Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Between:**

**Evelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec, Germaine Mestépapéo, Estelle Kaltush**

**Complainants**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Conseil des Montagnais de Natashquan**

**Respondent**

**Decision**

**Member:** Michel Doucet
**Date:** January 27, 2010
**Citation:** 2010 CHRT 2

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[1] On April 21, 2007, Évelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec, Estelle Kaltush and Germaine Mesténapéao, Innu from the Montagnais community of Natashquan, (the complainants) filed a complaint with the Canadian Human Rights Commission, alleging discrimination in employment based on their race, national or ethnic origin, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. (1985), c. H-6 (the *Act*) by the Conseil des Montagnais de Nutashkuan (the respondent). Three of the complainants, Évelyne Malec, Sylvie Malec and Estelle Kaltush, also allege that the respondent retaliated or threatened retaliation against them following the filing of their complaints, contrary to section 14.1 of the *Act*.

[2] The complainant Évelyne Malec is a special education teacher at Uauitshitun School in the Innu community of Nutashkuan. Since 2001, except for the 2003-2004 school year, she has been continuously employed at this school. Ms. Malec's employment contract indicates she has a bachelor's degree in education and certificates in Aboriginal studies and Amerindian teaching. Ms. Malec's spouse is Richard Boies. They have been married since 2003. Mr. Boies is also a teacher at Uauitshitun School.

[3] The complainant Anne Bellefleur-Tettaut is an Innu teacher for grades 1 to 6 at Uauitshitun School. She taught from 1983, except for the 2003-2004 school year. Ms. Bellefleur-Tettaut retired in June 2007. The complainant does not have a bachelor's degree, but has a teacher's certificate and a teacher's permit.

[4] Estelle Kaltush has a bachelor's degree in education. Since 1990, except for four years, she has been teaching at Uauitshitun School. Ms. Kaltush held the position of vice principal from 2003 to 2009 and the position of acting principal from January to June 2007.

[5] Anna Malec is a kindergarten teacher at Uauitshitun School. She earned her bachelor's degree in education from the Université du Québec à Chicoutimi in 1985. Since then, except for the 2003-2004 school year, she has been working at the community school.

[6] Marceline Kaltush has a bachelor's degree in education, which she obtained in 1985. Since 1990, she has been teaching at Uauitshitun School.

[7] Sylvie Malec has been teaching at Uauitshitun School since January 2003, except for the 2003-2004 school year. She teaches Innu. She does not have a bachelor's degree.

[8] The complainant Monique Ishpatao has a bachelor's degree in preschool and primary school education. Since 1990, except for the 2003-2004 year, she has been teaching at Uauitshitun School.

[9] Germaine Mesténapéao did not appear, nor did she offer any testimony at the hearing.

[10] The complainants were represented at the hearing by Richard Boies, a co-worker and, as noted above, the complainant Évelyne Malec's husband. The respondent was represented by Maurice Dussault, counsel from the law firm Dussault Larochelle Gervais Thivierge.

[11] The Canadian Human Rights Commission did not participate in the hearing.

## I. Facts Related to the Allegation of Discrimination

### A. The Innu community of Nutashkuan

[12] Located on the shores of the Gulf of St. Lawrence, the Innu community of Nutashkuan is 376 kilometres east of Sept-Îles, in the province of Quebec. The community's territory has a common border with the municipality of Natashquan and has been accessible by route 138 since 1996. The community's population is around 1,000.

[13] The Innu community of Nutashkuan has the infrastructure usually found in Aboriginal communities, including a school. Before 1990, this school was administered by the Department of Indian Affairs and Northern Development (DIAND). Since 1990, the school has been under

the respondent's authority. The respondent designated a councillor to take responsibility for the education sector. At the time relevant to this case, Nicolas Wapistan had this designation.

[14] Uauitshitun School has around 160 students: 60 in the secondary division and 102 in the primary division. The teaching staff is composed of 11 teachers at the secondary level and 8 at the primary level. Of the 19 teachers, 9 are Innu.

[15] For many years, Uauitshitun School has had a high turnover rate among principals. They changed yearly, which complicated relations between the administration and the teachers.

[16] The neighbouring village of Natashquan also has a school, École Roger-Martineau. This provincial school is under the responsibility of Quebec's Moyenne-Côte-Nord school board. Roger-Martineau School is around five kilometres from Uauitshitun School. It has close to 108 primary and secondary students. The proportion of Innu students enrolled at the primary school level at Roger-Martineau is around 75% and at the secondary level, 70%. This school offers preschool to Secondary III programs. In Secondary IV and V, students attend Monseigneur-Labrie school in Havre-Saint-Pierre, a community located around 150 kilometres from Natashquan.

[17] As of March 31, 2005, the respondent had accumulated a budget deficit that exceeded $5 million. As a result, at the beginning of April 2005, DIAND appointed a co-manager to administer the respondent's finances. In October 2005, noting that despite the appointment of the co-manager, the financial situation was not improving, DIAND decided to appoint a third party to administer funds so the money used to provide services to the community members would not be seized by the respondent's creditors. A few weeks later, the Health Canada did the same.

[18] DIAND and Health Canada appointed the firm "BDL Conseiller en administration" as the third party manager. Dominique Blackburn was BDL's representative for this third party management, which has three components:

- deliver essential services to the members of the community;
- help the respondent prepare its debt repayment plan;
- act as facilitator between the main partners, suppliers, financial institutions and departments.

[19] Starting October 1, 2005, all the respondent's expenses had to be pre-approved by the third party manager, including those in the education sector.

[20] Following the appointment of the third party manager, the respondent submitted a plan to adjust its finances and implement an organizational structure and administrative policies that would allow it to provide services to the members of the community. This remedial management plan was submitted to and adopted by DIAND in 2006. The plan showed that, among others, education budgets had to be adjusted because the sector had accumulated significant deficits over the previous years. The problems in the education sector had resulted in many parents in the Nutashkuan community deciding to take their children out of the community school and instead sending them to Roger-Martineau School in the village of Natashquan. Since educational funding in Aboriginal communities is based on number of students, having many students leave for the Moyenne Côte-Nord school board resulted in a significant annual shortfall for the education sector.

[21] In addition to the administrative and financial measures, under the band's remedial management plan, it was also to update and develop various administrative and financial policies. To this end, a financial management policy and a human resources management policy (including the education sector) were submitted in the fall of 2007. The purpose of these policies

was to bring order to the administration of services the respondent provided and to the treatment of employees.

[22] Since March 31, 2009, DIAND has removed the third party management. Health Canada has decided to maintain third party management for some time. Where DIAND is concerned, the respondent is now under co-management.

