

**Canadian Human Rights Tribunal**

**Tribunal canadien des droits de la personne**

**BETWEEN:**

**NANCIE MARTIN**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**SAULTEAUX BAND GOVERNMENT**

**Respondent**

**REASONS FOR DECISION**

**T.D. 07/02**

**2002/04/18**

**PANEL: Anne Mactavish, Chairperson**

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[1] Nancie Martin worked for two years as a Grade 3 teacher at the school on the Saulteaux Reserve in Saskatchewan. In May of 1997, Ms. Martin was advised that the Chief and Council of the Saulteaux First Nation had decided not to renew her contract for the following school year. Ms. Martin alleges that her pregnancy was a factor in this decision. The respondent contends that

those involved in the decision-making process did not know about Ms. Martin's pregnancy at the time that the decision was made not to offer her a new contract. According to the respondent, Ms. Martin's contract was not renewed because of concerns relating to her performance.

## **I. NANCIE MARTIN'S EXPERIENCE AT THE SAULTEAUX HERITAGE SCHOOL**

[2] Ms. Martin worked for several years as a Personal Care Worker and Life Skills Instructor. In these positions, she helped individuals with multiple disabilities participate in the community and gain meaningful employment. Ms. Martin then returned to school, and in May of 1995, she obtained a Bachelor of Education degree from the University of Brandon, where she majored in elementary education. Ms. Martin obtained the necessary credentials to teach in Manitoba, as well as a Class Four teaching certificate, which allowed her to teach in Saskatchewan.

[3] During the summer of 1995, Ms. Martin applied for a position as a Grade 7 teacher at the Saulteaux Heritage School near Cochin, Saskatchewan. The Saulteaux Heritage School is a small school, with a student population that is almost exclusively Native. Ms. Martin was interviewed for the position by three or four people, including Joyce Night, the Education Co-ordinator for the Saulteaux Band. The Education Co-ordinator is the senior Band employee responsible for the day to day operation of the school. The Education Co-ordinator reports to the Band school board, known as the Education Committee. Although Ms. Martin's application was for a position at the Grade 7 level, shortly after her interview, she was offered and accepted a position as a Grade 3 teacher.

[4] Ms. Martin was employed pursuant to a written contract of employment. Because the school was entirely dependent on funding allocated on an annual basis by the federal Department of Indian and Northern Affairs, all teachers were hired under fixed term contracts for periods of one year at a time. Although teachers were term employees, Ms. Night testified that teacher contracts were ordinarily renewed from year to year, unless there were problems with a teacher's performance.

[5] On August 28, 1995, Ms. Martin started work at the Saulteaux Heritage School. She had approximately 15 students in her Grade 3 class in the 1995-6 school year, some of whom suffered from conditions such as Fetal Alcohol Syndrome and Attention Deficit Disorder. According to Ms. Martin, no formal evaluation of her performance was carried out at any time during her first year at the school, and no performance concerns were brought to her attention during this period. Joyce Night confirmed in her testimony that the Band did not have any concerns with respect to Ms. Martin's performance during her first year at the school. Ms. Martin's contract was renewed for a second one-year term in June of 1996.

[6] The 1995-6 school year appears to have been a period of some disruption insofar as the administration of the school was concerned, which may explain why no formal assessment of Ms. Martin's performance was carried out. The Principal left the school early in the year, and Terry Martens, the Vice-Principal, acted as Principal until a new Principal could be hired. Lance Wellsch became the Principal in January of 1996.

[7] Because she was in her first year of teaching, Ms. Martin wanted to have a written record of her performance, and accordingly sought a letter of reference from Terry Martens, who had acted as Ms. Martin's supervisor in the period that the school was without a Principal. Ms. Martens' May, 1996 letter describes Ms. Martin as "a dedicated, highly organized classroom teacher." Ms. Martens noted that Ms. Martin inherited a "fairly difficult posting and ... gained very valuable experience in utilizing varied student management strategies". Ms. Martens also observed that Ms. Martin "displayed remarkable confidence and talent in extra-curricular activities at [the] school". According to Ms. Martens' letter, Ms. Martin had been involved in numerous such activities, having been the Craft Club leader, the cross-country running coach, the monthly school newsletter co-ordinator and typist, the Fun-Night co-ordinator, the computer contact person and the Music Festival Choral Speech Director. In her testimony at the hearing, Ms. Martens confirmed that her letter represented an accurate assessment of Ms. Martin's performance in her first year at Saulteaux Heritage School.

[8] During the summer of 1996, Ms. Martin attended a two-week workshop in Grouard, Alberta, where she was trained in the Blended Sight and Sound (BSS) method of teaching. BSS is a language arts program, involving an individualized approach to teaching children to read and write. Ms. Martens had been using the method for some time, and was a passionate advocate for its use throughout the school. Joyce Night agreed that the development of BSS teaching capacity was very important to the school. Indeed, Ms. Martin's training at Grouard was paid for by the Band.

[9] In the 1996-7 school year, Ms. Martin again taught the Grade 3 class, using the BSS skills she had acquired over the summer. Nancie Martin and Joyce Night agree that at no time during this school year were any concerns with respect to Ms. Martin's performance drawn to her attention. In December of 1996, Ms. Martin was given a "Certificate of Appreciation" signed by Chief Gabriel Gopher, recognizing her "high standard of work performance, commitment and dedication to the Saulteaux First Nation". According to Joyce Night, the awarding of this certificate was largely meaningless, as such certificates were handed out to all of the Band employees in attendance at the Band staff Christmas party.

[10] Ms. Martin's performance was assessed by Lance Wellsch during this school year. Although Mr. Wellsch testified that he evaluated each teacher three times a year - in November, January and April - only two documents that could arguably constitute performance evaluations were produced at the hearing. On November 15, 1996, Mr. Wellsch reviewed one of Ms. Martin's lesson plans for her Grade 3 art class, and then observed the class itself. According to Ms. Martin, this was done at her behest. Ms. Martin asked Mr. Wellsch to pay particular attention to the children's interest level, as well as their attention and responsiveness to her as a teacher. Mr. Wellsch's notes of the exercise are very sketchy, but indicate that Ms. Martin began the class by having the students clean the classroom, with all but two students participating. The two non-participating students were described as "running around the room". Mr. Wellsch describes the students as "interested because they are doing something", using "please" and "thank you", but leaving their desks before they should. He also noted that the students lost a bit of their attention when working on their own.

[11] The second document is the only formal performance appraisal in evidence. According to Mr. Wellsch, this appraisal was done late in the 1996-7 school year. Mr. Wellsch testified that the three page document produced is incomplete, and that there was a fourth page containing Ms. Martin's and his signatures. The first page of the performance appraisal consists of four boxes, where Ms. Martin is evaluated with respect to her personal and professional abilities in the areas of integrity, knowledge, interpersonal skills and flexibility. A six level grading system is used, with the subject rated as meeting the stated expectations "Always", "Usually", "Often", "Seldom", "Rarely" and "Never". Mr. Wellsch rated Ms. Martin as "Usually" reaching the stated level in three of the categories, and "Often" attaining the desired level with respect to her interpersonal relations.

[12] The next page of the appraisal rates Ms. Martin with respect to her teaching skills, in relation to Common Essential Learnings (*sic*), Areas of Study, Adaptive Dimension and Evaluation [of the students]. In each of these four areas, Mr. Wellsch rated Ms. Martin as "Usually" reaching the desired level.

[13] The third page of the appraisal is entitled "Summary/Appraisal of Observations". Although Joyce Night testified that the Education Committee was very unhappy with the quality of Mr. Wellsch's performance appraisals, as they lacked specifics, this section does contain a somewhat more detailed description of Ms. Martin's abilities as a teacher. As regards Ms. Martin's "Personal and Professional Abilities", Mr. Wellsch states that "Nancie at times tends to be a 'negative' person. She looks for the negatives in 'life' instead of looking for the positives. She must learn that to emphasize positives only reinforces positives". Mr. Wellsch then assesses Ms. Martin with respect to "Individualizing/Personalizing Instruction", stating "She does a good job in this area. Most of her students work at an individualized level, and at their own domain. (*sic*) She is good at the 'adaptive dimension'". The next area of evaluation is "Core Curriculum", where Mr. Wellsch notes that "She teaches all the 'core' areas extremely well. She could however try to incorporate more Native content into her programming." The final area of Ms. Martin's performance that was assessed was her "Classroom Management". In this regard, Mr. Wellsch states: "She has good classroom management, but at times has little tolerance for senior students. This has led to some confrontations."

[14] Insofar as the reference to confrontations with senior students is concerned, Mr. Wellsch explained that some of the older children at the school were 'a little unruly', and would run in the halls and come into the classrooms of the younger children from time to time. Mr. Wellsch said that it was not always productive to argue with a 13 or 14 year old in front of their peers, and that he had suggested various strategies to Ms. Martin, to assist her in dealing with such situations.

[15] In January of 1997, Ms. Martin discovered that she was pregnant. Her child was born on September 21, 1997. There is a dispute in the evidence as to who knew about Ms. Martin's pregnancy, and when. This issue will be examined later on in this decision. Suffice it to say at this juncture that Ms. Martin is of the view that by the Spring of 1997, her pregnancy was a matter of general knowledge in the school community.

[16] Ms. Martin states that in April of 1997, she had a discussion with Lance Wellsch in the course of which Mr. Wellsch advised her that she would be offered a new contract for the

upcoming school year. Mr. Wellsch agrees that he may well have made such a comment to Ms. Martin, stating that he had no reason to think otherwise. It is apparent, however, from the testimony of both Mr. Wellsch and Joyce Night, that Mr. Wellsch had no authority to make any commitment to Ms. Martin in this regard. Decisions as to whose contracts would and would not be renewed are made by the Chief and Council of the Band, on the recommendation of the Band's Education Committee.

