in the Arrangement including, persons ..."ordinarily resident on (the) reserve", ..."treaty/status Indians living on (the reserve)", "residents of (reserve/lands recognized by the Minister)". A second three year Alternative Funding Arrangement was entered into in June, 1993, (Exhibit HR-37) which again appeared to be directed for the benefit of the same group of persons. In both of these Arrangements, the MCK was obligated to provide information to the Minister for the purposes of maintaining DIAND's Indian Register.

Finally pursuant to a Financial Transfer Arrangement for the three year period commencing April 1, 1996, (Exhibit R-37) which was similar in tenor to its two predecessors, the term "Resident" or "band member" was to be defined and interpreted,

" ...in the same manner as it was in the previous A.F.A. It is acknowledged that The Mohawk Council of Kahnawake is in the process of developing a communal law on membership that necessitates a comprehensive consultation process with the community. When the communal law will be agreed upon by both parties, the definition could be adjusted following negotiations between both parties."

We are satisfied that when Trudy applied for the low interest loan in 1991, and when Peter applied for a water and sewer grant in 1992, they were persons who were "ordinarily resident on (the) reserve", ..."treaty/status Indians living on (the reserve)", or "residents of (reserve/lands recognized by the Minister)" and therefore fell within the ambit of beneficiaries contemplated under the applicable Alternative Funding Arrangement. For these purposes, the "public" is the group described in the Alternative Funding Arrangement as being entitled to a particular benefit. In our view, this is consistent with the government's desire to see these people benefitted from public funds.

We have already set out the facts relating to the manner in which the control over elections to Council was transferred by DIAND to the MCK by Ministerial Order dated May 27, 1992. (see p. 5, above) With respect to determining what constitutes "the general public" for the purposes of enjoying the right to vote and hold office in the future, we are satisfied that "the public" is a narrower group than it is for the purposes of determining entitlement to benefits and services provided out of public funds. We have concluded that for the purposes of voting and holding office, the general public constitutes those entitled to vote and hold office in accordance with the Regulations Governing the Mohawk Council of Kahnawake Elections, May 21, 1990, (Exhibit R-27) and the Ministerial Order of 1992. (Exhibit R-29) Both Peter and Trudy are excluded from this group.

When Trudy attempted to vote in 1990, the Ministerial Order had not yet been promulgated and so at that time, the denial of her right to vote constituted a discriminatory practice.

Both the Ministerial Order and the Alternative Funding and Financial Transfer Arrangements will be addressed again in these reasons when dealing with the defence raised by the MCK under Section 67 of the CHRAct.

In the result, the answer to this first question is "yes" except insofar as it relates to the right of Peter or Trudy to vote or hold office in any future MCK election.

C. THE DEFENCE OF BONA FIDE JUSTIFICATION

ISSUE # 2 - IF THE ANSWER TO QUESTION 1 IS "YES", WERE THE DISCRIMINATORY PRACTICES JUSTIFIED ON THE GROUNDS OF BONA FIDE JUSTIFICATION WITHIN THE MEANING OF SECTION 15 (g) OF THE CHRAct ?

A prima facie case of discrimination having been established, the onus now shifts to the Respondent to establish on a balance of probabilities the defence of bona fide justification, viz. that there is a bona fide justification for the impugned practices.

The Respondent submits that in this case, the impugned practices were justified because it was necessary for the community of Kahnawake to define and control its own membership by adopting the Moratorium of 1981 and enacting the Mohawk Law of 1984 in order to firstly, insure the survival of Kahnawake as a culturally distinct Mohawk community and secondly, protect the limited land base within the community. The MCK submits that the justification for both the Moratorium and the Law are found within the documents themselves (Exhibits HR-2 and HR-3).

There is no dispute between the parties as to the appropriate test that should be applied in resolving this issue. The test is the same as propounded by the Supreme Court of Canada in Ontario Human Rights Commission et al. v. The Borough of Etobicoke, supra, at 208 when considering the defence of bona fide occupational requirement (B.F.O.R.) in employment cases:

To be a bona fide occupational qualification and requirement a limitation .... must be imposed honestly, in good faith, and in the sincerely held belief... and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary...