[23] André Barrette also worked for the third party manager, BDL. He testified that he did not personally know the complainants and he did not receive any specific instructions from his superiors regarding the education sector. He said he was informed of the complaints by Jules Wapistan, the respondent's financial and administration coordinator. The issues regarding employees were the responsibility of Mr. Wapistan and Dominique Blackburn, from BDL. Mr. Blackburn was not called as a witness.

**B. Allegations of Discrimination**

[24] In June 2005, treatment of employees at Uauitshitun School was governed by a document called, "*Entente intervenue entre le Conseil des Montagnais de Nutashkuan et le personnel de l'École Uauitshitun de Nutashkuan – Convention réciproque de traitement du personnel de l'École Uauitshitun de Nutashkuan"* [Agreement between the Montagnais de Nutashkuan Band Council and Employees at the Uauitshitun School in Nutashkuan—Mutual Agreement on the Treatment of Employees at the Uauitshitun School in Nutashkuan]. According to the evidence, it seems that a similar policy had been in force since at least 1990, the year the school came under the respondent's responsibility. This agreement included the following provisions:

> [Translation]
>
> 3.13 Place of permanent residence?
>
> Residence in the legal sense of the term at the time of hiring, insomuch as the residence is located in the province of Quebec.

…

6.5 Isolated post allowance to teaching staff with at least a bachelor's degree and to professional employees with the same level of education.

6.51 The annual isolated post allowance is credited to the employee in 26 bi-monthly payments at the pay period.

6.5.2 The rate of the annual isolated post allowance is granted to the employee based on whether the employee has a dependent (minor dependent child) residing permanently at the workplace residence or is considered without dependents.

6.5.3 Rate of isolated post allowance:

**With dependent child(ren): $6,000 Without dependent child: $3,000.**

N.B. If two employees are married or are common-law spouses, only one of the two may claim the isolated post allowance with dependent child (if the conditions are met) and the other employee shall receive the allowance for an employee without a dependent child.

…

8.4 Allowances for annual outings for employees hired outside a 50 km radius.

8.4.1 Allowances are provided for three annual outings.

8.4.2 Except by special authorization from the school's administration, the schedule for outings is:

- 1st outing: Start date at the beginning of the year and vacation departure
- 2nd outing: Christmas
- 3rd outing: Easter or spring break.

8.4.3 Amount of allowance

8.4.3.-I The allowance for annual outings is as follows, according to the city of residence at the time the employee was hired, and is for a round trip:
Montréal: $950 Québec: $750 Sept-Îles: $300.

8.4.3.-II For other locations, the allowance is adjusted based on the three cities with set allowances under the preceding paragraph.

8.4.4 Payments occur at least 5 working days before the effective date of the annual outing.

…

8.6 Housing allowance

8.6.1 The council provides a monthly housing allowance to employees according to the following terms:

8.6.2 Monthly allocation: $450.

8.6.3 When two or more employees share a domestic residence, the sharing must be proportional.

[25] In 2007, the respondent adopted its "*Politique des ressources humaines – Personnel de l'école Uauitshitun"* [Human Resources Policy—Employees at Uauitshitun School] that replaced the 2005 agreement. According to the complainants, this policy was not accepted by the teachers at Uauitshitun School. They also allege that the new policy was never adopted by the respondent. No evidence was submitted to the Tribunal that suggests the policy had to be approved by the teachers to be effective. As to the issue of whether the respondent formally adopted the policy, it was never truly clarified at the hearing. Whatever the case, it seems clear that as of February 2007, everyone behaved as if this policy were in force.

[26] The following is provided under this policy:

[Translation]

4.15 **Resident**

Any person working for the Council whose ordinary and main place of residence and/or that of his or her spouse is Nutashkuan or is less than 50 km from Nutashkuan shall be **considered a resident** within the meaning of the employment policy of the Council.

The employee's residence status may change during the course of employment and the Council reserves the right to reassess the residence status of its employees in the education sector yearly.

(Section 55 of the *Canada Elections Act* defines place of ordinary residence as: "The place of ordinary residence of a person is the place that has always been, or that has been adopted as, his or her dwelling place, and to which the person intends to return when away from it.)

…

10.7 **Isolated post allowance for non-resident teaching staff and professional employees**

a. The annual isolated post allowance is credited to the employee in 26 bi-monthly payments at the pay period.

b. The rate of the annual isolated post allowance is granted to the employee based on whether the employee has at least one dependent (dependent minor child) who resides permanently at the workplace residence or is considered without dependents.

c. Rate of isolated post allowance:

**With dependent child(ren): $6,000 Without dependent child: $3,000.**

10.7.1 If two employees are married or are common-law spouses, only one of the two may claim the isolated post allowance with a dependent

child (if the conditions are met) and the other employee shall receive the allowance for an employee without a dependent child.

10.8 **Allowances for annual outings for non-resident employees**

a. Three (3) annual outings at the following times or by special authorization from the school's administration:
   1st outing: Start date at the beginning of the year and departure for vacation.
   2nd outing: Christmas
   3rd outing: Easter or spring break.

b. The allowance for annual outings is as follows, depending on the where the non-resident employee was hired and is for a return trip:

   **Montréal: $850** **Québec: $750** **Sept-Îles: $300**

   N.B. Allowances for other locations shall be pro-rated to adjust for the distance from the closest city indicated above.

c. The payment will be made at least five working days before the effective date of the annual outing.

…

10.10 **Housing allowance for non-resident employees**

10.10.1 Monthly allowance

The Council grants a monthly housing allowance to non-resident employees on the following terms:

10.10.2 Monthly allowance: $450

10.10.3 When two non-resident employees are common-law spouses or married persons, they allowance from a single allowance of $450.00. The employee is responsible for his or her own rent and lease.

10.10.4 When two employees live in the same residence, a single housing allowance is granted and half is paid to each member occupying the residence.

10.10.5 When the Council rents one of its unheated and furnished units, the monthly rent is $200.

[27] According to the evidence, until 2007, all non-Aboriginal teachers at Uauitshitun School and one Aboriginal teacher, received these allowances. The Aboriginal teacher who had received the allowance worked at Uauitshitun School for one year. This teacher, who was not Aboriginal by birth, was married to an Aboriginal person, an Attikamek, and had acquired Aboriginal status as a result, pursuant to the *Indian Act*. The respondent would use this exception to claim its policy was not discriminatory towards Aboriginal teachers.

[28] On February 21, 2007, some non-Aboriginal teachers living within 50 kilometres received a letter from the school's administration informing them that under the respondent's new policy, an employee [Translation] "must live outside a 50 km radius to be entitled to the housing and outing allowances." The letter also stated that the school's administration had noticed that certain teachers who were receiving the allowances had a permanent residence inside this zone. Those teachers were therefore no longer admissible for the $450 a month allowance for rent or for the three annual outings. The letter also informed the teachers that starting February 22, 2007, they would no longer be receiving an allowance for these allowances and they were to repay certain amounts they had mistakenly been paid from the beginning of the 2006-2007 school year. The letter makes no mention of the isolated post allowance. However, article 10.7 of the new policy clearly states that the isolated post allowance would only be paid to non-resident teachers from that point on.