[17] In early May, Joyce Night sent a form to the teachers, including Nancie Martin, asking the teachers to indicate their intentions with respect to the upcoming school year. Ms. Martin responded that she definitely planned to return to Saulteaux School for the 1997-8 school year.

[18] Ms. Martin testified that having indicated her intention to return to the school the next year, and not having been advised of any problems with respect to her performance, she was very surprised and upset to receive a letter dated May 26, signed by Joyce Night on behalf of Archie Moccasin (a Band Councillor), advising her that the Chief and Council of the Saulteaux First Nation had decided not to offer her a contract for the 1997-8 school year. In all of the circumstances, Ms. Martin formed the view that her pregnancy must have been a factor in the Band's decision. Consequently she contacted the Canadian Human Rights Commission, and filed her formal complaint on July 6, 1997.

[19] The respondent's explanation for its decision not to renew Ms. Martin's contract will be considered further on in this decision.

## **II. SAULTEAUX HERITAGE SCHOOL POLICY REGARDING MATERNITY LEAVE**

[20] The only policy governing access to maternity leave produced at the hearing is contained in the Saulteaux Heritage School Policy Manual. This policy provides simply that "Maternity leave (without pay) should consist (*sic*) with UIC guidelines". Witnesses, including Velma Night, the former Education Co-ordinator, suggested that the Band also had a personnel manual, entitled "Saulteaux Band Personnel Regulations", which required that employees seeking to take maternity leaves provide written notice to the Band. No such Regulations were ever produced. Joyce Night confirmed having seen the Regulations referred to by Velma Night, but explained that the Band governed itself by the *Canada Labour Code* insofar as employees' entitlement to maternity leave was concerned. I am satisfied on all of the evidence that it is the provisions of the *Canada Labour Code* that govern Ms. Martin's rights and obligations with respect to maternity leave.

[21] Section 207 of the *Canada Labour Code* requires that every employee who intends to take maternity leave must give her employer at least four weeks notice in writing, unless there is a valid reason why such notice cannot be given. <sup>(1)</sup> Much was made in the course of this hearing of the fact that as of May, 1997, Nancie Martin had not provided written notice to the Education Committee with respect to her desire to take maternity leave. Certainly, had Ms. Martin given notice in writing of her desire to take maternity leave, there would have been no evidentiary issue with respect to the state of the Education Committee's knowledge regarding her pregnancy.

However, Ms. Martin's baby was not due until September of 1997. In the circumstances, I find that as of May, 1997, there was no obligation on Nancie Martin to provide written notice to her employer of her desire to take maternity leave. As mentioned earlier, the issue of whether the Education Committee had actual notice of Ms. Martin's pregnancy at the time that the decision was made not to offer her a new contract will be examined later on in this decision.

### III. LEGAL FRAMEWORK

[22] Ms. Martin's complaint is brought under Section 7 of the *Canadian Human Rights Act*. Section 7 of the *Act* makes it a discriminatory practice to refuse to hire or continue to employ an individual because of a prohibited ground of discrimination. A refusal to hire or to continue to employ based on pregnancy is deemed to be discrimination on the basis of sex, which is a prohibited ground of discrimination. <sup>(2)</sup>

[23] In a case of this nature, the burden is on Ms. Martin to establish a *prima facie* case of discrimination. Once that is done, the burden shifts to the respondent to provide a reasonable explanation for the conduct in issue. <sup>(3)</sup>

[24] A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in Ms. Martin's favour, in the absence of an answer from the respondent. <sup>(4)</sup>

[25] In the employment context, a *prima facie* case has been described as requiring proof of the following elements:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and
- c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (ie: race, colour etc.) subsequently obtained the position. <sup>(5)</sup>

[26] This multi-part test has been modified to address situations where the complainant is not hired and the respondent continues to look for suitable candidates. In such cases, the establishment of a *prima facie* case requires proof:

- a) that the complainant belongs to one of the groups which are subject to discrimination under the Act, eg: religious, handicapped or racial groups;



b) that the complainant applied and was qualified for a job that the employer wished to fill;

c) that, although qualified, the complainant was rejected; and

d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications.<sup>(6)</sup>

[27] While both the *Shakes* and the *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Ms. Martin has satisfied the *O'Malley* test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Ms. Martin's favour, in the absence of an answer from the respondent? <sup>(7)</sup>

[28] If the respondent does provide a reasonable explanation for the otherwise discriminatory behavior, Ms. Martin then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind the respondent's actions was, in fact, discriminatory.<sup>(8)</sup>

[29] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi*:

Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practiced.<sup>(9)</sup>

Rather, it is the task of the Tribunal to consider all of the circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination".

[30] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. <sup>(10)</sup>

[31] It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if Ms. Martin's pregnancy was a *factor* in the decision not to renew her contract. <sup>(11)</sup>

#### **IV. THE EXPERIENCE OF OTHER BAND EMPLOYEES WITH RESPECT TO MATERNITY LEAVE**

[32] Before examining the evidence relating to Ms. Martin's complaint in the context of the legal principles applicable to such a case, it is necessary to consider the evidence adduced by both the Commission and by the Band regarding the experiences of other women employed by the Band in relation to maternity leave.

[33] The Commission called Brenda Keller and Barbara MacNaughton to testify with respect to their experiences as pregnant teachers at the Saulteaux Heritage School. Ms. Keller worked as the Grade 3 teacher in 1990-1. During the course of the school year, Ms. Keller became pregnant and, in May of 1991, was advised that her contract was not being renewed. No reason was given to Ms. Keller at the time for the Band's decision. Ms. Keller testified that the Unemployment Insurance authorities asked for information with respect to the reason for her contract not being renewed. Ms. Keller subsequently obtained a letter signed by Velma Night, the Band's Education Co-ordinator at the time, which indicated that Ms. Keller's contract had not been renewed because of her pregnancy. Velma Night acknowledged signing the letter, explaining that Ms. Keller had advised the Education Committee that she would be working in September and October, and then would be off from November to April. The Education Committee and Ms. Night were of the view that it would be too disruptive for the students to bring in a substitute teacher from November to April, and thus recommended that Ms. Keller's contract not be renewed. Ms. Keller subsequently filed a human rights complaint with respect to the Band's decision not to renew her contract, which complaint was settled.

[34] What happened to Ms. Keller was known to Velma Night's successor. Joyce Night testified that upon taking over from Velma Night as Education Co-ordinator, she reviewed the documentation relating to Ms. Keller's case. Joyce Night testified that her review of the Keller case led her to become interested in labour law, and the *Canada Labour Code* in particular, and that, as a result, she actively sought out information with respect to labour standards and employer obligations.

[35] It is uncontroverted that in the Spring of 1991, the Education Committee made the decision not to renew Brenda Keller's contract, and that Ms. Keller's pregnancy was at least a factor in that decision. The fact that the Education Committee discriminated against one employee on the basis of pregnancy does not, however, mean that some six years later, the decision of a differently constituted Committee to recommend that Ms. Martin's contract not be renewed was similarly tainted by discriminatory considerations of pregnancy.

[36] Both sides agree that the Band learned an important lesson from Ms. Keller's case, although they disagree as to what that lesson was. The Band says that it learned that it was unlawful to discriminate on the basis of pregnancy, and that it did not make the same mistake again. The Commission and Ms. Martin contend that the lesson that the Band and the Education Committee learned from Ms. Keller's case was not to put discriminatory reasons for not renewing an employee's contract in writing.

[37] It seems to me that either conclusion is possible. Therefore, rather than draw any inference from what went on several years before with respect to Brenda Keller, it seems to me that the evidence surrounding the non-renewal of Nancie Martin's contract should be considered independently, on its own merits. What can, however, be safely concluded from Joyce Night's

testimony is that she knew that it was unlawful not to renew a teacher's contract because the teacher was pregnant.

[38] Barbara MacNaughton was the second witness called by the Commission to testify with respect to her experience at Saulteaux Heritage School. Ms. MacNaughton worked as a teacher at the Saulteaux Heritage School between 1982 and 1993. She became pregnant in June of 1992, and went on disability leave in October of 1992. Ms. MacNaughton's baby was born in March of 1993, and she was on maternity leave until the end of June, 1993. Ms. MacNaughton testified that although she had been told in April of 1993 that her new contract was ready at the school for her to sign, she received a phone call at the end of May telling her that her contract was not being renewed. Ms. MacNaughton was never given any explanation by the Band, and does not know why her contract was not renewed. She acknowledged that she was at the top of the pay scale in June of 1993, and speculated that her contract might not have been renewed because of funding issues.

[39] In argument, counsel for the Commission conceded that Ms. MacNaughton's testimony could not properly be considered similar fact evidence. I agree. Unlike Ms. Martin, Ms. MacNaughton did take maternity leave while she was employed as a teacher at Saulteaux Heritage School. On the limited evidence before me, I am not prepared to find that Ms. MacNaughton's pregnancy was a factor in the Band's decision not to renew her contract. As a result, I am not persuaded that Ms. MacNaughton's testimony with respect to the circumstances of her leaving the Saulteaux Heritage School has any probative value in relation to Ms. Martin's complaint.

[40] Joyce Night was asked if any teachers went on maternity leave between the time that she took over from Velma Night as Education Co-ordinator in late 1994 or early 1995, and the Spring of 1997. She initially testified that both Jocelyn Iverson and Sherlyn Osook took such leaves, although she later acknowledged that Ms. Iverson's maternity leave took place during the time that Velma Night was the Education Co-ordinator. Insofar as Sherlyn Osook was concerned, in October, 1997, Joyce Night prepared a list of teachers who had taken maternity leave in response to an inquiry from the Commission. Sherlyn Osook is not mentioned - the result, Ms. Night says, of an oversight on her part. However, although a number of witnesses were asked to name school employees who had taken maternity leaves, no one else mentioned Ms. Osook being one of them. Ms. Osook herself did not testify. I find that no other school employee had become pregnant during the time that Joyce Night was Education Co-ordinator until Nancie Martin's pregnancy in 1997.

