

**NOVA SCOTIA BOARD OF INQUIRY UNDER  
THE *HUMAN RIGHTS ACT***

Case No: 04-02-0034

**IN THE MATTER OF:**     *The Human Rights Act*, R.S.N.S. 1989, c. 214, as amended  
S.N.S. 1991, c. 12.

**BETWEEN:**

**REVEREND KENNETH GILLIARD**

**COMPLAINANT**

- and -

**THE TOWN OF PICTOU**

**RESPONDENT**

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**DECISION**

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**Chair: Cheryl L. Hodder**

**Hearing Dates: October 19-22, 2004**

**Decision Date: January 31, 2005**

**Appearances:**

Ann E. Smith  
Burchells  
1800-1801 Hollis Street  
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For the NSHRC

For Reverend Kenneth Gilliard

For the Town of Pictou

## **INTRODUCTION:**

1. On September 18, 2002, Reverend Kenneth Gilliard completed an Intake Questionnaire with the Nova Scotia Human Rights Commission ("Commission") outlining a Complaint against the Town of Pictou. Reverend Gilliard filed a formal Complaint with the Commission on April 23, 2003. Reverend Gilliard's Complaint alleges that the Town of Pictou discriminated against him by denying him access to facilities or services on the basis of his religion, contrary to Section 5(1)(a)(k) of the *Human Rights Act*.
2. Reverend Gilliard is an Ordained Minister with Maranatha Revivals Inc. of New Brunswick. He is the Pastor of the Cornerstone Community Church in Pictou, Nova Scotia.
3. In August of 2002, Reverend Gilliard sought to use the Marina Stage, part of the Marina Hospitality Centre, a public facility located on the waterfront within the Town of Pictou. Reverend Gilliard wanted to use this facility for the purposes of putting on a dramatic religious presentation entitled "*This Blood Is For You*". The presentation included the performance of a short drama, gospel songs and preaching of the gospel. In an attempt to book the Marina Stage, Reverend Gilliard contacted the Pictou Department of Recreation, Tourism and Culture (the "Department").
4. Reverend Gilliard provided information about the performance he wanted to present and the Town denied him permission to use the Marina Stage.

## **The Witnesses**

5. At the Hearing before the Board of Inquiry evidence was presented by the Commission, the Town of Pictou and the Complainant. The Commission's witnesses included the Complainant Reverend Gilliard, his wife, Bonnie Gilliard, and Michelle Ferris, who at the time in question was the Marketing and Special Events Co-ordinator for the Town of Pictou. The same witnesses were called by the Complainant.
6. The Town of Pictou presented evidence from Nicole MacDonald, the current Director of Recreation, Tourism and Culture for the Town of Pictou, then Mayor Lawrence LeBlanc and Town Clerk, David Steele.
7. The facts giving rise to the Complaint are complex and in many respects, are in serious dispute. I will therefore outline the evidence in considerable detail.

## The Evidence

8. Reverend Kenneth Gilliard and Bonnie Gilliard testified at length about a series of dealings they had with the Town of Pictou wherein they made several requests to use Town Property for a variety of events relating to their church ministry. It is the circumstances surrounding one such event, their request to use the Marina Stage for the performance of a drama, *"This Blood Is For You"*, which gives rise to this Complaint.
9. Reverend Gilliard testified that when he requested the use of the Marina Stage, he was advised by Michelle Ferris, who at the time was the Marketing and Special Events Co-ordinator for the Town of Pictou, that the Town had adopted a "policy" (unwritten) prohibiting public exhibitions of anything other than light-hearted entertainment on the Marina Stage. Ms. Ferris indicated that since Reverend Gilliard's presentation had a "message", his request to book the facility was denied. Ms. Ferris did however offer Reverend Gilliard the use of the Market Square Gazebo instead of the Marina Stage. Reverend Gilliard accepted the alternate venue and on or about August 17 and 18, 2002, he and his drama group performed their presentation.
10. With regard to what was said during the telephone conversations between them, the evidence of Ms. Ferris and the evidence of Reverend Gilliard differs on some key points. Ms. Ferris testified that Reverend Gilliard telephoned her in August 2002 requesting the use of the Marina Stage to put on a performance of his dramatic presentation entitled *"This Blood Is For You"*.
11. Ms. Ferris said she asked Reverend Gilliard to describe the performance in their telephone conversation. She said Reverend Gilliard told her that the drama demonstrated social problems such as drug use, violence and alcohol abuse. Ms. Ferris said she understood that the actors carried out their performance in mime (without dialogue) while the song *Satisfaction*, by the Rolling Stones, played in the background. Ms. Ferris said Reverend Gilliard told her the mime was followed by a reading of the gospel and a mimed re-enactment of the crucifixion of Christ.
12. Ms. Ferris denied advising Reverend Gilliard that he could not use the Marina Stage because his performance contained a "message". A letter from Reverend Gilliard to Michelle Ferris, dated August 23, 2002 and a report prepared by Ms. Ferris on August 28, 2002, were introduced into evidence at the Hearing. It is clear in both the letter and the report that the "message" in the performance was a point of discussion between Ms. Ferris and Reverend Gilliard. The letter and report will be discussed in more detail below.

