

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DORITS DE LA
PERSONNE

EVELYN LONDON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

NEW BRUNSWICK ABORIGINAL PEOPLES COUNCIL

- and -

BARRY LABILLOIS

Respondents

DECISION

MEMBER: Michel Doucet 2008 CHRT 49
2008/12/30

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I. INTRODUCTION

[1] On May 30, 2005, Evelyn London (the "complainant") filed two complaints before the Canadian Human Rights Commission. One complaint alleges that the New Brunswick Aboriginal Peoples Council ("NBAPC") discriminated against her in violation of Sections 7 and 14 of *the Canadian Human Rights Act* (the "Act"). The other complaint, filed against Barry LaBillois, the complainant's supervisor at NBAPC, alleges that he discriminated against her in violation of section 14 of the Act. Both complaints allege that the respondents engaged in a discriminatory practice on the ground of race, national or ethnic origin.

[2] The respondents deny the complainant's allegations.

[3] The parties were represented by legal counsel at the hearing. The Canadian Human Rights Commission did not attend the hearing.

II. THE FACTS

[4] The complainant is of both Maliseet and Micmac ancestry. Maliseet and Micmac are the two largest aboriginal communities in the province of New Brunswick.

[5] The respondent, NBACP, was created in 1972. It represents off reserve or non status aboriginals and Métis people of New Brunswick. The organization includes aboriginals of Micmac, Maliseet, Ojibway, Passamaquoddy and Cree ancestries. To become a member of NBAPC a person must self identify as an aboriginal person and provide documentation to establish his aboriginal origins. Non status aboriginals would have to provide a birth certificate establishing that one of their parents is of aboriginal ancestry.

[6] NBAPC consists of locals comprising various communities of aboriginals living off reserve. According to its charter, a local of NBAPC can be established when five aboriginal members reside in a given geographical area. These individuals must not live more than ten kilometers apart. Various locals make up zones. There are seven zones in New Brunswick. Each zone elects a representative to the council of NBAPC. The president of the council is also known as the Chief. Betty Ann Lavalée has been president and Chief of NBAPC since 2000. The complainant was a member of NBAPC from late 1970 until 2002 when she gave up her membership.

[7] Barry LaBillois is of Micmac ancestry and was, at all times relevant time to this matter, an employee of NBACP. More specifically, he occupied the position of Aboriginal Fisheries Coordinator.

[8] The complainant was hired as a secretary/bookkeeper with NBAPC for its Aboriginal Fisheries Program on June 19, 2000. Her job was to assist the Supervisor of the Aboriginal Fisheries Program. Between June 19, 2000 and August 2001, Phillip Fraser was her Supervisor.

[9] In August 2001, after Phillip Fraser left NBAPC for other employment, the respondent, Barry LaBillois, took over the position of Supervisor. On January 24, 2002, the complainant was offered a position as Aboriginal Fisheries Monitor. Chief Lavalée testified that she had explained to the complainant that she would also hold the position of secretary/bookkeeper until somebody could be found to fill that position. The complainant did not, at that time, raise any concerns about being supervised by Barry LaBillois.

[10] The complainant stated that her working relationship with Barry LaBillois was not a good one. She added that he had told her that he was the boss and that she should do as she was told with no question asked. She also testified that before he became her supervisor, she had heard him make disparaging remarks against Maliseet but she was unable to say when these remarks had been made, except for one incident to which I will refer to later.

A. The lobster distribution incident

[11] The first incident the complainant specifically referred to as being harassment occurred in September 2001 during the preparation of lobsters for distribution to members of NBAPC. This incident happened outside of the workplace at the home of Carol LaBillois-Slocum, the sister of Barry LaBillois. Carol LaBillois-Slocum was then the communication officer of NBAPC. She now holds the position of vice-chief.

[12] The complainant said that, as part of her job, Barry LaBillois had requested her to be present. Another coworker, Jason Harquail was also present. As were Carol LaBillois-Slocum, her husband and Barry LaBillois.

[13] The complainant's task on that day was to cook the lobster and to put them in a walk-in cooling unit so that they would cool down.

[14] According to the complainant, everybody present was drinking alcohol except her. She said that at one point, Carol LaBillois-Slocum pressured her into having a drink and even slapped her in the face telling her "to get with it." Carol LaBillois-Slocum was present at the hearing when the complainant gave her evidence. She was also listed on the respondents' witness list but was never called as a witness.

[15] At one point during the evening, while she was putting lobster in the walk-in cooling unit, Barry Labillois closed the door of the unit, locking her inside. The complainant said that she panicked and started beating on the door, yelling for someone to let her out. When asked if somebody else was inside the unit with her, she answered that she did not remember. According to her recollection, this "incident", lasted "for a couple of minutes". Eventually, Barry LaBillois opened the door and let her out. She added that he was laughing. The complainant did not say anything to him and headed inside the house.

[16] During her cross-examination, the complainant testified that Mr. LaBillois had done this because she was a Maliseet and that this was leading up to what occurred later on in the evening. Barry LaBillois said that this was all done as a joke and that the complainant was not alone in the walk-in cooling unit but that Jason Harquail had also been locked in with her. He said that when the door was unlocked both the complainant and Jason Harquail were "laughing it off." When asked about this, Jason Harquail said that he did not remember anything particular about that evening and he never referred to the cooling unit incident.

[17] The complainant further testified that at one point during the evening, Barry LaBillois said that Maliseet "were an inferior race" and that they were "slow and slow speaking". She said that she told him that he should not be saying things like that and that his response was "it was true." But during her cross-examination, she agreed that this was the first time that she had mentioned that Barry LaBillois had replied to her comment and that since LaBillois alleged response that "it was true" had not been written in her complaint then the chances were that it had not been said.