[41] Five witnesses testified on behalf of the respondent with respect to the maternity leaves that they took while employed by the Band.<sup>(12)</sup> Three witnesses described leaves taken well before the 1996-7 school year. For example, Velma Night testified that she took maternity leaves in 1981, 1986 and 1991. In 1981, Velma Night was employed as the Band's Administrative Assistant. She was the Band's Education Co-ordinator at the time of her leaves in 1986 and 1991. Danita Gopher testified that she took maternity leaves in 1983 and 1986, while she was a Band employee. Ms. Gopher's testimony in this regard is difficult to reconcile with her earlier testimony that, as of the time that she was testifying (in February of 2002), she had only been a Band employee for ten years. In any event, there is no suggestion that Ms. Gopher ever worked

as a teacher at Saulteaux Heritage School. Linda Night was the Kindergarten and Nursery School teacher at the school. She took maternity leaves in 1981 and 1984.

[42] Leona Moccasin was working for the Band as the receptionist at Jackfish Lodge in 1992-3, when she took leave in connection with the birth of her son. Ms. Moccasin took a second maternity leave in 1995-6 for the birth of her daughter. Ms. Moccasin's testimony with respect to her employment at the time of her daughter's birth was confusing. At various points in her testimony, Ms. Moccasin suggested that, at the time of her daughter's birth, she was still employed by the Band as the receptionist at Jackfish Lodge, that she was working as a secretary at the Band's Treaty Land Entitlement office or that she was an "NADAP" Co-ordinator.<sup>(13)</sup> What was clear from Ms. Moccasin's testimony, however, was that at the time that she took her maternity leaves, she was not working under the supervision of the Education Committee.<sup>(14)</sup>

[43] Lisa Desjarlais worked as a Grade 6 teacher at Saulteaux Heritage School. She went on maternity leave in March of 2001. Her contract for the following school year was renewed, and Ms. Desjarlais returned to work in August of 2001. At the time that Ms. Desjarlais took her maternity leave, the Saulteaux Band was under the supervision of a Third Party Manager, which I understand to be the equivalent of being in Receivership. According to Joyce Night, decisions with respect to matters such as the granting of maternity leaves are now made by the Manager.

[44] I am not persuaded that the evidence of any of the respondent's witnesses regarding their experiences with maternity leaves assists me in this case. Velma Night, Linda Night and Danita Gopher's leaves were all taken long before the Spring of 1997, when Nancie Martin's contract was not renewed. While I am not sure where Leona Moccasin was working in 1995-6, when her daughter was born, it is clear that she was employed directly by the Band, and was not under the supervision of the Education Committee. Finally, the decision to grant Lisa Desjarlais a maternity leave in 2001 was made by the Third Party Manager, and not by the Band, and is thus of no probative value.

[45] In other words, none of the witnesses called by either the Commission or by the Band were granted or denied maternity leave based upon the recommendations of the Education Committee as it was constituted in the spring of 1997. As a consequence, I intend to consider the circumstances surrounding the non-renewal of Nancie Martin's contract on their own merits, without regard to the experiences of these witnesses.

## **V. HAVE THE COMMISSION AND MS. MARTIN ESTABLISHED A *PRIMA FACIE* CASE OF DISCRIMINATION?**

[46] In considering Ms. Martin's complaint, I must first determine if Ms. Martin and the Commission have established a *prima facie* case of discrimination on the basis of Ms. Martin's pregnancy.

[47] In determining whether a *prima facie* case of discrimination has been established, I must first consider whether Nancie Martin had the necessary qualifications for the position of Grade 3

teacher at the Sauleaux Heritage School. In this regard, Joyce Night and counsel for the respondent both acknowledged that Ms. Martin was qualified to teach a Grade 3 class at the school. This is borne out by a review of the advertisements that Joyce Night placed in the North Battleford Optimist and the Saskatoon Star Phoenix newspapers in June of 1997, seeking candidates to fill teaching vacancies, including the Grade 3 teaching position formerly held by Ms. Martin. According to the advertisement, the Band wanted candidates with strong extra-curricular backgrounds. Experience with the BSS method of teaching was also noted to be advantageous. Although there is an issue with respect to Ms. Martin's refusal to participate in a specific extra-curricular activity (which will be considered further on in this decision), Joyce Night did not dispute Nancie Martin's description of the numerous extra-curricular activities that she says she was involved in at Sauleaux Heritage School. I am more than satisfied on the evidence before me that Ms. Martin had the strong extra-curricular background sought by the Band. It is common ground that Ms. Martin had experience with the BSS method of teaching. The first element of the *prima facie* case, as articulated in the *Shakes* case has, therefore, been made out. <sup>(15)</sup>

[48] Ms. Martin was not rehired for the 1997-8 school year, and thus the second element of a *prima facie* case has been established.

[49] The final element of the *prima facie* case is that someone no better qualified but lacking the distinguishing feature that is the gravamen of the human rights complaint (pregnancy in this case) subsequently obtained the position. There is some confusion as to who actually replaced Nancie Martin as the Grade 3 teacher at Sauleaux Heritage School. Joyce Night testified that Starla Lakowski replaced Ms. Martin. Terry Martens was unsure if it was Cathy Petriew or Starla Lakowski. Linda Night did not recall who replaced Nancie Martin, and stated that although she was not sure, she thought that Starla Lakowski was a Special Education teacher. Starla Lakowski did not testify. While I found both Ms. Martens and Linda Night to be credible witnesses, both were very uncertain on this issue. On all of the evidence I find it probable that Starla Lakowski was hired to replace Nancie Martin.

[50] The evidence with respect to Ms. Lakowski's qualifications was also unclear. In October of 1997, in response to an inquiry from the Commission, Joyce Night provided information to the Band's counsel with respect to the qualifications of Ms. Martin's replacement. <sup>(16)</sup> Ms. Night's letter indicates that Ms. Lakowski had a Class Four teaching certificate, five years of cross-cultural experience, had taught Grade 3 for the Waterhen Band, had strong extra-curricular activities, a major in Fine Arts and a musical background. Ms. Lakowski was also noted to have strong community involvement. Ms. Night's 1997 letter makes no mention of any experience with the BSS method.

[51] Terry Martens testified that Starla Lakowski did not have any experience with the BSS method when she came to the school. Joyce Night stated that while Ms. Lakowski had not attended the extended training program in Grouard, she did have some BSS training before starting at the school, and that she might have used some of the BSS methods in her classroom. I prefer the evidence of Terry Martens on this point. Ms. Martens was clearly deeply committed to promoting the use of the BSS method at the Sauleaux Heritage School, and was thus more likely to be aware of the BSS qualifications of her fellow teachers than was Joyce Night. I am also very

concerned about Joyce Night's failure to make any mention of any experience in the BSS method on the part of Starla Lakowski in her far more contemporaneous written description of Ms. Lakowski's qualifications. As a result, I find that Starla Lakowski did not have any experience with the BSS teaching method before coming to the Saulteaux Heritage School.

[52] Although not mentioned in the advertisement, Joyce Night testified that the Band was seeking experienced teachers, particularly those with experience in Native communities. Joyce Night initially stated that Ms. Lakowski had three or four years experience teaching at a Native school. She later said that she thought Ms. Lakowski had six years of experience. Ms. Night's October, 1997 letter to the Band's counsel says that Ms. Lakowski had "5 years Cross Cultural experience". Whatever the precise number, Ms. Lakowski had several years' experience at a reserve school. Nancie Martin had two years of such experience. Neither Ms. Lakowski nor Ms. Martin had any professional training in dealing with students suffering from conditions such as Fetal Alcohol Syndrome or Attention Deficit Disorder, and both had Class Four teaching certificates. Both Ms. Martin and Ms. Lakowski had strong extra-curricular backgrounds. However, unlike Ms. Lakowski, Ms. Martin also had both training and experience in the BSS method which, according to the advertisement placed by the Band, was considered advantageous.

[53] Thus while Starla Lakowski had more teaching experience than did Ms. Martin, Ms. Martin had BSS experience that Ms. Lakowski did not have. Based upon the evidence before me, I find that Ms. Lakowski was no better qualified for the position of Grade 3 teacher at Saulteaux Heritage School than was Nancie Martin.

[54] A number of witnesses called by both the Commission and the Band were asked to name teachers who had become pregnant while at the Saulteaux Heritage School and had taken maternity leave. No one suggested that Starla Lakowski was one of these teachers.

[55] I am satisfied that a *prima facie* case of discrimination on the basis of pregnancy has been made out, and that the evidence before me is complete and sufficient to justify a verdict in Ms. Martin's favour, in the absence of an answer from the respondent. The burden therefore shifts to the respondent to provide a reasonable explanation for the decision not to renew Ms. Martin's contract.

## **VI. HAS THE RESPONDENT PROVIDED A REASONABLE EXPLANATION FOR THE DECISION NOT TO RENEW NANCIE MARTIN'S CONTRACT?**

[56] There are two aspects to the Band's explanation for the decision not to renew Ms. Martin's contract: that the Education Committee was not aware of Ms. Martin's pregnancy when it decided to recommend to the Chief and Council that Ms. Martin's contract not be renewed, and that the decision not to renew Ms. Martin's contract was based upon concerns regarding her performance. Each of these will be considered in turn.

### **A. Did the Education Committee Know That Nancie Martin Was Pregnant When it Decided to Recommend That Her Contract Not Be Renewed?**

[57] Nancie Martin testified that she discovered that she was pregnant in January of 1997. She says that she was very happy about the pregnancy, and did not keep it a secret. Ms. Martin and Lance Wellsch often drove to work together, and Ms. Martin says that although she did not make a "formal announcement", Mr. Wellsch knew she was pregnant.

[58] It is not clear from Ms. Martin's testimony when it was that Lance Wellsch became aware of her pregnancy. In all of the circumstances, it seems to me that Mr. Wellsch is in the best position to say when he became aware of Ms. Martin's pregnancy.