13. Bonnie Gilliard is a Licensed Minister and the author of the drama, *"This Blood Is For You"*. She testified that she participated in the performance at the Gazebo on August 18, 2002. Reverend Gilliard testified that when they performed the drama at the Gazebo on August 17 and 18, 2002, one of the performers who was playing the role of the "Tempter's Helper", had her face painted black. Bonnie Gilliard testified that because this was a mime drama, it is not uncommon for actors to paint their faces.
14. According to Bonnie Gilliard, while they were performing at the Gazebo, a woman came from the restaurant across the street, grabbed Reverend Gilliard's arm and started yelling at him about the performance. The group proceeded with the drama and the woman left. Mrs. Gilliard testified that at the end of the drama a man came out of the same restaurant across the street, and shouted profanities at the performers and at some of the people in the audience. An RCMP Officer, Constable Turner, arrived shortly thereafter to speak to the Gilliards. Mrs. Gilliard testified that Constable Turner stayed to watch the second performance of the drama which went ahead without incident.
15. Mayor Lawrence LeBlanc testified that he received "an inordinate number of citizens' phone calls" regarding the performance of the drama. He stated that "people said it was loud", "people were concerned about the faces and the use of the gun". He said "that bothered everybody".
16. Nicole MacDonald testified that after Reverend Gilliard and his group performed the drama on August 18, 2002, she was advised by Town Clerk, David Steele of complaints relating to the drama. She said she did not receive any complaints herself and neither was she aware of whether the Town of Pictou recorded any information in relation to the complaints.
17. Mr. Steele testified that he had heard that there were complaints about the performance at the Gazebo but when pressed on cross-examination, he could not say who told him about the complaints or from where the complaints originated. There was no evidence introduced at the Hearing regarding any efforts on the part of the Town to investigate the nature of the performance nor did anyone from the Town attempt to get the name or names of the individuals who allegedly complained about the performance. Town Clerk Steele said that Constable Turner, who saw the performance at the Gazebo was not interviewed about the performance. There were no charges laid in relation to this performance.
18. Reverend Gilliard testified that on or about August 20, 2002, he contacted Ms. Ferris at the Department a second time to inquire about booking the Marina Stage to perform, *"This Blood Is For You"*. Reverend Gilliard testified that he was again advised he was not permitted to use the Marina Stage facility, as his presentation contained a "message". Reverend Gilliard stated that he then advised Ms. Ferris that he believed he had a right to use the public space and he could not be

discriminated upon because of his religion. Reverend Gilliard then advised Ms. Ferris that it was his intention to perform the drama on the Marina Stage on August 24, 2002 whether he had permission from the Town or not.

19. The next day, Reverend Gilliard received a letter, dated August 21, 2002 from Michelle Ferris. The letter was delivered by the Town of Pictou By-Laws Officer, Special Constable, Donnie Wright. The letter included a copy of the Town of Pictou *Public Places By-Law* with several sections highlighted by Ms. Ferris. The letter was entered into evidence at the Hearing. Reverend Gilliard testified that Special Constable Wright said that he was not allowed to use any Town property. Town Clerk, David Steele testified that Special Constable Wright also delivered a copy of the *Public Places By-Law* to the RCMP on the same day. Mr. Steele said that the Town had not given the RCMP a copy of the *Public Places By-Law* before that time.
20. Reverend Gilliard testified that he telephoned the Town office and inquired about the letter and the process for booking the Marina Stage. He was advised by the Town Clerk that he could not use the stage without a Special Events Permit. Reverend Gilliard testified that when he inquired at the Town office about the process for booking the Marina Stage and acquiring a Special Events Permit, none of the Town support staff were aware of the process for acquiring such a permit. David Steele testified that there was no application form and no formal process for obtaining a Special Events Permit.
21. Reverend and Mrs. Gilliard testified that later in the week, Constable MacGillivray of the RCMP came to their residence to advise Reverend Gilliard that if he performed the drama on the Marina Stage, he would be charged under the *Public Places By-Law*. Reverend Gilliard testified that this prompted him to write once again to Michelle Ferris. With his letter dated August 23, 2002 which was introduced into evidence at the Hearing, Reverend Gilliard included copy of the *Human Rights Act* of Canada and references from the *Canadian Charter of Rights and Freedoms*. Reverend Gilliard stated at page 1 of his letter:

"A week previous to the weekend of August 18, 2002, you expressed in our telephone conversation, on more than one occasion that I could *not* perform a religious service at the outdoor stage of the Marina. I quote your reason of such a decision, "**because it has a message**". You also stated the Town of Pictou *only allows "light hearted entertainment"* to be performed at the Marina Stage. Also you said, "**the Marina is too public for such a message**" and gave us permission to use the Gazebo on Water St. and so as given permission and electricity we used the said facilities....