[18] Asked if he had made these comments, Barry LaBillois answered: "I say it never happened. I never made any comments about Maliseet that evening."

[19] The complainant never complained about these incidents to anyone at NBAPC. She explained that she was afraid to lose her job considering Barry LaBillois' position at NBAPC.

B. Incidents at the workplace

[20] The complainant also testified to various incidents which occurred at the workplace. She said that, on numerous occasions, Barry LaBillois would come out of his office and tell her that it was evident that Maliseet were inferior since he had read it on the Internet. Questioned further about these incidents, she specified that it had only happened once, during the year 2002 (she couldn't be more specific), after she had obtained the position of Aboriginal Fisheries Monitor.

[21] The complainant also referred to an incident which occurred when Phillip Fraser was the supervisor. She said that Barry LaBillois had then made a remark about Maliseet in the presence of Mr. Fraser. She did not indicate what this remark was. On cross-examination, the complainant admitted that this matter had been resolved and dealt with.

[22] Also on cross-examination, she mentioned remarks that Barry LaBillois made where he described Maliseet as slow speakers, stupid and incapable of following instructions. She added that these comments made her feel uncomfortable and that whenever she told him how she felt, this would only make matter worse. She testified that he would slam doors and make her work through her lunch hours. The complainant was not able to indicate when these incidents occurred and her testimony was the only evidence to support her allegations. She agreed that these incidents were never brought to the attention of her employer before July or August 2002.

[23] The complainant also stated that Chief Lavallee had once referred to her as a "Mal-i-Mic" which she felt constituted discrimination. Chief Lavallee explained that she used this expression to refer to the fact that the complainant had both Maliseet and Micmac ancestry. Chief Lavallee also indicated that NBAPC's newsletter is named *The Mal-i-Mic*.

[24] The complainant recalled other incidents where Barry LaBillois would throw things - erasers, pens, coffee cups - at her from his office in order to get her attention. She also said that he would refer to her as "Eleanor" or "Magoo" and not by her real name. She added that she had told him that she wanted to be called by her name, but that did not seem to make any difference. The complainant testified that she did not appreciate him calling her by those names. She further added that she had never heard him refer to other employees by any name other than their own. The complainant admitted that the fact that Barry LaBillois called her "Eleanor" did not constitute discrimination but that it was nonetheless "humiliating." I note that Monique Myrshrall, a co-worker of the complainant, testified that Mr. LaBillois would call everybody by different names and that Ms Myrshrall would also refer to him as "Bartholomew".

[25] Monique Myrshrall recalled another incident that occurred in a hotel room in Bathurst, New Brunswick. No dates were given for this incident. Monique Myrshrall said that she had heard Barry LaBillois and Carol Labillois-Slocum say that the complainant was slow to learn and stupid. Barry LaBillois denied making these comments, which he attributed to his sister. Although these comments are humiliating and certainly highly inappropriate coming from a

supervisor, nothing in Ms Myshrall's evidence indicates that they referred to the racial, national or ethnic origin of the complainant.

[26] Barry LaBillois admitted that on occasion he had referred to Maliseet as "muskrat eaters". He said that it was "common knowledge along the Saint John River that Maliseet ate muskrat". He added that he thought this was funny and that he was just joking when he made the comments. Pushed a little further by the complainant's lawyer, he never directly denied making other comments which he was not asked to specify neither in direct nor in cross-examination. He added that they were all made in good humor. He also added that the complainant never told him that she did not like him making those comments.

C. The office cleanup

[27] Around May 31, 2002, everybody at NBAPC was asked to participate in a cleanup of the office. The complainant said that while she was outside tying up pieces of wood in the back of a truck, Barry LaBillois told her "don't you know anything about tying down brushes. You Maliseet do not seem to know how to do much." She added that these comments made her feel worthless. Asked if somebody else had heard these comments, she said that Monique Myrshrall was just walking into the building when they were made, but she doubts that she was close enough to have heard them. Barry LaBillois testified that he "didn't recall making any comments about Maliseet on that day."

D. Personality test

[28] Around mid-April 2002, Barry LaBillois went to Banff, Alberta, for a couple of days, to take a management course. While there, he "picked up" a questionnaire, which he claimed was as a "personality test".

[29] In May 2002, he required that all the employees under his supervision complete the questionnaire. After they had completed the questionnaire, he proceeded to review and rank them based on their answers. Some time later, according to the complainant, Jason Harquail, Monique Myrshrall and herself were met with Barry LaBillois to discuss the tests results. The complainant said that, in front of all her coworkers, Barry LaBillois told her that her results showed that she was "the odd one" and that she had "no backbone." She added that these comments made her feel uncomfortable, but she did not say anything at that time. According to her, no other employees received negative reviews in this exercise. Neither the test results, nor the questionnaire were entered into evidence.

[30] Monique Myrshrall, although she recalled having been administered the questionnaire, did not remember any comments made by Barry LaBillois regarding the complainant's test results.

E. The moving of furniture

[31] NBAPC bought a workstation for the complainant. The complainant was told by Barry LaBillois to assemble it, which she did. Afterwards, he told her that she might have forgotten that she was left-handed and that the desk had been put together on the wrong side. She was told to make the necessary adjustments.