[29] The complainants allege that the respondent's policy regarding these allowances discriminates against Innu teachers because they do not have the right to the same benefits as those granted to non-Aboriginal teachers.

## C. Legal Context

[30] The purpose of the *Act* is stated at section 2:

> 2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> 2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

[31] Human rights legislation has been described as "…of a special nature, not quite constitutional but certainly more than the ordinary" (*Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R., para. 12). The Supreme Court of Canada elaborated on the purpose and objectives of this legislation and the manner in which they were to be interpreted, in *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 to 1134 (*sub nomine: Action Travail des Femmes*):

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

[32] Section 7 of the *Act* states that it is a discriminatory practice to differentiate adversely in relation to an individual in the course of employment on a prohibited ground of discrimination. Under section 3, prohibited grounds of discrimination include race, religion and national or ethnic origin.

[33] Since the Supreme Court decisions in *British Columbia* (*Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [also referred to as *Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [also referred to as *Grismer*], the classical distinction between direct discrimination and indirect discrimination has been replaced by a unified approach to analyzing human rights complaints. Under this analysis, the complainant must first establish *prima facie* evidence of discrimination. *Prima facie* evidence is evidence that covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of a reply from the respondent.

[34] Once *prima facie* evidence of discrimination has been established, the onus is on the respondent to prove that no prohibited grounds were present in the respondent's behaviour or to prove, on a balance of probabilities, that there is a *bona fide* justification for the discriminatory standard or policy. To do this, the respondent must prove that:

1. It adopted the standard for a purpose or goal rationally connected to the performance of the job. The focus at this step is not on the validity of the particular standard, but on the validity of its more general purpose.

2. It adopted the particular standard in the sincere belief that it was necessary to the fulfillment of the legitimate work-related purpose, with no intention of discriminating against the claimant. At this stage, the focus shifts from the general purpose of the standard to the standard itself.

3. The contested standard is reasonably necessary to accomplish its goal. The employer must demonstrate that it cannot accommodate the claimant and others affected by the standard without suffering undue hardship. (See, in particular, section 15 of the *Act*.)

[35] In this case, the complainants must first establish *prima facie* evidence that they were adversely differentiated against in the course of employment based on their race or national or ethnic origin. As stated above, *prima facie* evidence covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of a reply from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at paragraph 28).

[36] The complainants submit that they were discriminated against because of their Aboriginal status, compared to the non-Aboriginal teachers. They claim specifically that the respondent adversely differentiated against them in the course of employment by disallowing certain benefits to them that were granted to non-Aboriginal teachers. They refer, in particular, to the housing and isolated post allowances and those for the outings provided for in the respondent's policy.

[37] The respondent claims in its reply that the complainants did not establish *prima facie* evidence of discrimination. It did not submit evidence that there was a *bona fide* justification for the policy in question within the meaning of *Meiorin* and *Grismer*. In his final arguments, counsel for the respondent claimed that allowing the complainants' requests would impose a burden on his client that would send the community back into a financial crisis. But, again, no tangible evidence was submitted to support this claim.

**(i) Isolated Post Allowance**

[38] Until February 2007, the policy that applied to teachers at Uauitshitun School provided for an isolated post allowance to members of the teaching staff that held at least a bachelor's degree and to professional employees with the same education, regardless of the distance between their permanent place of residence and the school. The amount of the allowance varied based on whether the teacher had dependent children ($6,000) residing permanently with him or her, or was considered without dependents ($3,000). Moreover, the policy established that if two employees were married or common-law spouses, only one of the two could claim the isolated

post allowance for dependent children, and the other employee would receive the isolated post allowance without dependent children.

[39] The Tribunal notes that in regard to the isolated post allowance, the policy does not distinguish between resident or non-resident employees. Nothing in the policy indicates that it is paid as an allowance to recruit or to help recruit teachers from outside the Natashquan region.

[40] Moreover, it is clear that the only teachers who received this allowance were non-Aboriginal teachers, although once, it was paid to an Aboriginal teacher whose status had been acquired under the *Indian Act*.

[41] The respondent did not submit any evidence to explain the origin or underlying reason for this allowance. During his closing statements, counsel for the respondent essentially relied on the testimony of certain complainants who had testified that the isolated post allowance had been paid to non-Aboriginal teachers from outside the area to conclude that these statements were "admissions" about the rationale for the allowance and that its payment to only certain teachers could not be considered discriminatory. The Tribunal cannot agree with this conclusion. The fact that certain complainants made this statement cannot lead to a justification of the policy regarding the payment of these allowances. The Tribunal considers that by giving these answers, the complainants were simply stating a fact known to everyone in the teaching staff: that non-Aboriginal teachers received this allowance. Moreover, the uncontested evidence clearly shows that until February 2007, non-Aboriginal teachers permanently residing in the Natashquan region received the allowance. The fact that a teacher with Aboriginal status had, at one time, received the allowance, does not change our finding. The respondent did not submit any evidence to the Tribunal that justified why the allowance was not paid to Innu teachers at Uauitshitun School.

[42] In 2007, the respondent adopted a human resources policy for Uauitshitun School employees, which replaced the 2005 agreement. Under this policy, any person working for the

respondent and whose ordinary place of residence is Nutashkuan or within 50 km from Nutashkuan shall be considered a resident.

[43] As for the isolated post allowance, we note that there was little change in the new policy except that under article 10.7, the allowance was paid only to non-resident teachers. Now, the policy no longer differentiates between Aboriginal and non-Aboriginal teachers. The distinction is based solely on place of residence.

[44] Considering all the evidence submitted at the hearing, the Tribunal finds that the complainants established *prima facie* evidence that until 2007, they were adversely differentiated against because of their race by the respondent's refusal to grant them an isolated post allowance, when such an allowance was paid to all non-Aboriginal resident teachers.

[45] The burden is now on the respondent to show, on a balance of probabilities, that there was a *bona fide* justification to deny the complainants the isolated post allowance. The respondent did not submit any evidence to justify this unfair treatment. Moreover, the respondent did not submit any evidence to show that the treatment was due to the permanent residence of the recipients rather than their race/ethnic or national origin. The so-called "admissions" by the complainants have no probative value that would allow such a conclusion or practice.

[46] As a result, the Tribunal finds that the complainants established *prima facie* evidence that before 2007, they were adversely differentiated against in the course of employment because of their race, contrary to section 7 of the *Act*, by the treatment they received from the respondent when it refused to pay an isolated post allowance although such an allowance was paid to all non-Aboriginal teachers, residents or not.