This test is described as one having two elements, a subjective element and an objective element and in order for this defence to succeed, both parts must be satisfied. While this test was developed in the context of employment cases, courts have consistently held that the terms bona fide occupational requirement and a bona fide justification convey the same meaning whereas the former is used in the context of employment situations while the latter relates to other situations. (see Canada (Attorney General) v. Rosin , supra, at p. 408; Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489)

For the purpose of considering this defence, we begin with a further review of the evidence provided by Grand Chief Norton, Professor Alfred and by Professor Dickson-Gilmore.

It is clear from the evidence that the Moratorium of 1981 and the Mohawk Law of 1984 were the culmination of many years of discussion within the community. The move toward establishing control over membership has been outlined in these Reasons at pp. 7-15. While there were many meetings and discussions prior to the adoption of the Moratorium and enactment of the Mohawk Law, those meetings were sparsely attended. There was also a clear division within the community as to what the criteria for membership should be. However, it is evident that there was (and continues to be) virtual unanimity as to the need for the community to assert control over its own membership. The Moratorium and Mohawk Law certainly did not materialize 'out of thin air'.

There was concern and alarm within the community that an increasing number of non-Mohawks were residing in the community, primarily due to mixed-marriages and that this threatened the culture, traditions and language of the Mohawk people. There was also concern that there was an insufficient land base to support these numbers as membership included entitlement to land for the purpose of building a home.

The evidence established that by the early 1980s, the Kahnawake community was emerging from a long period of erosion of its culture. There had been a general decline in the traditional clan networks and language, and traditions were being lost. While there were some traditionalists within the community such as Peter and Trudy, Kenneth Deer and Mark McComber, (all of whom gave evidence), the overall trend was a move away from cultural identity. The traditionalists rejected the authority of the MCK because it was a creature of the Indian Act and in a real sense, the traditionalists may have represented the strongest body of resistance to outside control. However according to Grand Chief Norton and Professor Dickson-Gilmore, at the same time the MCK was being co-opted by the community as a vehicle for change in a similar direction. Both groups were moving toward the same goal although their methods differed.

According to Grand Chief Norton, a turning point occurred in 1979 when the MCK received a direction from the community that it was to devote its efforts to returning the community to a more traditional mode of living, to move away from the control of the Indian Act and to assert control over its own destiny.

Professor Alfred put the membership debate in its proper light. In his opinion the steps taken at Kahnawake with the adoption of the Moratorium and the enactment of the Mohawk Law were the first steps toward the assertion of a political identity separate from the existing colonial structures but nonetheless within the Canadian framework. They constituted efforts to remove dependency and to assert the right to self-determination by acquiring greater administrative powers and control.

Professor Alfred testified that there was and is a consensus within the community on the need to remove 'foreign' systems especially in the areas of membership and control of land. In his view, control over membership and the right of the community to define who is a Mohawk is the core power necessary to re-create a community based on traditional values. In this respect, blood lineage is important and has always been a criteria of identification. Blood quantum was not an historical criteria, but he is satisfied that a membership rule based on blood quantum is required in this community at this time.

With the assistance of Professor Alfred, the community of Kahnawake is currently undergoing a membership review which has led to a new draft proposal on membership criteria. (Exhibit HR-24) Indeed, according to the evidence of Kenneth Deer, the publisher and editor of the community newspaper, the community continues to be involved in an ongoing debate on this contentious issue. Professor Alfred believes that the membership review will eventually lead to the recognition of people such as Peter as members of the community but this will occur only when the community becomes culturally confident and mature enough to accept non-Indian adoptees. Until then, it is his view that matters must be left to the community to determine and not to governments or their agencies, courts or tribunals.

The vulnerability of Kahnawake both from a cultural perspective and with respect to its land base is further affected by a number of other additional factors. The Territory of Kahnawake is located on the south shore of the St. Lawrence River approximately 15 minutes by automobile from the centre of downtown Montreal. It comprises l3,282 acres. According to the evidence of Shari Lahache, the Membership Administrator for the MCK, there are currently 8,535 people enrolled on the DIAND List for Kahnawake and 6,173 on the Mohawk List. Grand Chief Norton testified that there were approximately 6,500 people currently living within the Territory.