[32] Barry LaBillois also told the complainant to put the desk facing the back wall, which meant that the complainant would have her back to the front door. The complainant said that she did not feel safe with this arrangement because sometimes clients would come in "a little upset" and she

would prefer facing them rather than having her back to them. Without the prior consent of Mr. LaBillois, the complainant and Monique Myrshrall decided to rearrange the orientation of the workstation. They swung the workstation around so that it would face the door and not the back wall. They felt that this arrangement was more workable and professional.

[33] When Barry LaBillois returned to the office, he took a look at the new arrangement and "yelled" at the complainant to come into his office. According to the complainant, he then told her: "What the hell do you think you are doing? I want the workstation to be put back as I had told you to." She said that she tried to explain to him why the changes had been made, but he did not want to hear any of this. Mr. LaBillois testified that he had never agreed to these changes.

[34] Chief Lavallee also testified about this incident. She said that she knew that the office furniture had been moved around in spite of the fact that the employees had been told not to do it. She also had been advised by the "chief of operation" that one of the desks had been damaged. Chief Lavallee called Barry LaBillois in her office and asked him what he was going to do about it. She informed him that he was the supervisor and that if he gave orders to his employees and they were not "obeying" them, then he needed to take control of the situation.

F. The "last confrontation"

[35] Funding having ran out for the Fish Monitoring Program, all of the employees were laid-off on July 3, 2002.

[36] The complainant was recalled to work on July 15, 2002 when new funding became available. She said that Barry LaBillois came to her house to inform her that she would be recalled. She added that he had also apologized for what his sister "had done" to her. According to the complainant, he was referring to an incident which had occurred in the conference room at some point in June 2002. The complainant was there having lunch with "four or five individuals" when Carol LaBillois-Slocum came in. When she saw the complainant, she said "please let me know when Evelyn is not here eating any longer because I lost my appetite." Barry LaBillois was not present when these comments were made.

[37] Barry LaBillois confirmed that he had made arrangements to go to the complainant's home. He said that the complainant and her husband had a car for sale and that he wanted to check it out. During that visit, he informed the complainant that funding for the program had been reestablished and that she would be recalled to work. At the hearing, Mr. LaBillois was not asked and never testified about the alleged incident between the complainant and his sister.

[38] The complainant testified that she was disappointed when she learned that she was going to be recalled. She added that she did not want to go back to work at NBAPC because of the way she had been treated. But, nonetheless, she did return.

[39] The last confrontation between the complainant and her supervisor occurred on July 17, 2002. On that day, the complainant was instructed by Barry LaBillois to contact NBAPC's fishers to inform them of a Department of Fisheries and Oceans variance order. She said that she went down the list of fishers but was unable to contact any of them. She then went to Barry LaBillois' office and told him that she was unable to reach the fishers. According to her, Barry LaBillois blew up, started swearing at her and told her to go back to work and do as she had been told. He then told her "to get out of his fucking office".

[40] In a letter of complaint she wrote to Chief Lavallee on August 23, 2002, the complainant was more explicit about the exchange she had with her supervisor on that day. She wrote:

"I went into Barry's office after lunch to inform him of the results of the phone calls [...] He cut me off short and stated to me on what he wanted done. I tried again to make him aware of the outcome of what he wanted done and he cut me off again. He again continued to state on what he wanted done. I said "I know what you wanted done, I only want to let you know how it is going with it". So I finally got the nerve and asked him if he has a problem with me. Barry said "sit down, if I didn't want to hear what he had to say to get the fuck out of his office." I again said it seems to me that clearly there is a problem with me and I want to know what it is (as I was closing the door for privacy). He said "there were a lot of things." He then said "I had been always defying his authority by moving the office desk around." I said "it wasn't my idea." He said "I told you how I wanted to have the desk." I said "that was all ready taken care of a long time ago." He said "What about talking to Betty Ann." I said "I hardly talk to her, do you want me to sit in the smoke room and say nothing in the mornings while there is only her and I there." We then got back to what the outburst was about. He started by saying "If I wanted to ask questions, everyone has the opportunity to ask questions at the end of staff meetings," I said "how will I know about what you want me to do if I can't ask questions on it?" He started to calm down and explained to me that he has been upset. He then talked to me in a more relaxed manner. The screaming match was over. I found out what I needed to know and went back into my office."

[41] Chief Lavallee, in her evidence, confirms that on the morning of July 17, 2002, she had instructed Barry Labillois to get in touch with the NBAPC's fishers and to get them off the water. On that same morning, while she was smoking a cigarette, she said she overheard the complainant and Monique Myrshrrall talking in the "smoke room". According to her evidence, they were making derogatory remarks about Barry LaBillois. They felt that he did not know what he was doing and that they should not have to call the individual fishers. Chief Lavallee called Barry LaBillois to her office and told him he had "to get a grip on his employees". She told him that she was not "impressed" with the conduct of his employees and that he was not behaving as a supervisor should behave.

[42] According to Barry LaBillois, after his meeting with Chief Lavallee, he returned to his office. He added that he then called the complainant into his office and told her that she had to contact the individual fishers. The complainant told him that she had tried but could not reach some of them. Mr. LaBillois said that he told her to keep trying because it was important that they be told about the situation on that day. They argued back and forth, until the point where Barry LaBillois blew up: "I had enough of it and basically lost it and told her to get the fuck out of the office." He added that he did not have any other interaction with the plaintiff after she left his office.