Since then I have researched the laws of the *Human Rights Act* of Canada. I have discovered we cannot be discriminated [sic] because of religion and that I have just as much right, as a Canadian citizen, to use goods, services, facilities or accommodation that are customarily available to the public." [emphasis by Reverend Gilliard]

22. Reverend Gilliard continued at page 2 of the letter:

"On August 20, 2002, I inquired if the Marina Stage was available on the evening of Saturday, August 24 (So I would not interfere with any scheduled event.). You stated there were no scheduled events and proceeded to say we were free to use the Gazebo on Water St., and not the Marina because of the "**content of our messages**" as you stated before. I then proceeded to tell you my constitutional rights and upon quoting the constitution to you, you hung up and had a hand delivered letter by the Town By-Law Officer stating that we do not have permission to use any Town of Pictou property on the date I inquired of and any other date including the Market Square Gazebo".

...

"I have been informed by the RCMP that you have asked them to enforce the highlighted *By-Law* under "Special Events" if I proceeded which is a minimum fine of \$200.00."

23. Reverend Gilliard continued at page 3 of the letter:

"We have a video of the religious service I performed at the Gazebo on Water St., and have several pictures which show we were a peaceable religious gathering. And we also had permission to use the said premises."

...

"Right from the beginning you never implied, indicated or told me the reason I could not assemble at the Marina was about a "Special Events Permit". If that was the case, I would have done so. Yet you said very clear it was about the *content of the message* as you stated "**we have made an internal decision at Pictou Recreation to not allow any performance with a message at the waterfront, it is too**

**public for a message".** You also stated previous to our inquiry, even the Salvation Army had been refused access to the waterfront. I am *astonished* to think that this type of religious discrimination can go on in Canada." [emphasis by Reverend Gilliard]

24. Following her last conversation with Reverend Gilliard, Ms. Ferris prepared a report dated August 28, 2002. The report was entered into evidence at the Hearing.
25. Ms. Ferris stated at page 1 of her report:

"I determined that the nature of the performance was unsuitable for that particular venue in light of the way that venue is promoted, in view of the fact that the events held there reflect the views of the Town of Pictou, and in view of the diversity of the audience/crowd that we draw to our waterfront. We have always attempted to develop programming with mass appeal and, where there's any variation we have attempted to provide advance notice. The standards that I have used for the past two and a half years of special event planning are based on a tourism development model that attempts to position the Town of Pictou as a charming sea-side destination steeped in Scottish culture and history and where traditional and maritime music can be easily found. As such, the Marina Hospitality Centre is positioned as a Summer Musical Showcase Venue and also as a community focal point for numerous events and festivals. In short, I deemed the described performance as at odds with the facility/venue, the marketing and promotions and our tourism objectives."

Ms. Ferris continued at page 2 of her report with the following:

"In summary, my intention was not to discriminate against Mr. Gilliard, **only to enforce the operating policy that has guided all product development for the waterfront for the last several years.**"

Ms. Ferris stated at page 4 of her report:

"I believe that Mr. Gilliard wants to leverage his message **off of our successful marketing campaigns**, that is precisely why he continued to insist on that particular venue, versus one less than three hundred m away."

Ms. Ferris concluded her report with the following:

**"Is it our obligation to provide a microphone for anyone who wants to come on Town property for the purpose of voicing political or religious platforms? What then prevents our public venues from becoming a target for anyone and everyone - what limits/controls do we have on protecting the social/culture and leisurely integrity of our public spaces? My view is that the waterfront should be reserved for displays of culture not displays of conscience". [emphasis mine]**

26. I have carefully reviewed and considered the evidence of Ms. Ferris and Reverend Gilliard in relation to whether Ms. Ferris told Reverend Gilliard the performance of *"This Blood Is For You"* was not suitable for the Marina Stage because it contained a "message". I prefer the evidence of Reverend Gilliard on this point and I find that Ms. Ferris did deny the use of the Marina Stage to Reverend Gilliard because of the "message" in the performance. This conclusion is supported by Reverend Gilliard's letter of August 26, 2002 and Ms. Ferris' own report of August 28, 2002 which are quoted at length above.

#### **The Performance of August 24, 2002**

27. Reverend Gilliard did not get a Special Events Permit from the Town. He and his group nevertheless, performed *"This Blood Is For You"* on August 24, 2002 at the Marina Stage. A video tape of the performance was played during the Hearing with the consent of all parties.
28. Bonnie Gilliard testified that shortly after they started their performance, Constable MacGillivray walked upon on the stage to speak with her husband. The drama continued while Constable MacGillivray spoke with Reverend Gilliard and shortly thereafter the Constable left the stage. The performance was acted out in mime without dialogue as the song, *Satisfaction*, played in the background. None of the actors had their faces painted. In the performance, a young man played the role of "the Tempter" who encouraged the other actors to indulge in various habits that represented social problems like excess spending, alcohol abuse, drug abuse and attempted suicide. As part of the depiction of the attempted suicide, a young male performer held a toy gun to his head as the Tempter encouraged him to pull the trigger.
29. Next, a young woman who played the role of "the Believer" tried to introduce the people with the social problems to the words of the scripture. The struggle between the Tempter and Believer was also acted out in mime during the playing of the song, *Satisfaction*. The re-enactment of the crucifixion of Christ was also done in mime.



During this part of the performance, the background music changed to a song called *This Blood Is For You*.