[59] There is some inconsistency in Ms. Martin's evidence with respect to the point at which her pregnancy became obvious. In her testimony, Ms. Martin said that her pregnancy had become obvious by March. However, both the "Intake Questionnaire" Ms. Martin completed for the Canadian Human Rights Commission, as well as Ms. Martin's human rights complaint itself state that her pregnancy was not apparent in April. I am not particularly troubled by this inconsistency, given the subjectivity involved in assessing, after the fact, when one's pregnancy began showing. Regardless of when it was that Ms. Martin's pregnancy became apparent to the school community as a whole, I am satisfied that Lance Wellsch was probably aware that Ms. Martin was pregnant by early April of 1997.

[60] The Education Committee met on April 9, 1997 in order to review the performance of the teachers, and to start discussing contracts for the next school year. Lance Wellsch was not a member of the Education Committee, but attended this meeting in order to provide his view of the performance of the various teachers. According to Mr. Wellsch, he told the Education Committee that Nancie Martin was expecting a baby, and that arrangements would have to be made to replace her while she was on maternity leave.

[61] Although not a voting member of the Education Committee, Joyce Night was also present at the April 9 meeting. She denies that Mr. Wellsch ever told the Education Committee that Nancie Martin was pregnant. Had the Committee known of Ms. Martin's pregnancy in April of 1997, Ms. Night says, other arrangements would have been made for her, such as giving her a smaller class to teach. According to Ms. Night, the Committee would have opted to go this route so as to avoid litigation.

[62] Notes of the meeting prepared by Joyce Night were produced at the hearing. These notes are very sketchy, and do not purport to record everything that was discussed at the meeting. There is no reference in the notes to Ms. Martin being pregnant.

[63] Danita Gopher and Stella Gopher were both members of the Education Committee at the time. Both say that Mr. Wellsch never mentioned Nancie Martin's pregnancy at the April 9 meeting.

[64] There is thus a clear conflict in the evidence as to whether or not Lance Wellsch told the Education Committee that Nancie Martin was expecting a baby. For a number of reasons, I

prefer the testimony of Lance Wellsch, and find that the Education Committee was told on April 9, 1997 that Nancie Martin was pregnant, and that it would therefore be necessary to find a replacement for her while she took maternity leave.

[65] In argument, counsel for the Band suggested that Mr. Wellsch's testimony on this point was inaccurate. In support of this contention, counsel pointed to notes made by a Commission investigator of a telephone interview with Mr. Wellsch, which notes do not mention any such discussion. However, a review of the notes discloses that Mr. Wellsch was not asked any questions about the April 9 Education Committee meeting, nor was he asked if he ever told any of his supervisors about Ms. Martin's pregnancy. This is not surprising, given that as of the date of the interview, the Band had not asserted that it did not know that Ms. Martin was pregnant when the decision was made not to renew her contract.

[66] I do, however, have my own concerns with respect to Lance Wellsch's reliability as a witness. Mr. Wellsch's contract as principal of the Sauteaux Heritage School was not renewed at the same time that the decision was made not to renew Nancie Martin's contract. It was evident from both the substance of Mr. Wellsch's testimony, as well as his demeanor while testifying, that he harbours considerable animosity towards the Sauteaux Band and the school administration. Having said that, Mr. Wellsch's testimony on the issue of whether he told the Education Committee of Ms. Martin's pregnancy on April 9, 1997 was very clear, and was not shaken on cross-examination.

[67] I also have concerns with respect to the reliability of the testimony of Joyce Night, Danita Gopher and Stella Gopher. Joyce Night played a central role in the decision not to renew Nancie Martin's contract, and consequently I observed Ms. Night especially carefully as she testified. Ms. Night is an articulate individual, and she delivered her testimony in chief in a direct and confident manner. She became visibly uncomfortable, however, when she was asked in cross-examination why the Band never told the Canadian Human Rights Commission that members of the Education Committee did not know that Nancie Martin was pregnant when the Committee made the decision to recommend to the Chief and Council that Ms. Martin's contract not be renewed. (Indeed, the first time that the Band asserted that it did not know Nancie Martin was pregnant was in the pre-hearing disclosure provided by the respondent on Oct 26, 2001.) According to Ms. Night, the failure of the Band to mention its lack of awareness of Ms. Martin's pregnancy was the result of an oversight, which oversight was the result of the time pressure on the Band to respond to the Commission's request for information.

[68] I do not accept this explanation. A review of the correspondence between the Band and the Commission discloses that the Commission first asked for the Band's position in a letter to Chief Gopher dated September 3, 1997. Sometime in October, 1997, Ms. Night prepared a written summary of the Band's position, which was forwarded to the Commission by Band counsel on October 31, 1997 - nearly two months after the Commission's initial request. The Commission sought additional information from the Band on at least two occasions - in February of 1998, and again in May of 1998. Even if I were to accept that Ms. Night forgot to mention what would presumably have been a key fact and a strong defense to Ms. Martin's complaint in her initial response to the Commission, no satisfactory explanation has been provided for why, at no time during the ensuing two-year period that the case was before the Commission did the Band ever



indicate that the Education Committee was unaware of Ms. Martin's pregnancy when it decided to recommend to the Chief and Council that Nancie Martin's contract not be renewed.

[69] I was similarly unimpressed by the testimony of Danita Gopher and Stella Gopher. Danita Gopher had limited recall of what went on at the April 9 meeting, as well as at a second Committee meeting which took place on May 6. According to Ms. Gopher, Lance Wellsch led the discussion at the May meeting. Lance Wellsch was not present at this meeting. She then stated that Lance Wellsch had prepared a written report for this meeting that was delivered by Joyce Night. No such report has been produced. More troubling is Danita Gopher's assertion that in the course of the April 9 meeting, Joyce Night described an incident where Ms. Martin purportedly "ransacked" her classroom. According to Ms. Gopher, this incident was cited by Ms. Night as an example of Ms. Martin's poor classroom management. It is common ground that the incident that Ms. Gopher is referring to did not take place until sometime after Nancie Martin was advised in late May that her contract was not being renewed.

[70] Stella Gopher also appeared to have limited recall of what transpired during the meetings of the Education Committee, and frequently appeared confused during her testimony.

[71] I am thus left to resolve a conflict in the evidence involving the testimony of four witnesses, none of whom I found to be particularly reliable. In these circumstances, I find the observations of the British Columbia Court of Appeal in *Faryna v. Chorney*<sup>(17)</sup> of particular assistance:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[72] Because I did not find Lance Wellsch to be a particularly reliable witness, I would be hesitant to find that the Education Committee was made aware of Ms. Martin's pregnancy at the April 9 meeting based solely on his testimony. However, Mr. Wellsch's testimony is reinforced, in my view, by the fact that the Band did not raise its purported lack of knowledge of Ms. Martin's pregnancy for some three and a half years after Ms. Martin first complained of pregnancy-based discrimination.

[73] Further, having already found that Mr. Wellsch knew that Ms. Martin was pregnant, it makes sense that he would raise the issue with the Education Committee in the course of a discussion regarding the school's needs for the upcoming school year. I am therefore satisfied, on a balance of probabilities, that Lance Wellsch told the Education Committee that Nancie Martin was pregnant on April 9, 1997.

[74] Having found that the Education Committee was aware of Nancie Martin's pregnancy at the time it decided to recommend that her contract not be renewed, it does not necessarily follow that Ms. Martin's pregnancy was a factor in that decision. That issue remains to be determined.

## **B. The Performance Issues Identified Before May 27, 1997**

[75] The respondent asserts that the decision not to renew Ms. Martin's contract was based not on her pregnancy, but on concerns regarding her performance. It is therefore necessary to carefully examine the evidence regarding Ms. Martin's alleged performance problems in order to determine whether her pregnancy was a factor in the decision not to offer her a new contract.

[76] This is not an action for wrongful dismissal, and my task is not to determine whether the Band had just cause to terminate Ms. Martin's employment. Ms. Martin was employed pursuant to a contract for a fixed term, and thus had no entitlement to employment beyond the end of the term of her contract.<sup>(18)</sup> Rather, my task is to determine whether the alleged deficiencies in Nancie Martin's performance constitute a reasonable explanation for the Band's decision not to renew her contract, or whether this explanation is pretextual.

[77] In assessing the alleged problems with Ms. Martin's performance, I am dependant almost entirely on the testimony of the witnesses. As Joyce Night acknowledged, there is no documentary evidence supporting any of the allegations as to the deficiencies in Ms. Martin's performance.<sup>(19)</sup> It should also be recalled that it is common ground that, at no time during Ms. Martin's employment at the Saulteaux Heritage School, was any concern regarding her performance as a Grade 3 teacher ever brought to her attention.

[78] The Band's allegations regarding the nature and extent of the problems with Ms. Martin's performance have evolved over time. No real concerns with respect to Ms. Martin's performance appear to have been discussed at the Education Committee meeting on April 9, and Joyce Night agrees that Lance Wellsch's comments regarding Nancie Martin's performance were positive. Under the heading of "Weaknesses / Strengths", Ms. Night notes only that Ms. Martin was "good @ adaptive dimension". The only comment that could be viewed as critical of Ms. Martin is the note that she "refuses to do Binges".

[79] The Education Committee met again on May 6, 1997. Lance Wellsch was not present at this meeting. Joyce Night's minutes record herself as being present, along with Stella Gopher and others. There is no mention of Danita Gopher being in attendance, although Danita Gopher and Joyce Night both say that she was at the meeting. According to Ms. Night, the purpose of this meeting was to make a final decision with respect to the Committee's recommendation to the Chief and Council regarding teacher contracts. Joyce Night says that she led the discussion. Based on feedback that Ms. Night had received from Lance Wellsch, as well as from teachers, including Terry Martens and Karen Crawley, it was felt that Nancie Martin's class was having the most problems. Ms. Night and Stella Gopher also testified to having received negative comments about Ms. Martin from parents.