[43] At the hearing, the complainant testified that when she left Mr. LaBillois' office she did not return to her workstation but went upstairs to speak to Chief Lavallee. She added that this was the first time that she had decided to talk to Chief Lavallee about the incidents with her supervisor. When she got there, Chief Lavallee was busy on the phone and she was asked to return after lunch. At the hearing, she testified that this had happened in the morning and that her first attempt to speak with Chief Lavallee occurred also in the late morning. But I note that in her letter of August 23 she states: "Being employed only for my second day Barry [LaBillois] and

we had our last confrontation after lunch. I had a scheduled appointment with the Chief after lunch, she was to let me know when she was free as she was on direct inquiries (phone) that noon hour but before the meeting my supervisor and I had it out. This last outburst led me to take the matter to Chief Betty Ann [Lavallee]." (The emphasis is mine.)

[44] The recollection she has of the event in her letter is a little different than what she testified to at the hearing. First of all, she indicates in her letter that the confrontation with her supervisor occurred after lunch, while she testified at the hearing that it had happened before lunch. On cross-examination, she admitted she should have written "before lunch". Nothing much really depends on this, but other discrepancies appear more significant. For example, in the letter, she refers to a "scheduled appointment" with Chief Lavallee. In her letter she also wrote: "I had verbally reported the conduct to Chief Betty Ann Lavallee of Barry's actions although that wasn't my intention for setting up the meeting with her." (The emphasis is mine.)

[45] At the hearing, the complainant did not refer to a "scheduled appointment", leaving the impression that her meeting with the Chief was spontaneous and due to the incident with her supervisor. Since the letter was written about a month after the events, I find it more convincing and credible than what was said at the hearing.

[46] The complainant did eventually meet with Chief Lavallee after lunch. During her direct examination, she said that she related to Chief Lavallee Barry LaBillois' attitude towards her. More specifically, she said that she told Chief Lavallee that Barry LaBillois had referred to Maliseet as being inferior. She added that she tried to explain the other incidents but just broke down. Seeing that she was upset, Chief Lavallee told her to go home for the rest of the week and get some rest. The complainant testified that Chief Lavallee told her that she would contact Barry LaBillois to see what was going on, although, according to the complainant, Chief Lavallee never suggested that there should be a meeting between her, the Chief and Barry LaBillois. The complainant added that if such a meeting had been proposed, she would have accepted immediately.

[47] Regarding her exchange with Chief Lavallee she wrote in her letter: "By the time I got to her office I was upset by the outburst with Barry [...]. Betty Ann asked me what was wrong. I started by asking if the offer was still there to be let go. I broke down at that point sobbing unable to say anything. I had said to Betty Ann that I feel that Barry is not very professional and I never had to work for someone like that before. He was not like that in the beginning. He has been making derogatory remarks about me as a Maliseet. At the time we were cooking for the lobster distribution around the province. I said to Barry that I was insulted by his remarks and that he was not only insulting me but my whole family. I had thought that would have been it but it didn't stop there. ... I asked if the offer to be let go from work was still available. That was the reason I wanted the meeting with her." (The emphasis is mine.)

[48] According to Chief Lavallee, the complainant did not seem distressed at the start of their meeting. She recalled that the complainant sat down and asked her if she could take the offer of an early lay-off. When asked why, Chief Lavallee said that "she started to say something about Barry." Chief Lavallee then told her that she had told Mr. LaBillois to call the fishers and get them out off the water. At that point the complainant started to cry. Chief Lavallee said that she then asked the complainant if she could bring Barry LaBillois up and the complainant refused. She added that every time she suggested that they sit down with Barry LaBillois to discuss the

matter, the complainant would say no. This contradicts the evidence given by the complainant who testified that if it had been suggested that they all meet together, she would have accepted.

[49] Seeing that the complainant was distraught, Chief Lavallee told her that it might be a good idea for her to go home and take the rest of the week off. The Chief told her that she would be talking to Barry LaBillois and that in the coming weeks they would all sit down and work things out.

[50] Later on in the afternoon of July 17, Chief Lavallee informed Barry LaBillois of what had happened.

[51] On July 22, 2002, the complainant said that she called Chief Lavallee to see what follow up had been made. She was told that Chief Lavallee had not yet spoken to Barry LaBillois. She added that she then told Chief Lavallee that she did not feel comfortable returning to work until the issues with her supervisor had been addressed. According to the complainant's evidence, Chief Lavallee told her that she would prepare her record of employment on which she would indicate that she was being laid off because of a lack of funding.

[52] Chief Lavallee has a slightly different recollection of what happened on that Monday, July 22. She agreed that the complainant was supposed to call her but testified that she never did. Chief Lavallee first testified that she called the complainant on Wednesday, July 24, 2002, but a little later she conceded and said that it was the complainant who called her on that day. During that conversation, Chief Lavallee said that the complainant again told her that she did not want to talk to Barry Labillois. The complainant again requested that she be given her lay-off. Chief Lavallee had the complainant's Record of Employment prepared. The reason given for her lay-off was: "Agreement with DFP re aboriginal fishery has not been signed therefore no money for this program."

[53] On August 23, 2002, the complainant wrote a letter to Chief Lavallee. In this letter she mentions that she left her work because of a "hostile workplace" in which she had been the subject of "discrimination and derogatory remarks" made by her supervisor. She referred specifically to incidents where she alleges Mr. LaBillois said the following: "that's a Maliseet for you", "Maliseet are inferior", "only a Maliseet would do that". She also referred to the throwing of objects and to the fact that her supervisor would call her by the nickname "Eleanor." The complainant also mentioned the incident concerning the rearrangement of the office and the events leading up to the "last confrontation."