30. At the end of the performance, the individuals who depicted the various social problems, accepted the Lord into their lives and were saved. The drama concluded, Reverend Gilliard read a short scripture passage and preached a brief sermon about the subject matter of the drama. At the end of the presentation, audience members were invited to speak with him or any member of the cast of the drama if they wished. The drama portion of the presentation was approximately 15 minutes in length and proceeded without incident despite the brief appearance of Constable MacGillivray on stage during the performance.
31. Mrs. Gilliard testified that the following week at approximately 11:30 p.m. Constable MacGillivray came to their home, got them out of bed and served Reverend Gilliard with a Summons to appear at Provincial Court to answer to a charge that he did:

"obstruct the use by others of the Town of Pictou Marina Property at Caladh Avenue, in the Town of Pictou without obtaining a Special Events Permit, contrary to Section 9(13) and Section 9(14) of the *Public Places By-Law* of the Town of Pictou and furthermore, on or about the 24<sup>th</sup> day of August, AD. 2002, at or near Pictou, in the County of Pictou, Province of Nova Scotia did loiter at the Town of Pictou Marina Property at Caladh Avenue, in the Town of Pictou contrary to Section 9(16)(b) of the *Public Places By-Law* of the Town of Pictou".
32. The charge under the *Public Places By-Law* of the Town of Pictou was heard on March 6, 2003 in Provincial Court. Reverend Gilliard was found not guilty of violating the *Public Places By-Law*.
33. Subsequent to being charged under the *Public Places By-Law*, Reverend Gilliard made an application to Pictou Town Council for a Special Events Permit for use of the Marina Stage to perform the drama on September 14 and 15, 2002. Reverend Gilliard made his application by way of a letter to Mayor Lawrence LeBlanc and Pictou Town Council dated September 5, 2002. This letter was introduced into evidence at the Hearing.
34. Reverend and Mrs. Gilliard attended the meeting of Pictou Town Council on September 9, 2002 during which their request to use the Marina Stage to perform the drama, "*This Blood Is For You*", was to be considered by Council. A second application for a Special Events Permit from Reverend Frank Melanson, of Shoreline Ministries was also scheduled for consideration at that meeting. Reverend Melanson applied to conduct a street ministry within the Town of Pictou. The Board of Inquiry heard evidence from Reverend Gilliard, Bonnie Gilliard, David Steele and Mayor Lawrence LeBlanc regarding Reverend Melanson's application

to perform his street ministry within the Town of Pictou. David Steele testified that after Reverend Gilliard made his request at the meeting, Pictou Town Council took it under consideration. Later that same evening during an *in camera* meeting of the Committee of the Whole of the Town Council, the applications of both Reverend Gilliard and Reverend Frank Melanson were considered. Both David Steele and Mayor Lawrence LeBlanc testified that the Committee of the Whole considered the factors enumerated in Section 17 of the *Public Places By-Law* and used its discretion to refuse the applications of Reverend Gilliard and Reverend Melanson for Special Events Permits.

35. In a letter dated September 10, 2002, Town Clerk, David Steele wrote to Reverend Gilliard stating that Town Council had reviewed his request for use of the Marina Stage. This letter was entered into evidence at the Hearing. Mr. Steele stated that the Marina Stage was already booked for the requested dates and that Town Council had refused Reverend Gilliard's request "taking into consideration the factors noted in Section 17 of the *Public Places By-Law*". Bonnie Gilliard testified that she checked to see what events were booked for New Scotland Days on September 14 and 15, 2002 and that there was nothing scheduled for the Marina Stage during the times Reverend Gilliard wanted to book it. The schedule for New Scotland Days was entered into evidence at the Hearing. There were no events listed on the schedule for the times that Reverend Gilliard wanted to book the Marina Stage on September 14 and 15, 2002.

### **The Public Places By-Law**

36. It is appropriate at this point to examine the history of the Town of Pictou's *Public Places By-Law*. David Steele testified that he has been an employee of the Town of Pictou for 34 years and the Town Clerk for 25 years. He testified that his role is to carry out the policy and the direction of the Town Council, attend and prepare agendas for all Council Meetings and to sign off on the minutes of such meetings. Mr. Steele testified that the *Public Places By-Law* was put in place to control and maintain order in public places in the Town of Pictou. Mr. Steele testified that the *By-Law* was passed in November of 2001.
37. Michelle Ferris testified that at the time she refused Reverend Gilliard's initial requests for use of the Marina Stage, she was not aware of the *Public Places By-Law*. The *By-Law* did, therefore, not inform any decision she made about the use of the Marina Stage. Ms. Ferris said that the first time she ever saw the *By-Law* was following her second phone call with Reverend Gilliard on August 24, 2004. She said that on that day, "Mr. Steele made us aware of the *By-Law*".