**(ii) Annual Outing Allowance**

[47] Before 2007, the agreement with the teaching staff provided an allowance for annual outings for employees from outside a 50-kilometre radius of Natashquan. There are three allowances for the annual outings and the schedule is as follows: first outing -entry into duty at

the start of the year and departure for vacation; second outing - Christmas; and third outing - Easter or spring break. The amount of the annual outing allowance is based on the city of residence at the time the employee was hired, and is for a round trip: Montréal, $950; Québec, $750 and Sept-Îles, $300.

[48] It is clear from the wording of the policy that this allowance applies to employees whose residence is more than 50 kilometres from Natashquan. The new policy adopted in 2007 makes no changes to this, other than defining the expression "resident" more precisely. Although the respondent might have paid this allowance to teachers residing within 50 kilometres in the past-as was the case, for example, with Richard Boies—it is clear that the intent of the allowance is to allow non-resident teachers to be able to return to their city of residence at least three times a year. As for payments that were made to ineligible teachers, it seems the February 2007 letter intended to correct this situation.

[49] With regard to the payment of this allowance, the Tribunal cannot find that the complainants established *prima facie* evidence that they were adversely differentiated against because of their race by the respondent's refusal to pay an allowance for annual outings. None of the evidence showed that any of the complainants or any Innu teacher residing outside a 50-kilometre radius was denied this allowance.

[50] As a result, the Tribunal finds that the complainants did not establish *prima facie* evidence that they were adversely differentiated against in the course of employment due to their race by the respondent's refusal to grant them an annual outing allowance for teachers residing outside a 50-kilometre radius of Natashquan.

**(iii) Housing Allowance**

[51] Under the policy in force before 2007, the Council would grant a monthly housing allowance of $450 to its teachers. Nothing in the policy indicates that the allowance is paid only to teachers not residing in Natashquan or inside a 50-kilometre radius of Natashquan. The policy

adopted in 2007 now grants this monthly allowance solely to non-resident employees, namely those living outside a 50-kilometre radius of Natashquan.

[52] Until 2007, all non-Aboriginal teachers received this housing allowance. Aboriginal teachers, with the exception of the teacher we mentioned above who had Aboriginal status, did not receive this allowance. In 2007, as was the case with the annual outings allowance, non-Aboriginal teachers residing inside the 50-kilometre radius were advised they would no longer receive this allowance. As a result, as of 2007, it is no longer possible to state that non-Aboriginal teachers are the only ones not receiving this allowance.

[53] Can the respondent's refusal to pay this allowance to Aboriginal teachers, until 2007, be considered a discriminatory practice contrary to section 7 of the *Act*?

[54] The evidence submitted at the hearing established that the purpose of the allowance was to help non-resident teachers pay the cost of their housing in the village of Natashquan or nearby. Geneviève Tacshereau-Néaschit, a witness for the respondent, testified that it is rather difficult for teachers from outside the area to find adequate housing at a reasonable price in the region. This evidence was not challenged by the complainants.

[55] As for the complainants, who all live on the territory of the Innu community Nutashkuan, except for Évelyne Malec, the evidence shows they benefitted from some housing-related allowances. Determining whether they are appropriate is not for the Tribunal to decide. Regardless, they still benefitted from the respondent's housing policy, which the non-Innu teachers could not. Moreover, none of the complainants testified that they paid $450 or more per month for their accommodations. Some even testified that they paid nothing at all. As for Évelyne Malec, the evidence showed that she could not receive this allowance because during the period of her employment, her spouse, Richard Boies, received the allowance of $450 a month.

[56] Whatever the case, based on the evidence, the Tribunal cannot conclude that the complainants established *prima facie* evidence that they were adversely differentiated against in the course of employment based on their race by the respondent's policy to pay a monthly allowance to non-Aboriginal teachers.

## II. Allegations of Retaliation

### A. The Law

[57] Before the hearing started, the complainants filed a motion to amend their complaint to add allegations that the respondent retaliated against several of them contrary to section 14.1 of the *Act*. The Tribunal granted this motion in the ruling *Malec et al. v. Conseil des Montagnais de Natashquan*, 2009 CHRT 5.

[58] Pursuant to section 14.1 of the *Act*, it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[59] Retaliation implies some form of wilful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint. As the Tribunal noted in *Virk v. Bell Canada (Ontario)*, 2005 CHRT 2, at paragraph 156: "This view departs in part from those expressed in previous decisions of this Tribunal on the issue of retaliation (*Wong v. Royal Bank of Canada*, [2001] CHRT 11; *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40 (CanLII), 2004 CHRT 40*).*" In *Bressette* and *Wong*, the Tribunal found that a complainant did not have to prove an intention to retaliate. It had only to show it reasonably perceived the impugned conduct by the respondent to be in retaliation quite apart from any proven intention of the respondent. In this case, the Tribunal adopts the approach set out in *Virk*.

[60] In the case of allegations of retaliation, it is the complainant who has the burden of proving retaliation actually took place. The complainant must therefore prove that the person or persons it claims retaliated knew of the existence of the complaint and that this person or persons

acted in an inopportune way and the conduct of that person or persons was motivated by the filing of the complaint.

[61] As a result, what is required is proof that the respondent or its representative retaliated and knew of the existence of the complaint and that the respondent or its representative acted in an inopportune way, giving rise to a *prima facie* case. Once this *prima facie* case is established, it becomes the respondent's responsibility to give a reasonable explanation for its actions. If the explanation is not credible, the Tribunal should find that the allegation of retaliation is substantiated.

**B. Facts Regarding the Allegation of Retaliation (Section 14.1 of the *Act*)**

[62] At the hearing, the agent for the complainants stated that the allegations of retaliation had been made solely by the complainants Évelyne Malec, Sylvie Malec and Estelle Kaltush. The alleged retaliation essentially consisted of disciplinary action, taken between September 9, 2008, and December 16, 2008. The details of the incidents that support the allegations of retaliation for each of the complainants follow.

**(i) Évelyne Malec**

[63] The evidence the complainant submitted in support of her allegations of retaliation focus on her relationship with the principal of Uauitshitun School, Marcel Rodrigue.

[64] Mr. Rodrigue was officially hired as the school's principal at the end of August 2008, a few days before the start of the school year. From the beginning, relations between the new principal and the complainant were strained. For example, Ms. Malec states that at their first meeting, the new principal said, [Translation] "You're Ms. Malec? I have heard a lot about you."A little later,, she claims he said, [Translation] "Are you Évelyne Malec? I've been hearing lots of things about you." She also added that he told her, [Translation] "there are going to be anti-establishment protestors." Although at the time he did not mention the proceedings

undertaken pursuant to the *Act*, the complainant is sure that he was aware of them because [Translation] "there are no secrets at BDL."