Kahnawake is traversed by highways and rail lines and its northerly boundary fronts on the St. Lawrence Seaway. It is linked to the Island of Montreal by the Mercier Bridge and approximately 85,000 vehicles per day travel through the Territory. It is surrounded on all sides by a large francophone and anglophone population with cultures and languages distinct from that of Kahnawake.

Valerie Norton, the Land Management Consultant for the MCK, testified that there are only 1,600 acres of undesignated and unallocated lands remaining in the Territory, 300 acres of which are designated for commercial development. Under its existing rules, members of the community who are on the Mohawk List and who do not own land are entitled to apply for a grant of 1/4 acre lot upon which to build a residence.

On the basis of the evidence that we heard, we are entirely satisfied that the subjective part of the test for determining bona fide justification has been met. Indeed, the Commission and the Complainants seemed to concede that this was the case. We find that in applying the membership criteria set out in the Moratorium of 1981 and the Mohawk Law of 1984, the Respondent was acting honestly, in good faith and in the sincere belief that these criteria were necessary in order to insure the survival of Kahnawake as a culturally distinct Mohawk community and in order to protect its limited land base. While there were suggestions that there was a lack of good faith because the criteria were being applied inconsistently, we reject this entirely. In our view, there were no ulterior or extraneous reasons for applying the criteria and there was certainly no intent to 'get even with the Jacobs' or single them out for any special adverse treatment.

Satisfying the objective part of the test is far more problematic. The test was articulated in the case of Canada (Attorney General) v. Rosin, supra. at p. 409 where Linden J.A. speaking on behalf of the Federal Court of Appeal said this:

.... It is not enough to rely on assumptions and so-called common sense; to prove the need for the discriminatory rule convincing evidence and, if necessary, expert evidence is required to establish this on the balance of probabilities. Without that requirement, the protection afforded by human rights legislation would be hollow indeed. Hence, it is necessary, in order to justify prima facie direct discrimination, to demonstrate that it was done in good faith and that it was "reasonably necessary" to do so, which is both a subjective and an objective test .....

(see also Brossard (Town) v. Quebec (Commission des Droits de la Personne), [1988] 2 S.C.R. 279 at 311)

Can it be said that enacting the Moratorium and Mohawk Law which denies Peter and Trudy (or persons in the same circumstances) the services and benefits that they applied for or may apply for in the future is reasonably necessary and required in order to insure the survival of Kahnawake as a culturally distinct Mohawk community and in order to protect its limited land base? Can it be said that enacting the Moratorium and Mohawk Law, which denies Trudy the right to vote, is reasonably necessary and required in order to protect those same values?

We think not. Peter and Trudy were raised as Mohawks. They adhere to Mohawk traditions and values. Peter speaks the Mohawk language although not fluently. Trudy is a Mohawk woman. Their children are being raised as Mohawks. They attend a Mohawk immersion school. Peter already owns land in the Territory and has built a family home. And by persevering with this Complaint for the past seven years, Peter has demonstrated a firm and resolute will to be part of the community of Kahnawake and contribute to it like all other Mohawk men. That Peter or Trudy could reasonably be considered a threat to the distinct Mohawk culture of this community or its land or resource base is simply unsupportable.

Furthermore, in order for the MCK to satisfy the objective part of the test relating to bona fide justification, it must demonstrate that the alleged discriminatory practice is based on "sound and accepted ... practice and there is no practical alternative" (see Zurich Insurance Co. v. Ontario (Human Rights Commission), supra. at p. 342)

We heard a great deal of evidence (some conflicting) particularly from Professor Dickson-Gilmore and Professor Alfred and to some extent from Mark McComber, with respect to how the Mohawk people have had a tradition of adopting non-Indian persons and then treating them as full members of the community except for the right to hold office. We cannot conclude on the evidence that we heard that it was an "accepted practice" to disentitle such persons to rights and benefits, except perhaps for the right to vote and hold office, that were afforded to others within the community.

While we accept that there is some basis for determining membership by considering blood lineage and blood quantum, we are not satisfied that the legitimate objectives of the community would not be met even if persons who were non-Indian but who were adopted in infancy and raised as Mohawks, culturally, linguistically and otherwise, were included.