38. Nicole MacDonald is the Director of Recreation Tourism and Culture for the Town of Pictou and she was the Director in August 2002 when Reverend Gilliard requested the use of the Marina Stage. Ms. MacDonald also testified that although she had been an employee of the Town of Pictou since 2001, she had never been made aware of the *Public Places By-Law* until the time of Reverend Gilliard's second request to use the Marina Stage.
39. Even though the *By-Law* had been passed in November of 2001, Mr. Steele testified that there were no plans within the Town or within his office for a process to train staff in the application of the *By-Law* and neither was there a process to implement the *By-Law*. Essentially from the time the *By-Law* was passed, Mr. Steele said "there was nothing done with it at all".
40. The relevant portions of the *Public Places By-Law* are:
  - (3) In this *By-Law*:
  - (10) "Public places" means:
    - (c) Property owned by the Town of Pictou.
41. Section 9 of the *By-Law* outlines activities which are prohibited in public places including swearing, spitting, lighting fires, camping, sleeping, begging, skateboarding and rollerblading, bicycling (with exceptions), keeping of animals, littering, driving (with exceptions), loitering or vending. Subsection 14 of Section 9 of the *By-Law* contains the following provision:
  - (9) Without limiting the generality of Section (8):

no person shall carry on public entertainment events, exhibitions, parades or circuses except as expressly authorized by or pursuant to a Special Events Permit.
42. The regulations concerning Special Events Permits are found at Section 13-19 of the *By-Law*. Requests for permits are made to either the Town Council or the Town Clerk. The relevant provisions are as follows:
  13. "A person wishing to carry out a public entertainment event, exhibition, parade or circus in a public place or any other activity of a temporary nature which might interfere with the lawful use and enjoyment of a public place by other persons may apply for a Special Events Permit.

(...)

17. In deciding whether or not to grant a Permit under Section (16), or in determining terms or conditions of the Permit, Council **shall** give consideration to:
  - (1) the social or economic benefit of the proposed event to the municipality;
  - (2) the volume, nature, duration and consistency of disturbance to the use and enjoyment of public places from the proposed event;
  - (3) the proximity and nature of abutting or adjacent land uses and the effect upon them of granting the Permit;
  - (4) whether the proposed event would also require the granting of an exemption from the *Noise By-Law*, and, if so, whether it is appropriate to grant such an exemption having regard to the requirements in that *By-Law*, and
  - (5) any other factor relevant to balancing the interests of the applicant, the Town of Pictou and others in relation to the proposed event. [emphasis added]
  
43. "In deciding whether or not to grant a Special Events Permit", the Town Council must give consideration to the five criteria set out in Section 17 of the *By-Law*. The same criteria must also be considered if the Town wants to impose conditions or terms on a particular Special Events Permit. David Steele and Mayor LeBlanc were questioned at length by way of direct and cross-examination, about which of the criteria under Section 17 of the *By-Law* were considered by the Town Council in the decision to deny Reverend Gilliard the use of the Marina Stage for the performance of "*This Blood Is For You*".
  
44. I have carefully reviewed the evidence of Mayor LeBlanc and Town Clerk Steele, and I find that there was no meaningful consideration of Section 17 of the *By-Law* by Town Council. Specifically, I find that there was no consideration of "the social or economic benefit of the proposed event to the municipality" as mandated by Section 17(1) and neither was there any consideration of "the proximity and nature of abutting or adjacent land uses" and the effect upon them of granting the Permit as set out in Section 17(3) of the *By-Law*. When the Mayor was asked what, if any,

consideration Council gave to Section 17 of the *By-Law* when refusing to grant Reverend Gilliard a Special Events Permit, he said "volume and nature".

45. Mayor LeBlanc, David Steele, Michelle Ferris and Nicole MacDonald all testified that they had not seen the drama at the time the Town was considering Reverend Gilliard's various applications. There was a suggestion by Mayor LeBlanc and David Steele that one of the Town councillors may have seen the drama but none of the witnesses were able to name this councillor and therefore no evidence was given by any member of Town Council who had actually seen the performance.
46. Reverend Gilliard did offer to show a videotape of the performance to Council (letter of August 23, 2002) but Council did not take him up on his offer. The Board finds that the Town made no attempt to measure the volume of Reverend Gilliard's drama against the volume of any other performances at the Marina Stage including the Rock and Roll performances which formed a part of the Summer Musical Show Case. I find that Council could not have considered "whether the proposed event would require granting of an exemption from the *Noise By-Law*" as articulated in Section 17(4). Further, the Town did not give any consideration to granting the permit with conditions.
47. Mr. Steele testified he had not seen the drama until he was shown a videotape of it during his preparation for this Hearing. He stated that the Committee of the Whole of Pictou Town Council determined that the drama was not suitable for the Marina Stage. When asked whether he was aware of a Town policy that there would be no politics or no religion on the Marina Stage and whether the Mayor expressed this opinion, he answered "I can't say it was the Mayor". When pressed on cross-examination as to whether he heard the Mayor say that, he indicated he didn't recall. Mr. Steele did suggest, however, that the opinion that there should be no politics or religion on the Marina Stage was expressed at Council.
48. Mayor LeBlanc said that the suggestion that there should be no religion or politics on the Marina Stage came from the Tourism, Recreation and Culture Committee of the Town. The Mayor denied expressing this opinion to Nicole MacDonald. When asked about the "operating policy" regarding the prohibition of religion and politics on the Marina Stage, Ms. MacDonald testified that she was aware that certain individuals in the Town of Pictou including members of the Town Council were of that view. I prefer the evidence of Nicole MacDonald on this point. Ms. MacDonald was very clear in her testimony that she had heard the Mayor say on several occasions that there was to be no politics or religion on the Marina Stage. Ms. MacDonald said that the Mayor also told her specifically that there should be no politics or religion on the Marina Stage. Ms. MacDonald testified to holding that same belief herself.