[65] Mr. Rodrigue confirmed that before accepting the position as principal, he had discussed the situation at Uauitshitun School with his predecessor. He had told him to be ready [Translation] "to manage opposition, because you are going to be facing some." He added that during this conversation there was never any talk of the complaints or complainants.

[66] As for Ms. Malec's allegations of retaliation, the first incident allegedly occurred on August 28, 2008. That day, the complainant was called to a meeting by the principal. He informed her that another teacher had filed an internal complaint against her following an altercation they allegedly had the previous day. According to the complainant, the principal did not reprimand her during this meeting. She said she gave him her version of the facts regarding the altercation. The principal indicated that it confirmed what the other teacher had described in her letter. According to the complainant, he even added that he [Translation] "appreciated her honesty." However, later in her cross-examination, she added, [Translation] "He [the principal] was always rude to me. From my first meeting, he has always been rude, he treats me like I am nothing." From her description of this meeting, it is difficult to conclude that the principal acted impolitely with her. The mere fact he said he appreciated her honesty seems contrary to an attitude of rudeness or ungratefulness.

[67] On September 3, 2008, Ms. Malec received a verbal warning from Mr. Rodrigue about the altercation of August 27, 2008. The complainant indicated that the principal "blamed" her for the incident.

[68] During his testimony, Mr. Rodrigue stated that on September 3, he had no knowledge of the complaints that had been filed under the *Act*. He added he only heard about these complaints for the first time near the end of October 2008 at a meeting of the teaching staff. Someone had mentioned the complaints at that time, but he added that it didn't mean anything to him because [Translation] "in my mind, it was not my responsibility. I did not know who was involved in this

recourse." He added that in May 2009, the complainant Évelyne Malec, informed him that he would be summoned to a legal proceeding at the beginning of June, but stated he did not know what she was talking about. He said that in early June he noticed that many teachers were absent. The school secretary then informed him they were attending the hearing. He said he was not formally informed of the proceedings or who the complainants were until the end of June or beginning of July 2009. I cannot easily accept this part of Mr. Rodrigue's testimony. The Innu community of Natashquan is not very large. The school is also fairly small. When eight teachers file a discrimination complaint together, even in a very large school, it would seem highly unlikely to me that the administration would not know about it. I understand that Mr. Rodrigue might not have felt involved in the complaints he considered were the respondent's or the third-party manager's responsibility, but from there to be claiming he did not even know about it is a big stretch.

[69] On September 9, 2008, the complainant received a written warning. The letter began by stating, [Translation] "[i]n September 2007, [the principal] met with you to give you a verbal warning to control your mood swings, to tone down and moderate your remarks following a meeting between teachers and the school's administration." It went on to say, [Translation] "Despite this warning, we learned from information provided to us and from our observations that your attitude has not changed and you continue to act in an unacceptable manner." The letter then described another incident that allegedly occurred between Ms. Malec and the teacher involved in the first altercation. After meeting with both teachers, the administration concluded: [Translation] "We consider the comments made during this altercation to be a serious lack of respect, a violation of the rules of ethics stated in the *Manuel des politiques générales de gestion des ressources humaines du conseil des Innus de Nutashkuan.* As a result, please consider this letter to be a written warning… If corrections are not made, we will have to proceed with the third step of disciplinary action, namely suspension."

[70] Mr. Rodrigue stated that this letter was written following a meting at which André Barette, from BDL, Jules Wapistan, Nicolas Wapistan, and Estelle Kaltush were present. The four other participants did not mention this meeting in their testimony. According to

Mr. Rodrigue, this is when he was informed that the former principal, André Leclerc, had given Ms. Malec a verbal warning. However, André Leclerc testified that he did not know about any conflicts with Évelyne Malec that required interventions or disciplinary measures.

[71] According to the complainant, the claim that she received a verbal warning in 2007 is false. She stated that before September 3, 2008, there had been no disciplinary measures against her. The Tribunal notes that no evidence was submitted about disciplinary measures against the complainant Évelyne Malec in September 2007 during the hearing. Moreover, during his testimony, Marcel Rodrigue stated that he found nothing in Ms. Malec's records about a verbal warning during that period.

[72] Mr. Rodrigue also testified that after this letter was sent out, he received a "visit" from Richard Boies, Évelyne Malec and Nicolas Wapistan at his office. He added that Estelle Kaltush also "joined in" on the meeting. Then, he said he received [Translation] "quite an outburst from Évelyne Malec and Richard Boies."

[73] The September 9, 2008, written warning was signed not only by the school's principal, Marcel Rodrigue, but also by the vice principal, Estelle Kaltush, one of the complainants. In cross-examination, Ms. Malec testified that Estelle Kaltush had told her she signed the letter under pressure from the employer. However, Ms. Malec was not able to indicate which person applied this pressure and stated she did not ask Ms. Kaltush this question. Mr. Rodrigue testified that he has no recollection of Ms. Kaltush had any reservations when she signed the letter. Ms. Kaltush was not questioned on this issue.

[74] On October 14, 2008, Mr. Rodrigue sent a letter to Dominique Blackburn, the third-party manager's representative. He said he felt the need to explain what was happening "to his employer." In this letter, he notes the following events:

> [Translation]
>
> Re: Évelyne Malec
>
> | | |
> |---|---|
> | 9 September | written warning for lack of respect. |
> | 17 September | telephone threat by Francis Malec, Évelyne's brother. |
> | 7 October | meeting of secondary teachers. Évelyne was disrespectful of me at that meeting. She called me "dense" (“bouché”) on two occasions. She said I was harassing her. This happened when I tried to answer Jacques Devost's question about employee departures. |
> | 10 October | I met with Évelyne Malec in my office to inform her of my intention to give her a suspension notice. |
> | 10 October | Nicolas phoned Estelle so she could tell me to resolve my issues with Évelyne. |

[75] Mr. Rodrigue also testified, although he did not specify the date, that he was informed that some teachers had requested a meeting with the band council to discuss him. Without giving a name, he said that someone suggested he meet with the teachers to discuss the issue. Two meetings were then organized with the teachers: one with the primary teachers, chaired by Estelle Kaltush, and another with the secondary teachers, chaired by Mr. Rodrigue. According to Mr. Rodrigue, while he was answering a question asked by another teacher, the complainant, Évelyne Malec, [Translation] "had a fit" and said, [Translation] "he was dense (“bouché”) and was harassing her." On October 20, 2008, after the meeting, Mr. Rodrigue wrote to Jules Wapistan to describe the incident.

[76] On October 21, 2008, Ms. Malec received a letter from Jules Wapistan, informing her she was suspended without pay for five days. The reasons stated for this suspension were: [Translation] "At the beginning of September 2008, you received a verbal warning ordering you to control your mood swings, tone down and moderate your remarks. On September 9, 2008, you received a written warning ordering you to take on a more positive attitude, be polite and respect your coworkers and members of the administration. Disregarding this written warning, on October 7, 2008, twice you called the school principal [Translation] "dense" (“bouché”). There is no doubt you did not care at all about the warnings you received because you did not change your inappropriate behaviour at all, and made disrespectful comments to the school's principal." The letter also indicated that the complainant was [Translation] "suspended from [her] duties, without pay, for the period starting October 20, 2008, until October 24, 2008."