[80] Ms. Night's minutes record the following discussion regarding Ms. Martin's performance:

Concerns were poor classroom management, lack of experience with children who were high risk, ADHD, ADD, possibly FAS in addition to the social problems they have from home. Other concerns from neighbouring teachers would complain of her lack of classroom management. Mr. Wellsch was continuously settling the classroom down, he shouldn't be interrupted all the time to settle her classroom down.

The board also recommended that we look for an experienced teacher preferably 8-10 years. Funding should not be an issue when we need to provide an ensure our children are receiving the proper education. We need to put the children first. [*sic* throughout]

[81] Although not specifically recorded in the minutes, I accept Joyce Night's testimony that it was at this meeting that the decision was made to recommend to the Chief and Council that Nancie Martin's contract not be renewed for the following year.

[82] The Chief and Council met on May 22. Joyce Night was in attendance, and conveyed the recommendation of the Education Committee that the contracts of four individuals (including Nancie Martin and Lance Wellsch) not be renewed. Ms. Night confirmed that this was a very short meeting, and it does not appear that there was any discussion of the Committee's reasons for recommending that the contracts of the four teachers not be renewed.

[83] Numerous additional concerns with respect to Nancie Martin's performance were subsequently identified by Joyce Night in the October, 1997 memorandum that she prepared in response to Ms. Martin's human rights complaint. In addition to Ms. Martin's purported lack of classroom control, Ms. Martin was reported to have left her classroom crying at times, and her classroom was described as untidy and dim. Ms. Night stated that a parent had threatened to sue Ms. Martin for mishandling her child. According to the memo, Ms. Martin was distant, irritable and tense, and displayed a lack of professionalism by involving herself in gossip regarding Band politics. After Ms. Martin learned that her contract was not being renewed, she ransacked her classroom. She is also alleged to have done very little teaching in the last weeks of school. Ms. Night also claimed that Ms. Martin refused to work with the school's computers, despite having expressed her willingness to do so in her job interview. Finally, Ms. Night reiterates the concern that Ms. Martin failed to cooperate in fund-raising activities.

[84] Each of these alleged performance problems will be addressed in turn.

#### **(i) The Bingo Issue**

[85] The only concern with respect to Ms. Martin's performance mentioned at the April 9 Education Committee is Ms. Martin's refusal to work at fund-raising bingos. Joyce Night's October memo refers to a more generalized "lack of cooperation in Fund-raising activities as requested by the Committee". At the hearing, Ms. Night initially contended that the Band's concerns with respect to the extent of Ms. Martin's extra-curricular involvement were not limited to the bingo issue, but also involved "a lot of other things". She subsequently acknowledged that she really didn't know what extra-curricular activities Ms. Martin was involved in at the school.

Joyce Night did not dispute the long list of extra-curricular activities that Ms. Martin says that she was involved in at the Saulteaux Heritage School. When pressed, Ms. Night conceded that the only concern that the Band had about Ms. Martin's extra-curricular activities was her refusal to work at bingos. Ms. Night explained that the Band placed a lot of emphasis on community involvement by the teachers, and that fund-raising activities were very important to the school. According to Ms. Night, Band members commented about anyone who did not participate in the fund-raising bingos.

[86] Ms. Night says that the Band expected teachers to devote between 80-120 hours each year to extra-curricular activities, although this expectation was never communicated to the teachers. The teaching contract stipulates only that teachers "shall assist with and participate in the organization of fund-raising, cultural [and] athletic activities, youth travel, outdoor education and similar activities as authorized by the Board of Education". The school's policy manual is more specific, stipulating that teachers should "Co-ordinate and supervise at least one extra-curricular activity per school year".

[87] Nancie Martin testified that she was very active in the school community, involving herself in the school canteen, the Family Fun Night (which was a major fund-raiser for the school) and the arts and crafts and Christmas craft clubs. In addition, she coached the cross-country running and track and field teams. Ms. Martin published the school newsletter and set up a school computer club. She prepared students for the annual choral verse competition in North Battleford, and took students on a number of field trips. The one activity that Ms. Martin did not participate in was bingo. Ms. Martin explained that she had both medical and ethical objections to working at the bingos. She suffered from chronic pulmonary problems that required her to avoid smoky locations, and objected to gambling being used to raise money for children's activities.

[88] Ms. Martin's description of her extra-curricular activities was corroborated by Terry Martens. Lance Wellsch testified that Ms. Martin would do anything that was asked of her, except bingo. Mr. Wellsch testified that he was aware of Ms. Martin's health problems, and excused her from this activity.

[89] I do not believe that Ms. Martin's refusal to work at the bingos had anything to do with the decision not to renew her contract. Both Joyce Night and Danita Gopher were aware that Ms. Martin had medical reasons for not wanting to work in smoky surroundings. Further, Ms. Night herself testified that there were *no concerns* with respect to Ms. Martin's performance during the 1995-6 school year. Ms. Martin did not work at bingos in 1995-6, and her contract was renewed nonetheless.

#### **(ii) Ms. Martin's Classroom Management**

[90] Concerns regarding Ms. Martin's classroom management were recorded in the minutes of the May 6 Education Committee meeting, and it appears that this was the principle area of concern with respect to her performance. According to Joyce Night, Ms. Martin exhibited a lack of control in her classroom throughout the period from September of 1996 to June of 1997. Ms. Night says that Ms. Martin has a quiet, shy nature, and that the children walked all over her. Ms.

Night bases her comments on her own observations, as well as the complaints that she says that she received on a regular basis from other teachers, including Karen Crawley and Terry Martens. According to Ms. Night, two or three times a week Ms. Martens made comments to Ms. Night about Ms. Martin's problems managing her class. Ms. Night says that she asked Ms. Martens and Ms. Crawley to help Ms. Martin manage the children, but that sometimes they would just have to close their classroom doors to shut out the noise emanating from Ms. Martin's classroom.

[91] Ms. Night says that there were up to four or five incidents each day in Ms. Martin's classroom that would have to be dealt with. Ms. Night's May 6 notes state that Lance Wellsch was continuously having to go in and settle the class down; in her testimony Ms. Night says that this was a daily occurrence. Ms. Night agrees that concerns of this magnitude should have been documented. As mentioned previously, however, it is common ground that there is not a single piece of paper from this period that makes mention of any such concern.

[92] Ms. Martin's Grade 3 class was a particularly challenging one, according to Ms. Night. A number of the children suffered from conditions such as Attention Deficit Disorder and Fetal Alcohol Syndrome. This led the Education Committee to conclude that they should hire a Grade 3 teacher with eight to ten years of experience, including experience teaching in a Native environment.

[93] Julia Night also described problems with Ms. Martin's classroom management. Julia Night spent half her day at the school teaching Cree, and the other half of the day assisting in various classrooms, including the Grade 3 classroom. According to Julia Night, the children in Ms. Martin's classroom were "wild", and there were a lot of problems with classroom control. Both Lance Wellsch and Terry Martens would have to come into the class to settle things down. In Mr. Wellsch's case, Julia Night says that this would occur once or twice each day.

[94] Danita Gopher and Stella Gopher testified that Lance Wellsch mentioned Ms. Martin's problems with classroom management to the Education Committee on several occasions, and both identified Ms. Martin's poor classroom management as the reason that her contract was not renewed.

[95] The testimony of Nancie Martin, Lance Wellsch, Terry Martens and Linda Night paints an entirely different picture of what was going on in Nancie Martin's Grade 3 classroom during the 1996-7 school year. Ms. Martin says that this class was easier to manage than her first Grade 3 class had been. She was not aware that any of the children had been formally diagnosed with conditions such as Attention Deficit Disorder or Fetal Alcohol Syndrome, but noted that she had experience with such conditions, as one of her own children suffered from Attention Deficit/Hyperactivity Disorder, and she had previously worked with people with developmental disabilities.

[96] Ms. Martin denies ever receiving any complaints from any of her colleagues with respect to noise from her classroom. She acknowledged that Mr. Wellsch came into her classroom on occasion, but says that he did that with all of the classes. Mr. Wellsch testified that Ms. Martin worked very hard on her classroom management, and that it improved as she gained teaching experience. According to Mr. Wellsch, Nancie Martin had as much experience with conditions

such as Attention Deficit Disorder and Fetal Alcohol Syndrome as any of the teachers at the school. Mr. Wellsch denied having any concerns about the level of control in Ms. Martin's classroom, and stated that he had never had any complaints from other teachers with respect to her classroom management. Apart from classroom visits associated with the performance appraisal process, Mr. Wellsch estimates that he visited Ms. Martin's classroom nine or ten times throughout the school year. Mr. Wellsch says that he was not called to Ms. Martin's classroom to settle the children down any more often than he was called to a number of other classrooms.

[97] Mr. Wellsch's testimony with respect to Ms. Martin's classroom management is consistent with the written performance appraisal that Mr. Wellsch prepared in the Spring of 1997. Although Mr. Wellsch noted that Ms. Martin had confrontations with children in the more senior grades, insofar as her Grade 3 class was concerned, he described her as having "good classroom management". Mr. Wellsch also provided Ms. Martin with a letter of reference in which he described Ms. Martin as "a very capable teacher". He wrote that Ms. Martin had "taken the time to develop her classroom management skills", and that she "exhibits a fine sense of management skills".<sup>(20)</sup> In his interview with the Commission investigator Mr. Wellsch stated that Ms. Martin did have "a bit of a problem" with classroom management, and that, at times, there was a lack of control in her classroom. However, he also stated that her performance was consistent with what one would expect from a first or second year teacher.

[98] Terry Martens testified that she was not aware of any teacher complaints with respect to Nancie Martin's classroom management, and that Ms. Martin's classroom management skills were no different than those of any new teacher. According to Ms. Martens, there were discipline problems in a number of classes, and Ms. Martin was very adept at handling a difficult classroom.