49. Mayor LeBlanc, said several times during his evidence that his concerns about the performance were based upon the complaints he had heard. He said his concerns were the use of the gun and the painted faces. We know from the video and from the evidence of Reverend and Bonnie Gilliard that, in fact, the faces were not painted during the performance at the Marina. In her evidence, Michelle Ferris said based upon the detailed description Reverend Gilliard gave her during their first conversation about the performance, there was nothing that caused her concern except that the performance "just didn't gel" with the programming that was scheduled at the Marina Stage.
50. When questioned why Reverend Melanson was also turned down by Council for his request for a Special Events Permit, Mayor LeBlanc stated:

"I think maybe that's maybe a little bit harder to explain and I believe, and I am only guessing that Council said no to that because they wanted to be consistent with Reverend Gilliard".
51. When asked on cross-examination what the commonality was between Reverend Gilliard's request and Reverend Melanson's request, Mayor LeBlanc's evidence was vague.
52. The Mayor also said "You had to treat them both the same" because "consistency was the main thing. You could not say yes to one and not to the other". The evidence at the Hearing was that Reverend Melanson wanted to do a street ministry within the Town of Pictou. There was no evidence that he intended to use a gun, that he intended to have his face painted or that he intended to play loud music. I therefore conclude that the desire on the part of the Mayor and Council to treat both Reverend Melanson and Reverend Gilliard the same was that they were both Reverends, and they both wanted to use Town property to further their respective ministries.
53. Having carefully reviewed the evidence of Town Clerk Steele, Mayor LeBlanc, Michelle Ferris and Nicole MacDonald, I find that the Town Council did not apply the criteria as enumerated in Section 17 of the *Public Places By-Law* in denying Reverend Gilliard a Special Events Permit for the use of the Marina Stage. The Board therefore concludes that Reverend Gilliard was denied a Special Events Permit for the use of the Marina Stage primarily because the performance contained a religious message.

**Legal Principles**

54. Do these facts establish a breach of s.5(1)(a) (k) of the *Human Rights Act* by The Town of Pictou in denying Reverend Gilliard the use of the Marina Stage?

55. Section 5(1) of the *Human Rights Act* states:

5 (1) No person shall in respect of

(a) the provision of or access to services or facilities;

...

discriminate against an individual or class of individuals on account of

...

(k) religion;

56. Discrimination is defined in Section 4 of the *Act* as follows:

4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

**Finding of Discrimination**

57. The Supreme Court of Canada set out the requirements as to what constitutes a *prima facie* case of discrimination in *O'Malley v. Simpson-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 at D/3108:

A *prima facie* case of discrimination ... is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer.

58. It is clear from the facts that the rental and use of the Town of Pictou's facility (the Marina Stage) is a service or facility customarily used by and available to the public. As such, the Marina Stage comes within the scope of Section 5(1)(a) of the *Human Rights Act*.
59. The case law supports the proposition that the Town's facilities fall within the scope of Section 5(1)(a) of the *Human Rights Act*. In ***Sonnenberg v. Lang***, [1989] N.B.J. No. 825 (N.B.Q.B.), a decision dealing with the tribunal's finding in ***Sonnenberg v. Centre Universitaire St-Louis-Maillet*** (1987), 9 C.H.R.R. D/5100 N.B. (Bd. Inq. ), a minister wanted to rent a university auditorium and some booth space for a church group meeting. He also wanted to publicize an evangelical tour. He was refused and subsequently filed a complaint. The Board of Inquiry denied the complaint on the basis that the Centre Universitaire did not fall under the Human Rights legislation's definition of "services or facilities available to the public". In ***Sonnenberg v. Lang***, *supra*, it was held that rental of the university auditorium did constitute a service or a facility customarily available to the public. On the issue of whether the rental of the university facilities fell within the purview of the legislation, the court said,
- "I believe that it is unreasonable to find that a facility available to the public in this case, i.e. the campus auditorium, is also excluded from the scope of the Act simply because this case also concerns an educational institution."
60. The onus is on the Complainant to show that he was treated adversely by the Respondent, and that there is evidence from which it is reasonable to infer that the Complainant's religion was a factor in the adverse treatment.
61. I find that religion was a factor in the decision not to grant Reverend Gilliard the use of the Marina Stage. Reverend Gilliard was denied the use of the Marina Stage because his performance contained a "message". The message was a religious message. In denying Reverend Gilliard the use of the Marina Stage, Michelle Ferris was carrying out an "operating policy" of the Town that there would be no religion or politics on the Marina Stage. The Town Council applied this same "operating policy" when they denied Reverend Gilliard's application for a Special Events Permit. This finding is supported by the *viva voce* evidence and the documentary evidence submitted during the Board of Inquiry which I have already outlined in detail.
62. It is not necessary for me to find that the discrimination by the Town of Pictou was intentional because lack of intent to discriminate is irrelevant to a finding of discrimination.