[77] Regarding this letter, the Tribunal notes that the start date of the suspension (October 20, 2008) precedes the date of the letter, October 21, 2008. This most likely explains the new letter dated October 27, 2008, in which Mr. Wapistan writes, [Translation] "we sent you a notice of suspension and mistakenly indicated in that notice that you would be suspended from October 20 to 24, 2008. That notice was sent by mail, and therefore, you worked that entire week." The letter advised the complainant that her suspension without pay would be effective for the period of November 17 to 21, 2008.

[78] However, on November 17, 2008, the complainant was on sick leave. On November 17, 2008, Mr. Wapistan wrote to the complainant again: [Translation] "Considering your absence for medical reasons, please be advised that your suspension will take effect upon your return to work, for the entire period of one normal work week."

[79] Despite these incidents with the principal, the complainant explained that her performance evaluation by the principal, Marcel Rodrigue [Translation] "went very well." She added that he [Translation] "found her competent" although he did state that she had [Translation] "strained relations with the principal." We assume Ms. Malec was referring to her evaluation for the 2008-2009 school year, because that was the only year Mr. Rodrigue was the

school's principal. If there is a written version of this evaluation, she did not submit it as evidence at the hearing. The Tribunal notes, however, that the respondent did not challenge this evidence.

[80] Ms. Malec also recounted an incident that allegedly took place on September 8, 2008, during a meeting with the teaching staff and the principal. She stated that because of family obligations, she and her husband arrived late to the meeting. She added that Mr. Rodrigue then asked them to write the time they arrived at the school beside their names on the attendance list. During the meeting, the discussion addressed the school calendar. At one point, according to Ms. Malec, the principal asked for a volunteer to work with him to review the calendar. Nobody volunteered, so she indicated that she [Translation] "wanted to do it." The principal allegedly replied, [Translation] "not you." She said that she asked for a reason for his refusal and that he replied that [Translation] "nobody had delegated her."

[81] Mr. Rodrigue gave a slightly different interpretation of the events at that meeting. He testified that the school calendar must include 180 days of classes. During the school year, five days on Innu culture are usually organized. Mr. Rodrigue said he talked about [Translation] "these culture days" with the former principal and he told him they were not considered class days. However, the vice-principal, Estelle Kaltush, stated the opposite. To clarify things, the principal decided to have separate meetings with the primary and secondary teachers. According to Mr. Rodrigue, the meeting with the primary teachers went well, and they agreed to remove the afternoon recess periods to cover the missing school hours. As for the secondary group, things were not as simple. The secondary teachers felt the culture days were class days. At the meeting, Mr. Rodrigue said he recalls that the complainant offered to help work on preparing the school calendar. He remembers he did not accept her offer because she had not been designated by the other teachers. In his testimony, he explained his decision to not accept the complainant's offer to help saying, [Translation] "I wasn't at that point yet. I needed to do some of my own verifications and would get back to that later."

[82] The complainant also testified that on November 27, 2008, Jules Wapistan allegedly informed her that she would receive a new disciplinary letter because she did not calculate, [Translation] "the minutes in her work schedule." Ms. Malec stated that she then went to see Marie-Anna Wapistan, the secondary principal, to whom she had given her schedule with the [Translation] "calculation of her minutes" and in fact, the document in question was found. Mr. Wapistan testified that he did not know the complainant had given her schedule to the secondary principal and after verification he saw it was true. For him, the situation was therefore resolved.

**(ii) Estelle Kaltush**

[83] Estelle Kaltush also alleges she was retaliated against because of the complaint filed.

[84] Among other things, she alleges that an oral warning she received from her principal on November 28, 2008, was an act of retaliation. This warning was given to her following an incident that allegedly took place on November 27. According to the letter, the complainant kicked the principal out of her office when he wanted to discuss the [Translation] "relocating her office." The principal felt that the complainant showed [Translation] "serious disrespect and was impolite."

[85] On January 26, 2009, the complainant received a written notice regarding an incident that allegedly occurred on January 22, 2009. That day, the principal met with a student who had discipline problems. According to him, the intervention plan with this student included the assistance of a psychoeducator from the school who had already met with the student. Shortly after this meeting, the psychoeducator informed the principal that the student's grandfather was coming to the school to meet with him. This meeting was not part of the intervention plan the principal had prepared. During the meeting, which included the grandfather, the psychoeducator, the student, the complainant and the principal, the grandfather informed the participants that it was the complainant who had called him to come and meet with the principal. According to the principal, the complainant had involved herself in a disciplinary case that was his responsibility and had compromised the success of his intervention plan with that student. He stated that by

acting in that way, the complainant did not show a cooperative spirit. He added that the complainant was disrespectful to him. According to the principal, the complainant's attitude and behaviour warranted a reprimand.

[86] During her testimony, Ms. Kaltush stated that as of January 2009, she has been avoiding the principal. She added that he is impolite with her, but she had no specific example to support her claim. The complainant stated that the principal's [Translation] "attitude affects her a great deal." Again, she submitted no evidence to support this claim.

[87] To her, the fact her position as vice principal was abolished and she was not offered employment for the following year was an act of retaliation. In fact, on June 12, 2009, after the first week of the hearing, the complainant received a letter from the school administration informing her that her employment would conclude on August 15, 2009, because the position of vice principal had been abolished. The complainant added that the principal allegedly told her she would no longer have a job the following year, but she added that she did not receive an official letter informing her of this decision. Although the Tribunal notes that the timing of the decision to abolish the position of vice principal may seem inappropriate, nothing supports the conclusion that the decision was made in retaliation against the filing of the complaint.

[88] Marcel Rodrigue does not deny he wrote the June 12 letter. According to him, every employee who indicated they were not returning and those whose contracts were ending received a letter in June indicating that their employment would conclude at the end of August. Since the position of vice principal had been abolished, Mr. Rodrigue advised Ms. Kaltush of the situation, adding that she could have a teaching position the following year. The complainant allegedly first replied that she would not accept [Translation] "a position with students," and then later changed her mind. Marcel Rodrigue then said he would send her name to the new principal.

[89] The situations the complainant described has more to do with interpersonal issues and communications with her immediate supervisor that with acts of retaliation. She testified that neither the principal nor the band council ever mentioned her complaint in discussions with her.

Moreover, Ms. Kaltush added that she did not know whether the principal was aware she had filed a complaint, because he never talked about it.