As to whether there may be "practical alternatives" within the meaning of the Zurich case, the MCK has not satisfied us that no practical alternatives exist. The HRC suggested that non-Indians adopted by Indians pursuant to either provincial or traditional native law might be a designation of a group worthy of inclusion within membership criteria. That may be so but it is not our role to dictate what the practical alternatives may be. Such questions are currently being considered at Kahnawake by its Task Force on Membership.

Professor Alfred testified that Mohawk society is based on a concept of cultural belonging, language and a set of behaviours including participation in ceremony. It also includes descendancy from a particular group of people - blood linkage. It seems to us Peter and Trudy and persons in like circumstances, have a substantial claim for inclusion based on those definitions. However, in the end, it must be the community that decides such questions.

The Respondent argued that it is not the individuals that should be considered but rather the overall effect on the community should Peter and Trudy and perhaps others in a similar situation also seek to exercise rights, benefits and privileges. It was argued that this could have serious consequences including those of an economic nature. In our view, the fear that too many people might seek similar rights benefits and privileges does not constitute a defence to discrimination. (see Raphaël v. CHRC and Montagnais du
Lac Saint-Jean Council, C.H.R.T. Decision T.D. 10/95, June 9, 1995, at pp. 39-40)

Furthermore, it is not the role of this Tribunal to determine hypothetical questions. Rather, our responsibility is to deal with the Complaints before us. While the community may have felt that the measures taken by it to control its overall membership were reasonably necessary in that they sought to strike a balance between competing interests, that they provided a mechanism for instatements and reinstatements, that they were publicized and subject to periodic review and revision, we are not satisfied that the exclusion of Peter and Trudy and their children and others in their unusual situation from the opportunity to enjoy the rights, benefits and privileges that are available to others ordinarily residing at Kahnawake was reasonably necessary.

It is also important to note that according to the evidence of Grand Chief Norton there are only six other individuals who like Peter are non-Indian adoptees who were adopted as infants by a native couple and who live in Kahnawake. No evidence was called to establish how many of those persons are married to Mohawk women and how many own their own land in Kahnawake; accordingly, we cannot determine how many women are in the same position as Trudy. The general entitlement of Mohawk women who have married non-Indian men who are not adoptees, is not before us in this case.

Accordingly in our view, the Respondent has failed to establish the defence of bona fide justification in the circumstances of this case and the answer to the second question is "no".

D. SECTION 67 OF THE CHRAct

ISSUE # 3 - IF THE ANSWER TO QUESTION 1 IS "YES" WERE THE DISCRIMINATORY PRACTICES EXEMPT FROM SCRUTINY UNDER THE CHRAct BY VIRTUE OF THE PROVISIONS OF SECTION 67 OF THE ACT IN THAT THE DISCRIMINATORY PRACTICES WERE CARRIED OUT PURSUANT TO A "PROVISION" MADE UNDER OR PURSUANT TO THE INDIAN ACT?

For us, the most difficult legal issue in this entire matter relates to the defence raised by the Respondent under Section 67 of the CHRAct. The argument is that the past and any future denials of services to Peter and Trudy and the past and any future denials

of the right to vote for Trudy were and will be done pursuant to a "provision made under or pursuant to" the Indian Act and therefore beyond the scrutiny of the CHRAct.
The "provision(s)" referred to by the Respondent are the Alternative Funding and Financial Transfer Arrangements of 1990, 1993 and 1996 (Exhibits HR-30, HR-31 and R-37) and the Ministerial Order of 1992 (Exhibit R-29), previously referred to.

At the outset, it is again important to note that the Ministerial Order of 1992 was not in effect when Trudy attempted to vote in 1990 and so the issue relating to her right to vote is only important with respect to the future. As for Peter and Trudy, it appears that the Alternative Funding Arrangement of 1990 was in place when they respectively sought a low interest loan in 1991 and a grant for the purposes of installing water and sewer services in l992 in connection with the building of their home. Accordingly, this issue is relevant with respect to the denial of those benefits in the past and with respect to the future as well. However, because neither Peter nor Trudy are seeking any monetary remedies in relation to their efforts to seek benefits in the past, the prime significance of this defence relates to any future applications that may be made by them on their own behalves and on behalf of their children for rights, benefits and privileges that are covered under these Arrangements and that may be available to those ordinarily resident at Kahnawake.