63. Section 4 of the *Act*, under the title "*Meaning of Discrimination*" states:

"For the purpose of this Act, a person discriminates where the person makes a distinction, **whether intentional or not**, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society." [emphasis added]

64. As the Complainant has discharged his burden on the *prima facie* case, the burden shifts to the Respondent to establish that its conduct was justified. The only defence available to a complaint of discrimination on the basis of religion in the provision of the Act that deals with services or facilities is found in Section 6(f) of the Act which provides:

- (f) Where a denial, refusal or other form of alleged discrimination is
  - (i) based upon a *bona fide* qualification, or
  - (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

#### **Public Places By-Law and the Exercise of Discretion**

65. The Town of Pictou relies on its *Public Places By-Law* to justify the exercise of its discretion in denying Reverend Gilliard access to the public Marina Stage facility. Section 17 sets out the criteria that the Council **shall** give consideration to in considering whether to grant a Special Events Permit. The wording of the *By-Law* is imperative; a mandatory consideration of the various criteria set forth in subsections 1-5. It is clear from the evidence of Mr. Steele and Mayor LeBlanc that the Pictou Town Council did not review and weigh the factors mandated by the *By-Law*. Their evidence was vague and contradictory on this point.

66. As stated earlier in this decision, the Board finds that the Town Council did not apply the criteria mandated by Section 17 of the *Public Places By-Law* in any meaningful way in its consideration of Reverend Gilliard's request.

67. Given the Town's Policy of not allowing religion or politics on the Marina Stage, coupled with the inconsistent and inconclusive testimony regarding how the criteria for a Special Events Permit, as set out in the *By-Law* was applied, I find that the Town's discretion was exercised improperly in denying Reverend Gilliard the use of the Marina Stage because of the religious nature of the performance.
68. It is well settled at law that, although an official may have discretion in providing a service, one cannot ignore the law in exercising that discretion. In ***University of British Columbia v. Berg*** (1993), 18 C.H.R.R. D/310 (S.C.C.) at para. 75 the Supreme Court of Canada stated:

"I do not think that a purposive approach to interpreting this provision can allow a discretion to be exercised on prohibited grounds of discrimination, once the service or facility which is the subject of the discretion is otherwise found to fall within the purview of the *Act*, i.e. to be customarily available to the public. In making this latter finding, the trier of fact must be careful to exclude from his assessment of whether the discretion is customarily exercised to provide the service those instances where the service has been withheld on discriminatory grounds. Furthermore, it would seem obvious that the fewer the guidelines for the exercise of this discretion, and the greater the scope for the person exercising that discretion to set his or her own criteria, the greater potential there is for invidious discrimination. It is a basic principle of administrative law that a discretion vested in an administrative official or body is only to be exercised on proper grounds. Similarly, in this content, while the existence of a discretion may mean that the person with the discretion is under no obligation or duty to extend the service or facility to everyone who asks for it, he or she is surely under an obligation not to make his or her decision in a discriminatory fashion."

69. While the Town of Pictou has the discretion to offer a service to some or all members of the public, that discretion cannot be exercised in a discriminatory way. The Town cannot ignore the law in exercising that discretion. For the reasons set out above, I find that the Town of Pictou discriminated against Reverend Gilliard and his group on the basis of religion. The Town's denial of Reverend Gilliard's application for a Special Events Permit was not "based upon a *bona fide* qualification or a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" as required by Section 6(f) of the *Act*. Such discrimination is contrary to the *Human Rights Act*.

## Remedy

70. The powers available to a Board of Inquiry to fashion a remedy are found at Section 34(8) of the *Human Rights Act*:

"34(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor."

71. The most common remedies for violations of the Act include monetary compensation and non-monetary compensation. As noted in *McAvinn v. Strait Crossing Bridge Ltd.* No. 4 (2001), 41 C.H.R.R. D/388 (C.H.R.T.) at para. 183, the goal of compensation in cases of discrimination is to make the victim whole, taking into account principles such as reasonable foreseeability and remoteness.

72. *Henwood v. Gerry van Wart Sales Inc.* (1995), 24 C.H.R.R. D/244 (Ont. Bd. Inq.) provides guidance as to the purpose of remedies and damage awards in human rights complaints at para. 33:

"These remedial provisions should be construed liberally to achieve the purposes and policies of human rights legislation: *Cameron v. Nal-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.) at D/2196."

It is the principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to a complainant to meet the broader policy objectives of the Code. The objectives of the Code are to put the complainant in the same position she would have been in had her human rights not been infringed by the respondents: *Cameron* at p. D/2196, paras. 18526-27. The measure of monetary damages in a case such as this is the amount that the complainant would have earned had she not been denied the employment opportunity: *Cameron* at p. d/2197, para. 18532; *Piazza v. Airport Taxicab (Malton) Assn.* (1989), 69 O.R. (2d) 281 at 284 [10 C.H.R.R. D/6347 [C.A.]. The complainant in this case had a duty to mitigate her damages; however, the onus of proving a failure to mitigate lies upon the respondents, as it does in other areas of the law: *Gohm v. Domtar Inc.* (No. 4) (1990), 12 C.H.R.R. D/161 at D/180 (Ont. Bd. Inq.), citing *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