[54] Chief Lavallee said that the complainant's letter of August 23, 2002, was her first contact with her since July 2002. After she received the letter, she called Barry LaBillois to her office to inform him that she had received a complaint. She had a conversation with Barry LaBillois about the content of the letter. She told him that she was not impressed with the situation and that if he had done his job right, this situation would not have degenerated. She also told him that this was why supervisors needed to be firm with employees and make sure that they followed rules and procedures.

[55] On August 26, 2002, Barry LaBillois wrote a letter to Chief Lavallee responding to the complainant's letter. In this letter, he claims to answer all the allegations made by the complainant. In regards to the comments he is alleged to have made at the lobster distribution

event, he does not deny making them. What he says in the letter is: "Ms London did not indicate at any time that she had a problem with this. If Ms London had a problem this was the first time that I had heard anything about it. Within aboriginal groups across this country this is a common occurrence as we back and forth joke to one another to who is superior. When the topic was first mentioned Ms London should have [taken] the opportunity to say something at that time, [but] she did not do it till a year later. I can only apologize on this over site [*sic*] on my part. It was not in my [intention] to insult her or her family."

[56] On September 10th, 2002, Chief Lavallee sent a disciplinary letter to Barry LaBillois. In that letter she writes: "As discussed, September 10th, 2002, at approximately 11:00 a.m. in a meeting between me and you, I told you I would be giving you a written reprimand for using foul language at or around Ms London. Also, we discussed that you are not to call any employees by any other name, except their given name, objects are not to be thrown around office or at each other whether or not it is in fun, and lastly, you will not joke with employees about their tribal affiliations." She explained at the hearing that she was handing him a reprimand for using foul language because he had admitted to cursing and yelling. She also added that he had admitted to making jokes about the complainant's Maliseet ancestry, about throwing things in the office and about calling her Eleanor. In her letter, she further stated:

"You have admitted and have taken responsibility for your actions and have assured me that this type of behavior will not occur again [...] Mr. LaBillois, both myself and the Deputy Vice-Chief, Barbara Cameron are very upset and disappointed with your conduct. Be forewarned if this "sort" of conduct or offensive behavior is to occur in the future with "any" employee of the New Brunswick Aboriginal Peoples Council, we the Executive of NBAPC will have no choice except to take more drastic steps."

The complainant said that she never saw this letter before the present procedures. Chief Lavallee added that she did not feel it proper to inform the complainant about this reprimand as she felt it would have been a breach of confidentiality.

[57] Chief Lavallee further testified that she was not convinced that Barry LaBillois' actions were done to hurt the complainant, but she wanted by this reprimand to set "the bar high" for the future.

[58] On December 18, 2002, the complainant filed a complaint with the New Brunswick Human Rights Commission, believing that it had jurisdiction over this matter. The complaint was ultimately transferred to the Canadian Human Rights Commission on May 30, 2005.

[59] On February 27, 2003, the complainant received a letter from Chief Lavallee informing her that funding was now in place for the Aboriginal Fisheries Program, and that she could return to her position as an Aboriginal Fisheries Monitor as of March 10, 2003. The letter also indicated that the funding commitment was only available until the end of March 2003. On March 6, 2003, the complainant wrote to Chief Lavallee indicating that she would not accept this offer because "her issues with Barry LaBillois had still not been addressed."

[60] On March 7, 2003, Chief Lavallee wrote back to the complainant indicating that NBAPC had taken steps to investigate her complaint and that it had "enacted the necessary disciplinary measures as a result." She added that NBAPC had also "reiterated [its] policy that there is to be no joking, conversation or remarks of a personal nature in the office. I am confident that if you

return to work with NBAPC that you will not be subject to any human rights issues or violations." Chief Lavallee also wrote that part of the difficulty the complainant had described as a "hostile work environment" was in fact a problem of "interpersonal communication in the office." She added: "I can only reiterate my request to all staff that we treat each other with respect at all times." She concluded her letter by again extending her offer of employment but she added "if my assurances are not enough to satisfy you, and you choose not to return, then I have no choice but to consider you to have fully and finally resigned from employment at NBAPC. If this is the case, I will prepare a Record of Employment reflecting your decision to leave."

[61] The complainant alleges that this offer of employment was made in retaliation to the filing of her complaints. Chief Lavallee answers that it had nothing to do with the human rights complaints but with the fact that an agreement had been concluded with the Department of Fisheries and Oceans concerning funding and that all the employee were recalled back to work. I note that the complainant never raised any issue concerning retaliation in her complaint.

[62] The complainant never returned to work at NBAPC.

III. THE LAW

[63] The complainant alleges that the respondents discriminated against her in within the meaning of sections 7 and 14 of the *Act*. Section 7 provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual, or in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Paragraph 14(1)(c) of the *Act* provides that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters related to employment. The prohibited grounds of discrimination include race, national or ethnic origin. In the present case, the complainant alleges that the respondents discriminated against her on the basis of her Maliseet ancestry. Whether or not the issue of the complainant's Maliseet ancestry qualifies as national or ethnic origin for the purposes of s. 3 of the *Act* was never challenged by the respondents.

[64] Given that the allegations that NBAPC discriminated against the complainant in the course of her employment arise solely from her complaints under section 14, I will deal with the issue of section 14 first and, if necessary, address afterwards the allegations under section 7.