The threshold question to consider is whether Section 67 of the CHRAct applies at all to the circumstance of this case. Section 67 reads as follows:

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

It is clear to us that this Section was intended to render the discriminatory features of the Indian Act immune from scrutiny. Otherwise, all non-Indians could claim that their human rights had been violated as a result of not being eligible for the many benefits conferred on Indians under that Act. In addition, when this Section was enacted in 1977, the benefits contained in the Indian Act were unavailable to Indian women who married non-Indian men and this discriminatory practice was also being rendered immune from scrutiny under the CHRAct. It was not until Bill C-31 in l985 that the Indian Act itself was amended to end this practice.

Accordingly, in our view, this Section was intended at least in part, to remove the application of the CHRAct in situations where both non-Indians and Indians made claims based on alleged discriminatory practices that were being carried out under a "provision" made under or pursuant to the Indian Act as it read at that time. We therefore find that this Section would apply in this case if the denial of benefits, rights and privileges to Peter and Trudy was done pursuant to any provision made under or pursuant to the Indian Act.

The MCK argues that both the denial of the opportunity to apply for a low interest housing loan and the denial of the sewer and water grant, were made pursuant to provisions made under or pursuant to the Indian Act, viz, the Alternative Funding and Financial Transfer Arrangements. It also argues that in future, Trudy is not entitled to vote in MCK elections by reasons of a provision made pursuant to the Act, viz. the Ministerial Order of 1992.

Dealing first with the Alternative Funding and Financial Transfer Arrangements, reference has already been made to these Arrangements at pp. 25-26 of these Reasons. We are satisfied that these Arrangements were provisions made under or pursuant to the Indian Act within the meaning of Section 67 of the CHRAct. The Federal authority for entering into such arrangements is found in Sections 3, 61, 62, 63, 64, 65 and 66 of the Indian Act. (see also Canadian Human Rights Commission v. Canada (Department of Indian Affairs and Norther Development (Violet Prince), [1995] 3 C.N.L.R. 28 at 40 per Muldoon J.)

The HRC cited two cases in support of its argument that the financial arrangements were not made under or pursuant to the Indian Act. In Desjarlais v. Piapot Band No. 75, [1990] 1 CNLR. 39 (F.C.A.), the Federal Court of Appeal held that the act of the Band Council in that case in dismissing one of its employees was not done pursuant to any provision or any section or regulation enacted in or under the Indian Act. In Laslo v. Gordon Band Council, Human Rights Tribunal, T.D. 12/96, December 4, 1996, Mrs. Laslo was denied new housing by the Band and she alleged discrimination on the basis of sex, marital status and race in that she was married to a non-Indian. The Human Rights Tribunal held that the denial in that case was made pursuant to Section 20 of the Indian Act and therefore immune from scrutiny by virtue of Section 67 of the CHRAct.

However, the Laslo case was appealed to the Federal Court and its decision was provided to us following the completion of oral argument. Counsel were given an opportunity to provide us with written submissions on the Federal Court ruling but chose not to do so. Mr. Justice Gibson of the Federal Court Trial Division (Docket T-4-97, December 30, 1997,) reversed the decision of the Human Rights Tribunal and held that the denial of benefits to Mrs. Laslo did not emanate from any decision or decisions of the Band Council made pursuant to or under any provision under the Indian Act but from other factors not present in the case at bar. In Laslo, there was no evidence of any financial agreement or arrangements being in place similar to those in existence at Kahnawake.

The Desjarlais case also can be distinguished on its facts from the case at bar as again, there was no evidence of any financial agreements or arrangements being in place similar to those that exist in relation to Kahnawake.

Having found that the Arrangements in question were provisions made under or pursuant to the Indian Act within the meaning of Section 67 of the CHRAct, it now remains for us to determine whether the Arrangements have the effect of permitting the MCK to carry on the discriminatory practice of denying the Jacobs family the rights, benefits and privileges in question.

We have concluded that the Arrangements do not in themselves provide that authority to the MCK. The argument advanced by the MCK is that by entering into these Arrangements, the Minister has accepted the membership criteria established by the Moratorium of 1981 and the Mohawk Law of 1984 and accordingly, has accepted the right of the community of Kahnawake and its Council to deny those services, benefits and rights to the Jacobs family by virtue of their inability to satisfy the criteria for membership as set out therein.