[99] The door of Linda Night's Kindergarten class was directly opposite that of Ms. Martin's Grade 3 class. Ms. Night testified that she heard the door slamming in Ms. Martin's classroom, but said that this usually occurred when the children were coming in from recess. On occasion, she would hear Ms. Martin raise her voice in the classroom, but could not say if this was appropriate or not. Ms. Night did not voice any concerns with respect to Ms. Martin's classroom management, observing that she was not in the classroom, and thus was not in a position to offer an opinion. Ms. Night confirmed that Lance Wellsch regularly visited all of the classrooms, including her Kindergarten class.

[100] I am not persuaded that the Education Committee had any significant concerns with respect to Ms. Martin's classroom management at the time that it recommended that her contract not be renewed. I found Joyce Night's testimony on this point to have been exaggerated, and not particularly credible. Even allowing for the apparent lack of sophistication of the school administration, it simply defies belief that a problem of the magnitude that Joyce Night described would be allowed to continue throughout the school year, without a single piece of paper being generated documenting the administration's concerns. What documentary evidence does exist suggests that Ms. Martin had in fact worked very hard to improve her classroom management skills, and had enjoyed considerable success in this regard.

[101] Joyce Night's testimony with respect to the exceptionally challenging nature of Ms. Martin's Grade 3 class is also troubling. Ms. Night testified that some of Ms. Martin's problems were attributable to the prevalence of students suffering from Attention Deficit Disorder and Fetal Alcohol Syndrome in the class. Ms. Night explained that this led the Education Committee to decide to hire a teacher with eight to ten years of experience for the Grade 3 position, although she went on to concede that Starla Lakowski did not have that much experience. However, as Ms. Martin pointed out, in assessing the legitimacy of the evidence in this regard, the focus should not be on the qualifications of the teacher hired to replace Ms. Martin in the Grade 3 class, but on the qualifications of the teacher who would be handling these children the following year, when they were in Grade 4. Ms. Night initially suggested that Karen Crawley replaced Audrey Gopher as the Grade 4 teacher, but then seemed to agree with Ms. Martin that it was Erin Walton who taught Grade 4 in 1997-8. Erin Walton was twenty three years old, and would have been in her second year as a teacher.

[102] I was similarly unimpressed by the evidence of Julia Night. There was a marked difference in Julia Night's demeanour between her testimony in chief and in cross-examination. In chief, Ms. Night appeared quite pleasant and friendly, whereas her responses in cross-examination were often defensive, and, at times, quite aggressive. Ms. Night demonstrated a surprising degree of hostility towards Commission counsel, considering that her involvement in the matters giving rise to Ms. Martin's complaint was peripheral, and that her conduct was not in issue in this proceeding.

[103] Neither Stella Gopher nor Danita Gopher had any first hand information with respect to Ms. Martin's classroom management, and I have already noted my concern about their limited recollection of what was discussed at Education Committee meetings.

[104] Both Mr. Wellsch and Ms. Martens spoke very positively about Ms. Martin's classroom management skills. As I have previously noted, I do have some concerns about the reliability of Mr. Wellsch as a witness. Counsel for the respondent suggests that Terry Martens was also not a neutral witness, in that her evidence was colored by the fact that her own contract was not renewed by the Sauteaux Band. As a result, counsel says, I should approach her testimony with some caution.

[105] I do not accept the respondent's submission in this regard. Firstly, I note that there is no evidence before me with respect to the circumstances giving rise to Terry Martens' departure from the Sauteaux Heritage School in June of 2001. Further, the description of Nancie Martin's performance as a Grade 3 teacher provided by Ms. Martens in her testimony closely resembled the very positive letter of reference that Ms. Martens prepared for Ms. Martin in May of 1996 - some four years before Ms. Martens left the school. In contrast to the demeanor of Lance Wellsch, Ms. Martens did not demonstrate any visible animosity to the Sauteaux Band or the school. Ms. Martens' testimony was both neutral and balanced, and I found her to have been a most credible witness.

[106] I therefore find that Nancie Martin demonstrated reasonable classroom management skills in the 1996-7 school year. I further find that the Education Committee did not have any

significant concerns with respect to Ms. Martin's classroom management at the time that it recommended that her contract not be renewed.

### **C. The Deficiencies in Ms. Martin's Performance Raised in Joyce Night's October, 1997 Memorandum**

[107] Although not mentioned in any of the minutes of the discussions surrounding the decision not to offer Ms. Martin a new contract, in an October, 1997 memorandum the Band alleges that there were a number of additional problems with Ms. Martin's performance, each of which will be considered in turn.

#### **(i) Nancie Martin Leaving her Classroom in Tears**

[108] Joyce Night alleges that Ms. Martin would leave her classroom in tears, because the children were out of control. Although her memo says that this happened "at times", in her testimony Ms. Night said that she only witnessed this on one occasion.

[109] Nancie Martin does not recall this happening, although she conceded that she did feel like crying on occasion. Unlike Joyce Night, who was in and out of the school several times a week, Lance Wellsch, Terry Martens and Linda Night were in the school all day, every day. None of them ever witnessed Ms. Martin leaving her classroom in tears.

[110] Even if this did occur on one occasion, as Joyce Night claims, I cannot believe that it played any role in the Band's decision not to renew Ms. Martin's contract. Joyce Night herself testified that she did not know how anyone could retain their sanity in that classroom, and that she would not have been able to do so. Ms. Night also acknowledged that there was nothing alarming about Ms. Martin losing her composure. Further, it is not clear from Ms. Night's testimony that the incident that she says that she witnessed even occurred during the 1996-7 school year.

#### **(ii) The Condition of Ms. Martin's Classroom**

[111] Joyce Night's memo alleges that Ms. Martin's classroom was untidy and dimly lit. Insofar as the messiness of the classroom is concerned, Ms. Night testified that she was in the school on a regular basis, and became concerned about the condition of the classrooms. Lance Wellsch acknowledged that, at times, things in Ms. Martin's classroom were "sort of helter-skelter". Julia Night also referred to the lack of order that she says existed in the Grade 3 class. The testimony of Lance Wellsch and Julia Night must, however, be considered in the context of Joyce Night's further observation that the problem was by no means limited to Ms. Martin's classroom, and that all of the classrooms were untidy.

[112] Joyce Night described a generalized concern with respect to the condition of the classrooms throughout the school: she did not suggest that Nancie Martin's classroom was any messier than any of the other classrooms in the school. Given this, it is hard to believe that untidiness in Ms. Martin's classroom played any role in the decision not to offer her a new contract.



[113] Ms. Night says that her concern with respect to Ms. Martin's class, in particular, was that the classroom was dimly lit. Ms. Night says that she told Mr. Wellsch that she wanted the problem corrected, and that Mr. Wellsch told her that Ms. Martin liked to keep her classroom that way.

[114] Ms. Martin appeared to agree that her classroom was dimly lit on occasion, and described the difficulty that she had in getting the maintenance staff in to replace light bulbs as they burnt out. Mr. Wellsch recalled Ms. Martin complaining about this problem. Terry Martens described her own problems getting the maintenance staff to fix broken fluorescent lights and replace the burnt out fluorescent tubes. Ms. Martens also stated that Ms. Martin's classroom was no darker than any of the other classrooms.

[115] I accept the testimony of Nancie Martin, Lance Wellsch and Terry Martens, and find that any deficiencies in the lighting in Ms. Martin's classroom were attributable to maintenance problems. I am further not persuaded that a concern with respect to dim lighting in Ms. Martin's classroom was a consideration in the decision not to renew Ms. Martin's contract.

### **(iii) The Threat to Sue Ms. Martin over the Mishandling of a Child**

[116] Nancie Martin was asked about Joyce Night's assertion that the mother of one of her students had threatened to sue Ms. Martin over her handling of the woman's child. Ms. Martin acknowledged that this happened, and described an incident that occurred on June 11, 1997. According to Ms. Martin, several children had been out very late the night before, and were having trouble staying awake in class. Ms. Martin took the children to the guidance counsellor, and asked her to make arrangements for the children to be taken home. Evidently one of the children was taken home and was left there, even though no one else was at home. The child's mother later came to the school to speak to Ms. Martin. Ms. Martin agreed with the woman that it was not appropriate for the child to have been left unattended, and explained that it was the guidance counsellor who had done so, and not Ms. Martin herself. The mother was evidently very upset, and threatened to sue Ms. Martin.

[117] In the course of discussing this incident with Lance Wellsch shortly after it occurred, Mr. Wellsch suggested that Nancie Martin prepare a written "Incident Report", which she did. Ms. Martin's report was produced at the hearing, and corroborates her version of the event.

[118] At no time in his cross-examination of Ms. Martin did respondent counsel ever suggest to Ms. Martin that there was a second occasion on which a parent threatened to sue her over her handling of a child, nor was Lance Wellsch asked about any such threats. Terry Martens recalled the June 11 incident, and testified that Ms. Martin followed school procedure in her handling of the situation. Once again, Ms. Martens was not asked about a second alleged threat.

[119] Joyce Night testified that there had been a long history of problems with this particular family, and that the mother was "always threatening to sue everybody". According to Ms. Night, there was an earlier incident involving Ms. Martin and this particular parent, arising out of Ms. Martin having allegedly grabbed or shaken the woman's child. Ms. Night says that the child's mother talked about taking her child to a physician in order to have the child's bruises examined.

Ms. Night then told Lance Wellsch and Nancie Martin to make sure that incident reports were prepared. Ms. Night did not suggest that she, or anyone else, ever looked into the allegation that Ms. Martin had physically assaulted a student.

[120] No incident reports have been put before me, apart from the report relating to the June 11 incident. There is no reference in any of the Education Committee minutes to any allegation of the physical abuse of a student by Ms. Martin, and the mother of the child did not testify.

[121] Danita Gopher testified that the issue of Ms. Martin mishandling a child was raised at the April 9 Education Committee meeting. No one else present at the meeting mentioned such a discussion, nor is there any reference to it in the minutes of the meeting. I have already expressed my reservations about the reliability of Ms. Gopher's testimony, and I find that no such discussion took place.