[65] Harassment that is proscribed under the *Act* can take many forms. In this case, the complainant alleges that she was harassed because of her race, national or ethnic origin. The case law has established that for a complaint to be substantiated, it is not necessary for harassment to be the sole reason for the actions complained of for a complaint to be substantiated and the harassment need not even be intentional on the part of the perpetrator. (See *Swan c. Canada (Armed Forces)* (1994), 25 C.H.R.R.D./ 312 at para. 73 (C.H.R.T.), rev'd on other grounds (1995), 25 C.H.R.R.D./333 (F.C.T.D.); *Dhanjal v. Air Canada*, (1996), C.H.R.R. D/27 at para. 206 (C.H.R.T.), aff'd [1997] F.C.J. No. 1599 (F.C.T.D.) (Q.L.); *Marinaki v. Canada (Human Resources Development)*, [2000] C.H.R.D. No. 2 at para. 187 (C.H.R.T.) (Q.L.); *Rampersadsingh v. Wignall*, [2002] C.H.R.D. n° 27, at para. 40).

[66] In the case of *Canada (HRC) v. Canada (Armed Forces) and Franke*, [1999] 3 F.C. 653 at paras. 29-50 (F.C.T.D.) ("Franke") (also applied in cases of racial harassment, see

Rampersadsing, supra; *Morin v. Canada (Attorney General)*, 2005 CHRT 41, at para. 246), the Federal Court stated that in order for a complaint of harassment to be substantiated, the following must be demonstrated:

- (1) The acts that are the subject of the complaint were unwelcome. This can be determined by assessing the complainant's reaction at the time of the alleged incidents of harassment and whether the complainant expressly, or by his/her behavior, demonstrated that the conduct was unwelcome. The appropriate standard against which to assess a complainant's conduct will be that of a reasonable person in the circumstances.
- (2) Where the complainant alleges that there has been harassment practiced on the basis of her national or ethnic origin, the respondent's conduct must somehow be shown to be related to that ground. Harassment can be verbal in nature, encompassing conduct such as insults or remarks regarding a person's national or ethnic origin. The Tribunal's determination of whether the unwelcome conduct was related to a complainant's origins should again be carried out in accordance with the standard of a reasonable person in the circumstances of the case, keeping in mind the prevailing social norms. (*Rampersadsing*, supra, at para 41.)
- (3) Ordinarily, harassment requires an element of persistence or repetition, but in certain circumstances even a single incident may be severe enough to create a hostile environment. The Court in *Franke* noted, for example, that a physical assault may be serious enough to constitute in itself sexual harassment. On the other hand, a crude joke, although in poor taste, will not generally be enough to constitute sexual harassment and would rarely create a negative work environment. The objective reasonable person standard is used to assess this factor as well.
- (4) The final factor arises where a complaint is filed against an employer regarding the conduct of one of its employees. Fairness requires that in such cases, the victim of the harassment, whenever possible, notify the employer of the alleged offensive conduct

IV. ANALYSIS OF THE FACTS

[67] Human rights decisions hold that the initial burden lies with the complainant, who must establish a *prima facie* case of discrimination. Once a *prima facie* case is established, it is usually said that the respondent has the burden of explaining. (*Hill c. Air Canada*, [2003] C.H.R.D. N°3.)

[68] I find that even if I was to accept that the facts of the case are in accordance with the evidence led in support of the complaint, the respondents' conduct does not constitute harassment on the grounds of race, national or ethnic origin, within the meaning of the *Act*. I have no doubt that the complainant was bothered and annoyed by Barry LaBillois' behavior, but his conduct does not meet the standard established in law for the proscribed form of harassment.

[69] In order to explain this conclusion, I will now apply the criteria set out in *Franke* to the present case.

A. Was the Impugned Conduct Related to the Complainant's race, or national or ethnic Origin?

[70] I will address each of the situations where the complainant alleges that Barry LaBillois or NBAPC harassed her on the basis of the fact that she was a Maliseet.

(i) The lobster distribution incident

[71] During that September evening of 2001, the complainant alleges that the respondent, Barry LaBillois, discriminated against her because of her Maliseet origin. She referred to two incidents

in particular: when he locked her in the walk-in cooling unit, and when he told her that Maliseet were "an inferior race" and "slow and slow speaking".

[72] As to the cooler incident, although it might suggest a lack of maturity on the part of Mr. LaBillois, I fail to see how this incident can be related to the complainant's race or national or ethnic origin and will exclude it from further consideration for the purpose of this decision.

[73] In regards to the other incident where Mr. LaBillois is alleged to have said that Maliseet "were an inferior race" and that they were "slow and slow speaking". Mr. LaBillois testified that these comments were never made.

[74] Both the complainant and Barry LaBillois admitted that the respondent's sister, Carol LaBillois-Slocum, was present when these comments were made. Ms LaBillois-Slocum was on the respondents' witness list up to the last moment. Very late in the proceeding, counsel for the respondents informed the Tribunal that she would not be calling her as a witness. I will draw the inference from this that this potential witness would have confirmed that these comments had been made. Also, I note that in his letter of August 26, 2002, Barry LaBillois does not deny making these comments. He only indicates that the complainant had not at the time indicated that she had a problem with this. I therefore accept the complainant's evidence that Barry LaBillois made the comments attributed to him on that evening.

(ii) Incidents at the workplace

[75] During her evidence, the complainant referred in a general manner to incidents at the workplace during which she alleges the respondent, Barry LaBillois, made comments about Maliseet. She could not indicate when these remarks were made and what was said. She did, though, refer to an incident that happened in front of her former supervisor, Phillip Fraser, but also admitted that this matter had been dealt with and resolved.

[76] She also testified to the fact that Barry LaBillois had described Maliseet as slow speakers, stupid and of being incapable of following instructions. She could not recall the specific times when these remarks were made, nor in what context they were made. Considering the vagueness of these allegations, I can understand that it is rather difficult for the respondent, to produce a reply.