In our view, there is nothing in those Arrangements which clearly constitutes an adoption of those membership criteria. Rather, the Arrangements appear to require the MCK to provide the services, benefits and privileges covered therein to those who appear on DIAND's Band List and who are ordinarily resident at Kahnawake. The Alternative Funding Arrangement and Financial Transfer Arrangement of 1996 makes it clear that the intention is to benefit those previously entitled by the earlier Arrangements which for the most part refer to persons who are ordinarily resident at Kahnawake. It is recognized that further communal laws on membership are being considered and that the existing definitions could be adjusted in the future following negotiations between DIAND and the MCK.

Under Section SS3 of the Financial Transfer Arrangement of 1996 (Exhibit R-37) there is a list of Policies that are to be applied by the MCK in order to meet the minimum program requirements set out in the Arrangement. Under the heading "Mohawk Council of Kahnawake guidelines for Chief and Council" the item "Membership policy" is listed. The MCK urged us to find that this was tantamount to an adoption of the membership criteria set out in the Mohawk Law of 1984 by the Federal authority for the purposes of determining entitlement to services.

However, we find this provision to be in conflict with Definition 15 in that document which appears to accept the definition and interpretation of "resident" for the purposes of determining who is entitled to benefits as contained in the earlier Agreements set out above. In our view, the Financial Transfer Arrangement of 1996 is too vague and ambiguous for the purposes of concluding that it categorically adopts the criteria of membership contained in the Mohawk Law of 1984 for the purposes of determining entitlement to services. It seems to us that this area has been left vague and ambiguous on purpose for political reasons and that is evident from the evidence of both Pierre Lamontagne and Jean-Guy Fortier.

Pierre Lamontagne, Senior Advisor of the Funding Services Directorate of DIAND for the Quebec Region, which is responsible for managing the funding arrangements between the Minister and the MCK, gave evidence on behalf of the Commission. He explained DIAND's role in funding the Kahnawake community and the background relating to the Alternative Funding Arrangements and Financial Transfer Arrangement of 1990, 1993 and 1996. He described the gradual shift that has occurred over the past 10 or so years in the funding arrangements between the Minister and Kahnawake leading to the latest Financial Transfer Arrangement of 1996. This shift has seen greater responsibility given to the MCK in the management and delivery of the programs including the allocation of funds and less involvement from DIAND. (Exhibit HR-27) Mr. Lamontagne described the 1996 Arrangement with the MCK as the farthest you can go and yet remain under the Indian Act without bestowing absolute rights of self-government on the Kahnawake community.

Clearly, the Minister has turned over considerable responsibility to the MCK with respect to the services covered in its Arrangement and does not interfere with the decisions made by the MCK. If an individual has a problem because he or she is not receiving the services that he or she feels entitled to, an appeal lies to the MCK and not to DIAND.

The evidence of Mr. Lamontagne was confirmed by the evidence of Jean-Guy Fortier, the Regional Manager, Lands and Trusts Branch of DIAND for the Quebec Region and the person responsible for administration in relation to Indian Bands within the Province. Mr. Fortier made it quite clear that if a person in the position of Peter was refused services by the MCK and complained to DIAND and sought those same services from DIAND, he would be refused and simply referred back to the MCK. Should the MCK still refuse to grant the service, Peter would be 'left out in the cold'. It was also clear that DIAND is aware of the current membership criteria being applied at Kahnawake and nonetheless has taken a ‘ hands off' approach. This is so notwithstanding that Peter is a status Indian within the meaning of the Indian Act who resides in a Territory and is therefore entitled to the benefits of programs funded by DIAND under the Act.

While one can well understand the politics of the Kahnawake situation, in our view DIAND has abrogated its statutory responsibility by refusing to assist Peter and his family. However, DIAND is not a party to these proceedings and certainly does not have to answer to this Tribunal for its conduct.

We have concluded that while the Alternative Funding Arrangements and Financial Transfer Arrangement come close to adopting the membership criteria enacted in the Mohawk Law of 1984, they do not do so. Accordingly, the discriminatory practices of denying services to Peter and Trudy in the past and any denial of such services to them and their children in the future are not exempt from scrutiny under the CHRAct by virtue of the provisions of Section 67.