## Damages

73. The Complainant has requested the following:
1. Special damages of \$4,100.00 for the cost of Reverend Gilliard to defend the charge under the *By-Law*.
  2. \$5,000.00 - \$7,500.00 in general damages for suffering, ridicule, assault to his dignity.
  3. A \$5,000.00 donation to the Corner Stone Community Church to promote *This Blood Is For You* in their outreach programs in the summer of 2005.
74. Boards of Inquiry have awarded both general and exemplary damages. General damages are awarded for the harm and injury to a complainant's dignity and self-respect, and to recognize the humiliation suffered as a result of discrimination or harassment.
75. The following statement concerning an award of general damages articulated in ***Willis v. David Anthony Phillips Properties*** (1987), 8 C.H.R.R. D/3847 (Ont. Bd. Inq.) at para. 3046 has been cited with approval by various human rights tribunals:
- "Awards of general damages under the *Human Rights Code*, 1981, should be high enough to provide real redress of the harm suffered, insofar as money can provide such redress, and high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society. ... No award should be so low as to amount to a mere 'license fee' for continued discrimination. At the same time, fairness requires that an award bear a reasonable relationship to awards made by earlier boards of inquiry."
76. Some of the considerations in assessing general damages in the human rights context are addressed at para. 38 in ***Henwood v. Gerry van Wart Sales Inc.*** (1995), 24 C.H.R.R. D/244 (Ont. Bd. Inq.):
- "Loss of dignity and self-respect are relevant considerations in assessing general damages for 'loss arising from the infringement'. Damages for this loss should reflect the seriousness of the injury caused: Cameron, *supra*, at D/2198, para. 18538. An inherent but separate component of the damage award for 'loss arising out of the infringement' in s. 41(1)(b) reflects the loss of the human right of equality of opportunity in employment. This is based upon the recognition

that, independent of the actual monetary or personal losses suffered by the complainant, whose human rights are infringed, the very human right which has been contravened has intrinsic value. The loss of this right is therefore an independent injury suffered by the complainant: Cameron, supra, at D/2198, para. 18539."

77. The range for general damages in human rights cases in Nova Scotia is generally between \$2,000.00 and \$6,000.00, although awards have been made for higher and lower amounts.
78. In ***Blanchard v. L.I.U., Local 1115*** (2002), C.H.R.R. Doc. 02122 (N.S. Bd. Inq.), the Board found that the respondents could rely on one of the exemption provisions in the *Act*, but found that had the Complainant made out his case, he would have been awarded general damages of \$15,000.00 "for the suffering inflicted upon him" plus interest at 2.5%.
79. In ***Cunanan v. Bollen Developments Limited*** the tribunal awarded general damages of \$4,000.00 to the complainant plus pre-judgment interest dating back to the date of the complaint.

### **Special Damages**

80. A Board of Inquiry has jurisdiction to award special damages where it deems appropriate to do so.

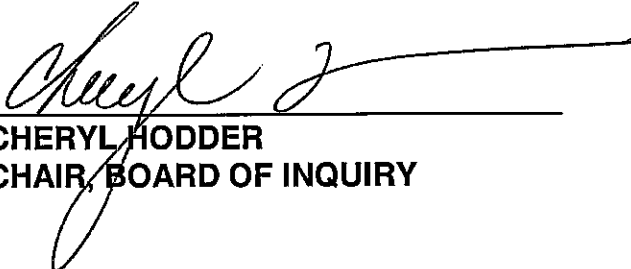
### **Non-Compensatory or Public Interest Remedies**

81. Boards of Inquiry in Nova Scotia have awarded various non-compensatory remedies, largely designed to require respondents to remedy their discriminatory practices. Such remedies have included mandatory sensitivity training and development of anti-discrimination policies (***Wigg v. Harrison*** (1999), C.H.R.R. Doc. 99-188 (N.S. Bd. Inq.) and ***Miller v. Sam's Pizza House*** (1995), 23 C.H.R.R. D/433 (N.S. Bd. Inq.)).

**Award**

82. I have carefully reviewed the submissions of the parties and reviewed the case law in relation to the specific facts of this matter and their impact on Reverend Gilliard. The Board has reached the following conclusion as to remedy:
1. The Respondent, Town of Pictou shall pay to the Complainant, Reverend Kenneth Gilliard, the sum of \$6,000.00 in general damages plus interest at 2.5% from the time of the complaint to the date of this decision.
  2. The Respondent shall pay to the Complainant as a contribution to costs, the sum of \$3,000.00 plus tax and disbursements.
  3. The Respondent, Town of Pictou, shall be required to offer sensitivity training to its administrative employees. Through sensitivity training, the Respondent will develop a better understanding of what constitutes discrimination and why it is prohibited in Nova Scotia under the *Human Rights Act*.
  4. The Respondent, Town of Pictou, shall file an Anti-Discrimination Policy in conformance with the *Act* with the New Glasgow office of the Nova Scotia Human Rights Commission within six (6) months of the date of this decision.
83. I wish to express my gratitude to Counsel for their excellent Briefs and their professionalism throughout these proceedings.

**DATED** at Halifax, Nova Scotia this 31<sup>st</sup> day of January, 2005.

  
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**CHERYL HODDER**  
**CHAIR, BOARD OF INQUIRY**

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