[122] I do not believe Joyce Night when she suggests that there was a second threat to sue Ms. Martin, involving the alleged physical abuse of a student. Firstly, Ms. Night's testimony in this regard was very vague and lacking in specifics. More importantly, it is simply not credible to think that an allegation of the physical abuse of a student by a teacher would not generate any kind of report or inquiry whatsoever. Further, not only is there no mention of any such concern in any of the Education Committee minutes, indeed, there is no mention anywhere of this being a factor in the decision not to renew Ms. Martin's contract until after she had filed her human rights complaint.

[123] An additional reason for rejecting Joyce Night's claim that this earlier threat to sue Ms. Martin was one of the reasons why Ms. Martin's contract was not renewed is the internal inconsistency of Ms. Night's testimony on this point. While Joyce Night alleges in her memo that the earlier threat to sue Ms. Martin was one of the reasons that Ms. Martin was not offered a new contract, Ms. Night's own testimony is that she previously told Ms. Martin precisely the opposite.

[124] Ms. Martin met with Joyce Night on June 2, 1997. Ms. Martin had asked for this meeting in order to ascertain why her contract was not renewed. According to Ms. Martin, when she pressed Ms. Night for a reason, Ms. Night said "I don't think that it was anything that you did". Joyce Night acknowledges having said something like this to Ms. Martin. According to Ms. Night, when she said this she was referring to the threat to sue Ms. Martin for mishandling a child. Ms. Night went on to say that this threat was *not* a factor in the decision not to offer Ms. Martin a new contract. Ms. Night could not have been referring to the incident involving the child being left at home alone. That incident did not take place until the week after Ms. Night and Ms. Martin's June 2 meeting.

[125] I find that there was only one threat to sue Ms. Martin, and that this threat was made on June 11, 1997. This was after the decision had been made not to renew Ms. Martin's contract, and thus could have played no part in that decision. I further find that on June 2, 1997, Joyce Night told Nancie Martin that nothing that Ms. Martin had done had led to her not being offered a new contract.

[126] Notwithstanding my finding that Joyce Night acknowledged to Nancie Martin that Ms. Martin's performance was not the reason that her contract was not renewed, I will address the remaining alleged deficiencies in Ms. Martin's performance that were identified by Ms. Night in her October, 1997 memo.

#### **(iv) Ms. Martin's Lack of Professionalism and Ethics**

[127] Joyce Night alleges that Nancie Martin demonstrated a lack of ethics and professionalism in that she was distant, irritable and tense. She did not, however, provide any specific examples of such behaviour. Although Lance Wellsch described Nancie Martin as being "negative" at times in his performance appraisal, both Mr. Wellsch and Ms. Martens testified that Nancie Martin was a very congenial colleague.

[128] Given the lack of specificity regarding this allegation, and the fact that it only surfaced after Ms. Martin filed her human rights complaint, I am not persuaded that Ms. Martin's personality played any role in the decision not to offer her a new contract.

[129] I am similarly not persuaded that there is any substance to Joyce Night's allegation that Nancie Martin engaged in gossip about Band politics. Once again, I am very concerned by the fact that there is no record of this being raised as a performance concern in any of the minutes of the various meetings at which teacher contracts were being discussed. Further, Nancie Martin denies involving herself in Band gossip, and Terry Martens, Lance Wellsch and Linda Night all state that they never heard Ms. Martin participating in such discussions.

[130] Danita Gopher says that Ms. Martin made comments about the Education Committee being incapable of doing their job, but acknowledges that she never heard any such comments herself.

[131] Finally, Joyce Night's professed concern with respect to Ms. Martin's conduct is difficult to reconcile with her testimony that everyone, including Ms. Night herself, participated in such discussions, and that this was not something that would warrant the non-renewal of a contract.

#### **(v) No Learning During the Last Week of School**

[132] Joyce Night's October, 1997 memorandum alleges that Ms. Martin did very little teaching in the last weeks of school, and that this constituted a breach of Ms. Martin's contract. I accept the testimony of Ms. Martin, Lance Wellsch and Terry Martens that by June, the curriculum had largely been covered, and the students' days were taken up with activities such as field trips and parties. More important, however, is the fact that this was after Ms. Martin had been advised that her contract was not being renewed, and thus could not have played any role in that decision.

#### **(vi) Nancie Martin Ransacking her Classroom**

[133] In her October, 1997 memorandum Joyce Night states that after Nancie Martin was advised that her contract was not being renewed, she "ransacked" her classroom. Ms. Martin acknowledges that she was extremely upset to learn that she was out of a job, and had the children help her take down her posters and other materials from the classroom walls.

[134] However one characterizes this event, once again, it occurred after the Band decided not to offer Ms. Martin a new contract, and could not have played a part in that decision.

#### **(vii) Nancie Martin and the Computers**

[135] Joyce Night states that despite the fact that Nancie Martin had expressed a willingness to work with the school's computers in her job interview, she later refused to do so, complaining that the school's computers did not work. Ms. Night further claims that Lance Wellsch told her that Ms. Martin had said she did not know anything about computers. Because of Ms. Martin's unwillingness to work with the school's computers, Ms. Night says, the computer lab was dismantled.

[136] In contrast, Terry Martens described Nancie Martin as "the school computer expert", stating that everyone in the school relied heavily on Ms. Martin's expertise. Mr. Wellsch agreed that Ms. Martin was knowledgeable about computers. According to Mr. Wellsch, the computer room had been dismantled before he started at the school in January of 1996, because the school needed the space. The computers were then placed in the classrooms. Mr. Wellsch says that he saw children working on computers in Ms. Martin's classroom.

[137] Ms. Martin prepared a proposal for the school to purchase new computers, but Ms. Night says the cost was "outrageous", and the school did not have the thousands of dollars that would have been required to purchase the equipment that Ms. Martin had suggested. According to Ms. Night, Ms. Martin then suggested that the school contact Industry Canada, which ran a program providing computers to schools. Ms. Night was very critical of Ms. Martin's conduct in relation to the Industry Canada program. According to Ms. Night, although Ms. Martin suggested that Industry Canada be contacted, Ms. Martin had failed to follow through on this herself. Ms. Night says a proposal was not submitted to Industry Canada until several years later, and that Ms. Night prepared the application herself.

[138] In cross-examination, Ms. Night was confronted with an application form for the Industry Canada computer program, which application had been completed by Ms. Martin in March of 1996. Ms. Night testified that she was not aware that Ms. Martin had, in fact, applied to Industry Canada for computer assistance.

[139] Ms. Martin testified that she has worked with computers for many years, and is currently teaching computer classes at Northwest Regional College. She explained the problems that she encountered with the school's computers on her arrival at the school. The computers were all old, disk-driven computers, and the majority of the disks were broken. Ms. Martin's husband is evidently a computer technician, and she says that she took the computers home for him to fix. Ms. Martin says that between them, they were able to get several of the computers running, and she worked with these computers at the school.

[140] It will be recalled that Joyce Night did not dispute Ms. Martin's assertion that one of the extra-curricular activities that Ms. Martin was involved in at the Saulteaux Heritage School was running the school's computer club. Ms. Martin has also produced lesson plans that contain references to computer instruction being included as part of the students' day. The computer

proposal that Ms. Martin prepared for the Band also refers to work that Ms. Martin was doing with the students on the computers, including an e-mail pen-pal project. Far from demonstrating an unwillingness to work with computers, the proposal also expresses Ms. Martin's willingness to put in extra time after school or on the week-ends, to run workshops teaching community members about computers.

[141] In light of the foregoing, I am not persuaded that the Education Committee had concerns with respect to the level of Nancie Martin's computer skills, or the computer work that she was doing with the students at Saulteaux Heritage School. Similarly, I am not persuaded that the computer issue played any part in the decision not to offer Nancie Martin a contract for the 1997-8 school year.

#### **D. Conclusion on Liability**

[142] While performance problems could most certainly constitute a reasonable explanation for the decision not to renew an employee's contract, in this case I am more than satisfied that the explanation offered by the Saulteaux Band is pretextual. I find that Nancie Martin's teaching contract was not renewed in May of 1997 because Ms. Martin was pregnant and would be taking maternity leave. Accordingly, Ms. Martin's complaint is sustained.

### **VII. REMEDY**

[143] Having found liability on the part of the respondent, it remains to be determined what, if any, remedy should properly be provided. In fashioning a remedy, the Tribunal's jurisdiction is governed by section 53 of the *Act*, which contemplates the imposition of remedies designed to prevent future acts of discrimination, as well as compensation for individual complainants. The goal of compensation in cases of discrimination is to make whole the victim of the discriminatory practice, taking into account principles of mitigation, reasonable foreseeability and remoteness.<sup>(21)</sup>

#### **A. Systemic Remedy**

[144] It is common ground that in 1991, the Saulteaux Band decided not to renew Brenda Keller's contract, at least in part because she was pregnant. I have now found that this conduct was repeated in May of 1997, when the Education Committee recommended to the Chief and Council of the Saulteaux Band that Ms. Martin not be offered a new contract because she was pregnant. In the circumstances, I think it appropriate to order the respondent to cease discriminating against pregnant employees, and to consult with the Canadian Human Rights Commission, in accordance with the provisions of Section 53 (2) (a) of the *Act*, to develop measures to prevent further incidents of pregnancy-based discrimination in the future.

#### **B. Lost Wages**

[145] Although teachers at the Saulteaux Heritage School teach from September to June, their salaries are spread out over twelve months. As a result, Ms. Martin received her regular salary from the Band until the end of August, 1997.

[146] Ms. Martin's baby was born in September of 1997. Had her contract been renewed, Ms. Martin says she would have taken maternity leave from September, 1997 to the commencement of the second school term, in January of 1998. In accordance with the Band's maternity leave policy, Ms. Martin would have collected Employment Insurance maternity leave benefits during this period. Ms. Martin did collect EI benefits from September through December, and thus has not sustained any financial loss during these four months.