On the other hand, it is our view that as a result of the Ministerial Order dated May 27, 1992, (Exhibit R-29), DIAND has permitted the Kahnawake Band to conduct its elections to Council in accordance with its own "Regulations Governing the Mohawk Council of Kahnawake Elections" and no longer pursuant to Section 74 of the Indian Act. The Order itself makes specific reference to these "Regulations". The Regulations (Exhibit R-27, Section 23) make it explicit as to who is ineligible to vote and hold office in Council elections and this includes Trudy, because she married a non-Indian after May 22, 1981, and Peter, because he is totally non-Indian by birth.

In our opinion, the Ministerial Order is a "provision made under or pursuant to" the Indian Act (see Sections 2, 3 and 74 of the Indian Act) and accordingly, any future decision made by the MCK denying either Trudy or Peter the right to vote or hold office in Council elections on the grounds that they are excluded by virtue of the membership criteria being currently applied at Kahnawake, would be beyond the scrutiny of the CHRAct.

In this respect, the Ministerial Order of 1992 constitutes an endorsement of the membership criteria developed in the Mohawk Law of 1984 of Kahnawake which is based on blood content and quantum. In satisfying its political requirements, the federal government has become a party to the resulting discriminatory practice which is insulated from review under the CHRAct.

While the discriminatory practice of denying Trudy the right to vote in 1990 was not exempt from scrutiny (as the Ministerial Order was not enacted until 1992), any future denial of her right to vote or hold office in Council elections (or Peter's right to vote or hold office) would be exempt from scrutiny under the CHRAct by virtue of the provisions of Section 67.

E. REMEDIES

ISSUE # 4 - IF THE ANSWER TO QUESTION 1 IS "YES" AND THE ANSWERS TO BOTH QUESTIONS 2 AND 3 ARE "NO", WHAT REMEDY, IF ANY, SHOULD BE GRANTED TO THE COMPLAINANTS AND THE COMMISSION PURSUANT TO SECTION 53 OF THE CHRAct ?

To summarize, we have found that the MCK has engaged and is engaging in acts of direct discrimination against Peter, Trudy and their children by denying them services and access to services that are ordinarily available to members of the public. We have found that the defence of bona fide justification fails and that the discriminatory practices are not immune from scrutiny pursuant to Section 67 of the CHRAct except for the right to vote and hold office in MCK elections.

While it first appeared from the evidence of Trudy that she intended to pursue a monetary remedy, it is now quite clear that neither she nor Peter are seeking financial relief in this case. Rather they seek a remedy which will recognize that they are Mohawks and are part of the community of Kahnawake. They wish to be included on the Mohawk List and treated like all other Mohawks in the community with entitlement to all of the rights, benefits and privileges afforded to other Mohawks.

The HRC was specific in the remedy that it sought. It asked for the following remedy:

" Peter and Trudy Jacobs and their children are to be placed by the Mohawk Council of Kahnawake on a list of persons entitled to the following rights, benefits and privileges

Band number - assistance in obtaining
Residency (to live in Kahnawake)
Land allotment and land rights
Housing assistance - loan, repair, servicing
or related services
Welfare - in Kahnawake only
Education - in Kahnawake only
Voting privileges - in Kahnawake only
Burial
Medicines - in Kahnawake only
Tax privileges - in Kahnawake only, and

Any other benefits or privileges under the jurisdiction of the Mohawk People of Kahnawake.

The Mohawk Council of Kahnawake shall treat this list equally with its current Mohawk list in providing, administering and enforcing, whether directly or indirectly, such rights benefits and privileges. "

It seems to us that no matter what we might say or do, it is not possible for anyone, certainly not a statutory tribunal, to make effective an Order that someone be accepted as part of a community if the community is unwilling to have them. Acceptability within a community is a matter for the mind, the soul and the spirit and is not the subject matter of Orders. No matter what we might do, we cannot "make" Peter and Trudy members of this community - only the community can do that.

The MCK submitted that only the Kahnawake community can determine issues of membership and in doing so a line must be drawn somewhere resulting in some being included and some being excluded. While this may be so and while it may be that only the community can draw that line, it must be drawn in a manner that avoids prohibited acts of discrimination contrary to the CHRAct.