[77] Monique Myrshrall testified to an incident in a hotel room in Bathurst where Barry LaBillois and his sister are alleged to have said that the complainant was slow to learn and stupid. The complainant never referred to this incident in her complaint or in her evidence at the hearing. Barry LaBillois denied making these comments, which he attributed to his sister. Be that as it may, as humiliating and inappropriate as these comments can be, I see nothing in them that would refer to the complainant's race, national or ethnic origin.

[78] Barry LaBillois would only admit to referring to Maliseet as "muskrat eaters". The complainant never referred to this in her complaint. This being the case, I cannot see these comments as being part of the complainant's complaint.

[79] Finally, I cannot draw any inference of discrimination from the incidents described as the throwing of objects in the office or the calling of names. These incidents might be characterized as childish and immature, on the part of the supervisor, but no evidence was submitted to

establish that they were done with the intention to discriminate on the basis of race, national or ethnic origin.

[80] On another issue concerning a comment made by Chief Lavallee, the complainant alleges that she was discriminated against when Chief Lavallee referred to her as a "Mal-i-Mic". Chief Lavallee explained in the evidence that she was just referring to the complainant's dual origin. I note also that NBAPC's newsletter is called the "Mal-i-Mic". I cannot see any discrimination in Chief Lavallee's use of this expression.

(iii) The office cleanup

[81] The complainant alleges that Barry LaBillois made disparaging remarks against Maliseet on that day. She testified that, seeing that she could not tie down some pieces of wood, he said "You Maliseet do not seem to know how to do much." Barry LaBillois denies having made these comments. Nobody else heard this exchange. For the sake of argument, I will accept that these comments were made.

(iv) Personality test

[82] The complainant alleges that her supervisor discriminated against her when, after administering a personality questionnaire to her he stated that she was "the odd one" and that she had "no back bone" and that these comments could be attributed to discrimination on his part. She added also that these remarks had been made in front of her colleagues. Neither Monique Myshrall, a witness for the complainant, nor Jason Harquail, a witness for the respondents, could recall any comments made by Barry LaBillois to the complainant regarding her test results.

[83] Again, nothing in these remarks refers to the complainant's race, national or ethnic origin. They are a clear indication of the interpersonal difficulties that existed between the complainant and her supervisor, but they cannot be interpreted as being discriminatory.

(v) The moving of furniture

[84] The evidence as not convinced me how this can be seen as being discriminatory on the basis of race, national or ethnic origin.

(vi) The "last confrontation"

[85] Going over the whole of the evidence of what happened on that last day, nowhere did I find comments uttered by the respondents regarding the complainant's race, national or ethnic origin. There were a lot of "I said/She said" exchanges, some foul language was used, but the evidence does not convince me that it was partly based on the issue of race, national or ethnic origin. The stress level at the workplace seemed to be very high on that day and the interpersonal problems between the complainant and her supervisor reached their highest peak. What we have is a supervisor (LaBillois) who had been told by his superior (Lavallee) to execute a certain task in a certain manner and an employee (the complainant) who thought that this was not the proper course to follow. She wanted to argue the issue with her supervisor who at one point just blew up and used inappropriate, but not discriminatory, language.

[86] I cannot conclude that what happened on that last day was in any way related to the complainant's race, or her national or ethnic origin discrimination under the *Act*.

(vii) Conclusion

[87] In summary, I conclude that the only incidents which could be linked to the complainant's racial, national or ethnic origin are the comments made at the lobster cook-out, where Barry LaBillois stated that Maliseet "were inferior" and "slow and slow speakers" and the comment made during the "cleanup" where he said "You Maliseet do not seem to know how to do much."

B. Was the Impugned Conduct Unwelcome?

[88] It is difficult to answer this question considering the fact that, according to the evidence, only two or three incidents could clearly refer to conduct that would be discriminatory on the basis of the complainant's race, national or ethnic origin. But nonetheless, I intend to deal with this issue. I explained earlier that in order to determine whether the respondents' conduct was unwelcome, I needed to assess the complainant's reaction at the time of the alleged incidents and whether the complainant expressly, or by her behavior, demonstrated that the conduct was unwelcome.

[89] The complainant's evidence established that, at the lobster cook-out when Barry LaBillois made the comments, she did reply that he should not be saying this and that he was not only insulting her but also her whole family. Certainly her reaction at that time was indicative that the comments were not welcome. Regarding the cleanup incident, there is no evidence that she replied to the comments at that time.

[90] Be that as it may, I will accept that the comments made by the respondent, Barry LaBillois, on both occasions, were unwelcome.

C. Was the Impugned Conduct Serious or Repetitive Enough?

[91] I find that the respondent's conduct was not repetitive enough, nor of a sufficient severity to constitute the type of harassment proscribed by the *Act*. In effect, according to the evidence submitted at the hearing, the respondent conduct that I have found to be related to the complainant's race, national or ethnic origin is limited to two events spread out over two years. The other events or comments referred to at the hearing cannot be viewed as harassment. They do establish a real problem of interpersonal relationship and maybe a lack of maturity and discipline in the workplace, but they cannot be considered under s. 14 since they are unrelated to the prohibited grounds invoked in this case.