**(iii) Sylvie Malec**

[90] The complainant Sylvie Malec's allegations of retaliation are essentially based on the fact the school's administration refused to allocate planning and preparation time for her Innu language classes. In her opinion, when teaching the Innu language, the teacher's duties should include allocated planning time. She added that Innu language teachers do not have a predetermined program as is the case for core courses such as French and English. Teachers of those courses have access to teaching material that does not exist for Aboriginal language teaching.

[91] She said that for her, teaching Innu at all school levels is extra work. She added that she informed the principal, Marcel Rodrigue, who allegedly replied: [Translation] "you take it, or you don't take it and leave."

[92] Although I can sympathize with Ms. Malec's situation, it is impossible for me to find, based on the evidence submitted, that this conflict between the administration and the complainant can be interpreted as retaliation because the complaint was filed.

[93] Moreover, according to the testimony, the school's administration never referred to her complaint during their discussions.

**C. Conclusion Regarding the Allegations of Retaliation**

[94] The Tribunal finds that the complainants, Évelyne Malec, Estelle Kaltush and Sylvie Malec did not establish *prima facie* evidence of retaliation.

[95] The Tribunal feels that the situations described and the evidence submitted by the complainants do not support the allegations that the respondent retaliated against them following

the filing of the complaint, contrary to section 14.1 of the *Act*. The Tribunal notes that the complainants did not seem to take the behaviour or decisions made by the respondent and its representatives in context, and they perceived them as retaliation. They describe, for example, disciplinary measures taken by the respondent starting in the fall of 2008 to support their allegations of retaliation. Although an employee in the complainants' situation might have been able to successfully challenge such measures in a legal or arbitral proceeding, the Tribunal notes that it is not a labour relations arbitrator.

[96] Nothing in the evidence leads to the conclusion that the respondent imposed disciplinary measures or took other action because the complaint was filed, or that they were motivated by an intention to take retaliation.

[97] It is clear that for many years, relations between the complainants and the Uauitshitun School administration were strained and tense. It is also clear that these problems became more complicated during the respondent's third party management and the ensuing obligation it had to get its finances in order, particularly in the education sector. The Tribunal recognizes that it is possible that conflicts between the complainants and the school's administration might have led the complainants to perceive certain acts the administration carried out under the exercise of its management rights as acts of retaliation, but they were not legally considered as such.

[98] As a result, the allegations that the respondent had retaliated against the complainants contrary to section 14.1 of the *Act* are dismissed.

## III. Section 67 of the *Canadian Human Rights Act*

[99] At the time the complaint was filed, April 21, 2007, section 67 of the *Act*, which was repealed in 2008, (see *Act* to amend the *Canadian Human Rights Act* R.S.C. 2008, c. 30) was still in force. Section 67 stated:

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

> 67. La présente loi est sans effet sur la Loi sur les Indiens et sur les dispositions prises en vertu de cette loi.

[100] The wording in this provision is clear and concise. Parliament's purpose in adopting it was to prevent provisions of the *Act* from conflicting with the application of the *Indian Act* (see: *Prince v. Department of Indian Affairs and Northern Development* (1994, 25 C.H.R.T. D/386, (F.C.), at paras. 23-24). This section should not, however, be taken as exempting all band council decisions, but only those authorized by the *Indian Act*. (See *Ennis v. Tobique First Nation*, 2006 CHRT 21, at para.18).

[101] In *Canada (Human Rights Commission) v. Gordon Band Council*, [2001] 1 F.C. 124 (C.A.), the Court found that section 67 of the *Act* must be interpreted restrictively because it limits the scope of human rights legislation. On this, the Court relied on *Zurich Insurance Company v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, page 339, in which the Supreme Court of Canada granted the Ontario Human Rights Code quasi-constitutional status, meaning that exceptions to such legislation must be interpreted restrictively.

[102] In light of section 67, counsel for the respondent asked the Tribunal to declare that the *Act* has no effect on the human resources policy adopted by the respondent for Uauitshitun School and that the complaint must therefore be dismissed.

[103] Many decisions have interpreted section 67 of the *Act*. In order to understand the scope of this provision, we shall conduct a brief overview of the principles of this case law. In *Desjarlais v. Piapot Band No. 7,* [1989] 3 F.C. 605, at page 608 the Federal Court Appeal Division interpreted the expression "…or any provisions made under or pursuant to that Act" from section 67. In that case, the band council had adopted a motion to dismiss an employee. That employee then filed a complaint alleging that she was subject to discrimination on a prohibited ground based on age. The respondent alleged that the Commission did not have the jurisdiction to hear the case pursuant to section 67 (then subsection 63(2)) of the *Act*. In interpreting this provision, Desjardins J.A. stated:

> 11. The word "affects" is indeed very wide in scope. I take it to have the meaning of "To act upon or have an effect upon"… The word "*effet*" in the French version is also general and is equivalent to such words as "*conséquence*" or "*influence*". Hence: "*La présente loi est sans conséquence, sans influence sur*".
> 12. The word "provision" in the expression "any provision of the *Indian Act*" has a legislative connotation and refers both to the *Indian Act* and the Regulations adopted thereunder. This interpretation is confirmed by the French version.
> 13. The word "provision" in the expression "or any provision made under or pursuant to [the *Indian Act*]" cannot have the same meaning as the first word "provision" and cannot refer exclusively to a legislative enactment of general application as counsel for the Commission submits. Such interpretation is made impossible by the French version. The word "*dispositions*" in that version might have the meaning of "*mesures législatives*" but it encompasses as well the very wide connotation of "*décisions*", "*mesures*". So that the words "or any provision made under or pursuant to that Act" mean more than a mere stipulation of a legal character. I interpret such words as covering any [page 609] decision made under or pursuant to the *Indian Act*.

[104] In that case, the Federal Court of Appeal questioned the way in which Indian bands could make legal decisions. Desjardins J.A. felt that however the decision was made, any decision a band council makes pursuant to a specific provision of the *Indian Act* would be made "under or pursuant to the *Indian Act*" and only in that case would the *Act* be without effect.

[105] Application of section 67 to decisions made by a band council was discussed by Rothstein J. (as was then his title) in *Shubenacadie Indian Band v. Canadian Human Rights Commission* [1998] 2 F.C. 198 ; affirmed in [2000] F.C.J. No. 702. In that case, the Canadian

Human Rights Tribunal found that the chief and band council had discriminated against the complainants based on race and marital status by denying social assistance benefits to non-native spouses of Indian band members. At paragraph 31, the Federal Court stated:

> I do not think that the decision in this case is one contemplated by section 67 of the *Canadian Human Rights Act*. While there is no doubt that a decision was made by the Band Council, and it may well have been made under the *Indian Band Council Procedure Regulations*, there is no evidence to suggest that the decision was made pursuant to a provision of the *Indian Act*. While undoubtedly section 67 recognizes that certain provisions of the *Indian Act* and Regulations may conflict with the *Canadian Human Rights Act* and in such cases the *Indian Act* and Regulations will prevail, I do not think section 67 is to be interpreted as taking out of the scope of the *Canadian Human Rights Act* all decisions of Indian band councils provided they are made under the *Indian Band Council Procedure Regulations*. If it was Parliament's intention to immunize all decisions of Indian band councils from overview by the Human Rights Commission, Parliament would have expressly so provided rather than enacting section 67. Section 67 immunizes decisions authorized by the *Indian Act* and Regulations, but not all decisions made by Indian band councils. I think that this conclusion is consistent with the dicta in *Desjarlais (Re)*. Section 67 therefore does not assist the applicant in this case.