[147] Ms. Martin testified that she would have returned to school in January of 1998, and thus would have earned her regular teaching salary for the balance of the term of her contract - in other words, until the end of August, 1998. In fact, she collected various forms of EI benefits until April of 1998.<sup>(22)</sup> Ms. Martin did not receive any further monies until she commenced a new teaching position in September of 1998. She is, therefore, entitled to be compensated for the income that she lost between January 1 and August 31, 1998.

[148] Ms. Martin's contract discloses that in 1996-7, she earned an annual salary of \$32,826. There is no evidence as to what her pay would have been in 1997-8, had she returned to the Saulteaux Heritage School. In the absence of any evidence to suggest that her salary would have differed, the assessment of Ms. Martin's wage loss should be based on the assumption that she would have earned \$32,826 in 1997-8.

[149] The evidence with respect to the dollar value of Ms. Martin's actual wage loss is unclear, and I am not currently able to calculate the precise amount owing to her. In the event that the parties are unable to come to an agreement with respect to the monies owing to Ms. Martin under the terms of this decision, I may be spoken to.

### **C. Gross-up**

[150] Ms. Martin will now be entitled to a lump sum payment on account of wages, while she is earning income from her current employment. This may well result in negative income tax consequences for her. In my view, it would unfairly penalize Ms. Martin if she were to suffer a more onerous income tax burden, by receiving a lump sum payment now, than she would have incurred had the monies been paid to her as salary in 1998. This would be inconsistent with the remedial goal of making Ms. Martin whole. Accordingly, the respondent shall pay Ms. Martin an additional amount sufficient to cover any additional income tax liability that she incurs as a consequence of receiving payment in this fashion.

### **D. Special Compensation**

[151] Section 53 (3) of the *Act*, as it stood in May of 1997, provided for awards of "Special Compensation" for reckless or wilful conduct, as well as for injuries to feelings or self-respect, to a maximum of \$5,000. There will be a range of cases warranting awards of special compensation under the *Canadian Human Rights Act*, and the \$5,000 maximum award must be reserved for the

very worst cases. <sup>(23)</sup>

[152] The respondent submits that any award made to Ms. Martin under this head should take into account the fact that Ms. Martin was, at least to some extent, the author of her own misfortune by not having provided the Band with written notice of her desire to take maternity leave. According to counsel, had the Band been provided with such notice, it may have chosen to deal differently with Ms. Martin's situation, and a hearing would not have been necessary. Given my finding that the Education Committee had actual notice of Ms. Martin's pregnancy at the time that it recommended that she not be offered a new contract, I reject this submission.

[153] In observing Ms. Martin give her testimony, I was struck by the impact that these events have had on her. Ms. Martin was a new teacher, and this was her very first teaching job. It was clearly a major blow to her self-confidence not to be offered a new contract by the Band. The negative impact that this had on Ms. Martin was undoubtedly compounded by the numerous ostensible concerns raised by the respondent with respect to Ms. Martin's competency in her chosen profession.

[154] I am also mindful of the fact that this is the second occasion on which the respondent has discriminated against a pregnant teacher.

[155] In all of the circumstances, I award Ms. Martin \$4,000 as special compensation.

#### **E. Apology**

[156] Ms. Martin asks that the Tribunal order that Joyce Night and the Education Committee apologize to her for their conduct. I am satisfied that, in the circumstances of this case, such an order is appropriate. I therefore order that the respondent provide a written apology to Ms. Martin, signed by Joyce Night and the Chair of the Education Committee, within thirty days of this decision.

#### **F. Interest**

[157] Interest is payable on awards of special compensation as well as on awards for lost wages. <sup>(24)</sup> I order that interest be paid on the monies awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the award for lost wages should start to run from January 1, 1998, and be calculated as the wages would have become payable to Ms. Martin. Interest on the special compensation shall run from May 26, 1997: that is, the date of the letter notifying Ms. Martin that her contract was not being renewed. In no case, however, should the total amount payable on account of special compensation, including interest, exceed \$5,000. <sup>(25)</sup>

#### **G. Retention of Jurisdiction**

[158] I will retain jurisdiction in the event that the parties are unable to agree with respect to the quantification or implementation of any of the remedies awarded under this decision.

### **VIII. ORDER**

[159] For the foregoing reasons, I declare that Ms. Martin's rights under the *Canadian Human Rights Act* have been contravened by the respondent, and order that:

- i) The respondent cease discriminating against pregnant employees, and consult with the Canadian Human Rights Commission, in accordance with the provisions of Section 53 (2) (a) of the *Act*, to develop measures to prevent further incidents of pregnancy-based discrimination in the future;
- ii) Ms. Martin be awarded compensation for lost wages, calculated in accordance with this decision;
- iii) The respondent pay to Ms. Martin an amount sufficient to cover any additional income tax liability that she may incur as a consequence of receiving the monies referred to above in this fashion;
- iv) The respondent pay \$4,000 to Ms. Martin as special compensation;
- v) The respondent provide a written apology to Ms. Martin, signed by Joyce Night and the Chair of the Education Committee, within thirty days of this decision; and
- vi) Interest be paid on the lost wages and special compensation awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the lost wages shall run from January 1, 1998, calculated as the wages would have become payable to Ms. Martin. Interest on the special compensation shall run from May 26, 1997.

ORIGINAL SIGNED BY

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Anne L. Mactavish, Chairperson



OTTAWA, Ontario

April 18, 2002

**CANADIAN HUMAN RIGHTS TRIBUNAL**  
**COUNSEL OF RECORD**

TRIBUNAL FILE NO.: T589/4700

STYLE OF CAUSE: Nancie Martin v. Sauteaux Band Government

PLACE OF HEARING: Saskatoon, Saskatchewan

(November 20-22, 2001; February 4-7, 2002)

DECISION OF THE TRIBUNAL DATED: April 18, 2002

APPEARANCES:

Nancie Martin On her own behalf

Mark McDonald For the Canadian Human Rights Commission

Reynold Robertson, Q.C. For the Sauteaux Band Government

1. <sup>1</sup> R.S.C., 1985, c. L-2

2. <sup>2</sup> Section 3 (2), *Canadian Human Rights Act*

3. <sup>3</sup> *Israeli v. Canadian Human Rights Commission*, 4 C.H.R.R. D/1616 at p. 1617 (aff'd 5 C.H.R.R. D/2147), and *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029

4. <sup>4</sup> *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R. 536 at 558

5. <sup>5</sup> *Shakes v. Rex Pak Limited* (1982), 3 C.H.R.R. D/1001 at p. D/1002

6. <sup>6</sup> *Israeli*, supra.

7. <sup>7</sup> *Chander and Joshi v. Department of National Health and Welfare*, T.D. 16/95, at p. 25, aff'd [1997] F.C.J. No. 692, (1997) 131 F.T.R. 301. See also *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 (CHRT), aff'd *Canada A.G. v. Singh*, (April 14, 2000) T-2116-98 (F.C.T.D.), *Morris v. Canadian Armed Forces*, T.D. 17/01 and *Crouse v. Canada Steamship Lines Inc.*, T.D. 7/01

8. <sup>8</sup> *Israeli*, supra., and *Basi*, supra.

9. <sup>9</sup> At p. D/5038

10. <sup>10</sup> B. Vizkelety, *Proving Discrimination in Canada*, (Toronto), Carswell, 1987 at p. 142.

11. <sup>11</sup> *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 at p. D/15

12. <sup>12</sup> When Ms. Martin was questioned about the fact that other teachers had taken maternity leaves, she suggested that Band members may be treated more favourably than non-Band members insofar as the granting of maternity leaves are concerned. In this regard, I note that Ms. Martin complains of discrimination on the basis of sex, and has not alleged racial discrimination. The Band had no notice of any allegation of race-based discrimination, and has not defended itself against such a claim. As a consequence, I do not think that it would be fair to deal with this suggestion any further.

13. <sup>13</sup> NADAP is evidently an alcohol and drug abuse program.

14. <sup>14</sup> Although the decision not to renew Nancie Martin's contract was nominally made by the Chief and Council of the Band, it is clear from the evidence of Joyce Night that the Band Council essentially 'rubber stamped' contract decisions made by the Education Committee, and that it is the actions of that Committee that must be scrutinized in this case.

15. <sup>15</sup> Both the Commission and the respondent have adopted the analytical framework articulated in *Shakes*, as both have approached Ms. Martin's complaint as being one of failing to hire her, and not of refusing to continue to employ her. This is undoubtedly a result of the contractual nature of her employment.

16. <sup>16</sup> Joyce Night's letter to Mr. Robertson actually describes the listed qualifications as being those of 'the applicant'. From her testimony, however, as well as the context in which the letter was written, it appears that Ms. Night's letter describes Ms. Lakowski's qualifications.

17. <sup>17</sup> [1952] 2 D.L.R. 354

18. <sup>18</sup> See *Comfort v. Sauteaux Band*, [2000] S.J. No. 272

19. <sup>19</sup> Ms. Night attributes this, in part, to the poor quality of Lance Wellsch's performance appraisals.

20. <sup>20</sup> Mr. Wellsch's letter is undated, but appears to have been written in or around June of 1997.

21. <sup>21</sup> See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (F.C.A.), and *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530 (F.C.A.)

22. <sup>22</sup> Although not addressed by the parties, it appears that consideration may have to be given to the operation of Sections 45 and 46 of the *Employment Insurance Act*, in relation to Ms. Martin's wage loss.

23. <sup>23</sup> *Premakumar v. Air Canada*, T.D. 03/02. See also *Morgan*, supra.

24. <sup>24</sup> *Morgan*, supra.

25. <sup>25</sup> See *Hebert v. Canada (Canadian Armed Forces)*, (1993), 23 C.H.R.R. D/ 107