[92] As the Supreme Court of Canada stated in *Janzen v. Platy Enterprises Inc* [1989] 1 S.C.R. 1252 at page 1282, in order to come to a finding of harassment, it must be demonstrated that the conduct of a respondent was such as to have detrimentally affected the work environment. A certain level of seriousness or repetition in the conduct is required for such a hostile or poisoned environment to develop. The Canadian Human Rights Tribunal pointed out, in *Pitawanakwat v. Department of Secretary of State* (1992), 19 C.H.R.R. D/110 at paras. 40-42 (C.H.R.T.), rev'd on other grounds [1994] 3 F.C. 298, (1994) 21 C.H.R.R. D/355 (F.C.T.D.). as well as in *Dhanjal, supra* and *Rampersadsingh, supra*, that when the impugned conduct takes the form of racial slurs, jokes in bad taste and stereotyping, it must be persistent and frequent or severe in order to constitute harassment. An isolated racial slur, even one that is very harsh, will seldom by itself constitute harassment within the meaning of the *Act*.

[93] It was further noted in *Dhanjal*, at para. 215 that:

In short, the more serious the conduct the less need there is for it to be repeated, and, conversely, the less serious it is, the greater the need to demonstrate its persistence in order to create a hostile work environment and constitute racial harassment.

[94] The same issue was dealt with by the Court of Appeal of Quebec in the case of *Habachi v. Commission des droits de la personne du Québec*, [1999] R.J.Q. 2522, R.E.J.B. 1999-14361, [1999] J.Q. No. 4269 (Q.L.) (C.A.Q.). The Court recognized that a single act, provided it is serious enough and has an ongoing effect, may constitute harassment. But the Court also pointed out that if one were to conclude that acts lacking the requisite severity nevertheless constitute harassment, the effect would be to trivialize a provision of the *Act* that was intended to deal with a very specific form of discrimination.

[95] As ill-advised as Barry LaBillois' conduct may have been, it was of limited duration and severity. It was limited to two incidents, maybe three if we add the one that occurred when Phillip Fraser was supervisor, but which the complainant identified as having been resolved. There is no question that the complainant and the respondent, Barry LaBillois, had interpersonal problems which could have had a negative effect on the working environment, but I am not convinced that, with the exception of two to three isolated incidents, these problems had any connection with the complainant's race, or national or ethnic origin.

[96] The evidence establishes that the incidents where comments were made about the complainant's race, national or ethnic origin occurred on not more than on two or three occasions. The other incidents - the throwing of objects, referring to the complainant as Eleanor, the yelling matches, the use of foul language, the questionnaire - probably demonstrate a lack of professionalism on Barry LaBillois' part, but they are far from being related to her race, national or ethnic origin. I find that a reasonable person would not perceive these acts as having contributed to the severity, persistence or the duration of the two or three incidents that I have found to be connected to proscribed grounds.

[97] The fact that the complainant felt compelled to cease working at NBAPC is not an indication that a poisoned work environment had developed within the meaning of s. 14. There is no doubt, as I have already repeatedly pointed out, that the complainant and Barry LaBillois had an antagonistic relationship, and that this was a factor in her decision to stop working there. However, it is also noteworthy that the complainant never once, during the time that she worked at NBAPC, other than after the incident of July 17, 2002, mentioned to Chief Lavallee-- or to any other persons -- the difficulties she was having working with her supervisor. The complainant even accepted to return to work with NBAPC in July 2002. Ultimately, the focus of the analysis must return to the respondents' specific conduct. I am satisfied that a reasonable person would not conclude that a poisoned or hostile work environment developed as a result of incidents related to utterances about the complainant's racial, national or ethnic origin.

[98] As to NBAPC's conduct in this situation, it is impossible to criticize their reactions, since they were never officially made aware that there was a problem. For most of the relevant period, the complainant never notified a person in authority of her supervisor's conduct, but when she finally did in August 2002, Chief Lavallee reacted appropriately and asked Barry LaBillois to give an explanation of what had occurred. After having reviewed the matter, the council decided, in September 2002, to give him a written reprimand for the use of foul language, and it firmly indicated that it would not accept anymore bantering in the workplace. It also indicated clearly

that employees of NBAPC should refrain from making jokes or comments about each other's national or ethnic ancestry. I am satisfied that NBAPC acted reasonably once it was made aware of the incidents.

[99] I agree that when the complainant's allegations of discrimination and harassment were brought to the attention of NBAPC, it raised a duty to investigate and correct any problems in the workplace. I do not agree, however, with the complainant's arguments that NBAPC failed in its duty of due diligence. I accept that its attempts to deal with the issues raised by the complainant once NBAPC was made aware were real and substantive.

V. CONCLUSION

[100] In conclusion, I find that Barry LaBillois' conduct was at times offensive, rude and inappropriate, and that there is no question that the complainant was annoyed by his conduct. But as the Tribunal stated in Rampersadsingh, supra, at para. 60,

Discouraging and preventing persons from ever directing pejorative or insulting comments to each other, particularly when such expressions are related to one of the proscribed grounds of discrimination under the Act, is a laudable goal. However, the provisions in the Act regarding harassment are not intended to sanction brief or sporadic conduct of this nature.

VI. ORDER

For these reasons, the complaints against both respondents are dismissed.

"Signed by"
Michel Doucet

OTTAWA, Ontario
December 30, 2008

PARTIES OF RECORD

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STYLE OF CAUSE:	Evelyn London v. New Brunswick Aboriginal Peoples Council and Barry Labillois
DATE AND PLACE OF HEARING:	January 16 to 18, 2008 April 15 to 18, 2008 April 24, 2008 Fredericton, New Brunswick
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DATED:	
APPEARANCES:	
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(No one appearing)	For the Canadian Human Rights Commission
Ann E. Smith	For the Respondents