As previously indicated, we heard expert evidence with respect to the Mohawk tradition of adopting non-Indian persons and then treating them as full members of the community. We were invited to conclude that these adoptions have always been part of the Mohawk tradition, culture and the Great Law of Peace of the Mohawk people and that accordingly, we should direct the MCK to recognize Peter as a full member of the community. (It is to be noted that Peter was never formally adopted in a ceremony under Mohawk tradition in the Longhouse although he did sit with one of the Clans.)

Again, we refrain from making any pronouncements on what is or is not part of the Mohawk tradition, culture and Great Law. That is not our mandate. Our function is to determine whether unjustified discrimination occurred in this case within the meaning of the CHRAct.

During the course of this Hearing, we were told by Grand Chief Norton, by Professor Alfred and in the submissions of counsel for the MCK that should this Tribunal make an adverse finding against the MCK, its Order would be ignored. This was because the Mohawk community of Kahnawake would not accede to any outside authority on a matter regarding control over its own membership. We were told this not out of any disrespect to the Tribunal but as a matter of political reality. Professor Alfred stated that the intrusion of any outside authority such as this Tribunal on the membership issue, would likely harden the resolve of the community to exclude rather than include the Jacobs family. This, in itself, underscores the political context surrounding this entire matter.

While we understand the attitude of the MCK and the community's belief that it must take extraordinary measures in order to protect itself within the existing Canadian framework, we, as a statutory Tribunal, must apply the law to the circumstances of this Complaint. As to whether Peter and Trudy are well served by pursuing their Complaint, that is a matter for them to determine.

We were also told that in time, it was likely that Peter would be recognized as a full member of the community but that this would only occur when the community was culturally secure enough to embrace such persons. The Tribunal believes that this will eventually happen because the mark of a great people, even one whose principle values are directed to the collective rather than the individual, is one that treats the individual with justice, humanity and compassion. It may well be that in time, the views of the Royal Commission on Aboriginal Peoples (1993, Ottawa, Canada Communications Group) will be accepted in Kahnawake:

" In our view, any code that specifies a minimum blood quantum as a general prerequisite for citizenship ..... is also wrong in principle, inconsistent with the historical evolution and traditions of most Aboriginal peoples, and an impediment to their future development as autonomous political communities."

We are satisfied that it is appropriate to grant a remedy against the MCK as it, its administrators and employees are responsible for administering the distribution of rights, benefits, privileges and services within the community of Kahnawake. However, we are not prepared to grant a remedy in the terms advanced by either Peter, Trudy or the HRC. Rather, the remedy takes the form of a declaration and mandatory order as follows:

I . WE DECLARE that when Peter Jacobs was denied a grant for water and sewage facilities in 1992, the MCK committed a discriminatory practice contrary to the provisions of Section 5 of the CHRAct on the basis of race, national and ethnic origin;

2. WE DECLARE that when Trudy Jacobs was denied the right to vote in the Mohawk Council of Kahnawake election of 1990, and when she was denied an application for a low interest loan in 1991, the MCK committed discriminatory practices contrary to the provisions of Section 5 of the CHRAct on the basis of her family status;

3. WE DECLARE that by excluding Peter and Trudy Jacobs and their children from the Mohawk List and thereby denying them the opportunity to apply for rights, benefits, privileges and services (other than the right to vote and hold office) that are available to others on the List, the MCK is engaging in a direct discriminatory practice contrary to the provisions of Section 5 as aforesaid;

4. WE ORDER that the MCK should cease and desist from committing acts of discrimination against Peter and Trudy Jacobs and their children by refusing them access to the rights, benefits, privileges and services available to other members of the Mohawk community of Kahnawake and under its jurisdiction (except for the right to vote or hold office in MCK elections) as follows: band number; residency; land allotment and land rights; housing assistance - loan, repair, servicing or related services; welfare; education; burial; medicines; and, tax privileges.

By "access", we mean the right to be considered for those rights, benefits and privileges in accordance with the terms and conditions of the programs in place in the community.

Stanley Sadinsky, Q.C., Chair Lise Leduc, Member

DATED this , day of , 1998.