[106] The decision in *Shubenacadie Indian Band* was followed by the Tribunal in *Bernard v. Waycobah Board of Education* (1999), 36 C.H.R.T. D/51, in which the Tribunal dismissed a section 67 argument stating that, although subsection 114(2) of the *Indian Act* authorizes the Minister to establish, operate and maintain schools for Indian children, it is difficult to establish a clear link between this provision of the *Indian Act* and the Waycobah Board of Education decision to terminate the complainant's employment as the school secretary. The Tribunal did not find that the decision was made pursuant to the *Indian Act.*

[107] In *Bressette v. Kettle and Stoney Point First Nation Band Council* (No. 1), 2003 CHRT 41, at issue was a status Indian and member of the Kettle and Stoney Point First Nation who applied, unsuccessfully, for the position of family case worker. He filed a complaint with the Canadian Human Rights Tribunal, alleging he did not receive the position because of his family status. The respondent claimed its decision was specifically authorized by sections 69, 81 and 83 of the *Indian Act*. Sections 81 and 83 authorize band councils to make by-laws for the

purposes mentioned in those sections. The respondent also relied on two by-laws adopted pursuant to the *Indian Act*. The Tribunal concluded that the respondent's decision had both a staffing and a financial aspect; however, the main purpose of the band council's decision was to replace the family case worker position. The *Indian Act* has no specific provision on staffing in a band. As a result, the Tribunal found that section 67 did not apply.

[108] Among the cases dealing with the application of section 67 cited by the respondent, three (*Courtois v. Canada (Department of Indian and Northern Affairs*, 1990 CanLII 702 (C.H.R.T.); *Prince v. Department of Indian Affairs and Northern Development, supra,* and *Canada (Human Rights Commission) v. Gordon Band Council, supra*) concluded that the band council decision was exempt from human rights review. In those cases, the band council decision was supported by a specific provision in the *Indian Act*. In the other cases where the decision was subject to review under the *Act*, the respondent could not provide a specific provision in the *Indian Act* to support the decision about which the complaint was made.

[109] In the present case, we must question whether there is a specific provision in the *Indian Act* that would allow the respondent to refuse payment of the isolated post allowance to the complainants. In his arguments, counsel for the respondent referred to section 73 of the *Indian Act*, under which Parliament delegated part of its constitutional law-making authority over Indians and lands reserved for Indians to the federal Cabinet through federal regulations. He also referred to sections 81, 83 and 85.1 that cover the making of by-laws. He added that the exercise of powers conferred on a band or council shall be exercised pursuant to the principle of delegations of powers, which is specifically mentioned at paragraph 2(3)(*b*) of the *Indian Act*.

[110] Nobody in this case, including the complainants, challenged the respondent's power to make by-laws or policies regarding human resources at its school. What is challenged is the implementation of this policy, in particular the fact that the isolated post allowance was paid to all teachers except the Innu teachers. No provision in the *Indian Act* was submitted to the Tribunal in support of the conclusion that these benefits could not be granted to the Innu. As a

result, it cannot be claimed that the respondent's decision to not grant this allowance to the complainants was a power resulting from the *Indian Act*.

[111] The respondent also draws the Tribunal's attention to the transitional provision in section 3 of the *Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, which states:

> 3. Despite section 1, an act or omission by any First Nation government, including a band council, tribal council or governing authority operating or administering programs or services under the *Indian Act*, that was made in the exercise of powers or the performance of duties and functions conferred or imposed by or under the Act shall not constitute the basis for a complaint under Part III of the *Canadian Human Rights Act* if it occurs within 36 months after the day on which this Act receives royal assent.
>
> 3. Malgré l'article 1, les actes ou omissions du gouvernement d'une première nation – y compris un conseil de bande, un conseil tribal ou une autorité gouvernementale qui offre ou administre des programmes ou des services sous le régime de la *Loi sur les Indiens* – qui sont accomplis dans l'exercice des attributions prévues par cette loi ou sons son régime ne peuvent servir de fondement; a une plainte déposée au titre de la Partie III de la *Loi canadienne des droits de la personne* s'ils sont accomplis dans les trente-six mois suivant la date de sanction de la présente loi.

[112] The respondent claims that this provision provides further clarification on the interpretive scope that section 67 of the *Act* "should have had". He claims that this provision establishes the scope of the protection provided to the band council under the former provision and that [Translation] "any prior court decision must now be clearly distinguished because of the broad scope this new provision gives to the former section 67."

[113] The Tribunal does not accept this submission. The only effect of section 3 is to provide a grace period of 36 months, and any attempt to see this as a rejection of decisions involving the application of section 67 to date is illogical. If that had been Parliament's intent, it would have been expressed more clearly and not merely in a provision offering a grace period.

[114] As a result, the respondent's objection regarding the issue of the Tribunal's jurisdiction is dismissed.

## IV. Remedies

[115] The remedies sought by the complainants are:

1. payment of the isolated post allowance;
2. compensation for pain and suffering in accordance with paragraph 53(2)(*e*) of the *Act*; and
3. special compensation in accordance with subsection 53(3) of the *Act*.

### A. The Isolated Post Allowance

[116] Subsection 53(2) of the *Act* states:

> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> …
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> 53(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
>
> […]
>
> b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

[117] Given the Tribunal's findings, for the years prior to 2007, the complainants would therefore have the right to the isolated post allowances that they were denied as a result of the respondent's discriminatory practice.

[118] The respondent's policy in force before 2007 provided that teachers with at least a bachelor's degree and professional employees with the same education had the right to an isolated post allowance. The rate of the allowance varied based on whether the teacher had dependent children ($6,000), or was considered not to have dependent children ($3,000). It also provided that if two employees were married or were common-law spouses, only one of the two could claim the isolated post allowance for an employee with dependent children and the other employee would receive the allowance for those with no dependent.

[119] To determine the amount of the allowance to which the complainants are entitled, each case must be addressed independently:

- **Évelyne Malec** – This complainant has a bachelor's degree in education. She has two dependent children. However, since her spouse received an allowance of $6,000 a year until 2007, she would only be entitled to an annual allowance of $3,000 from the start of her employment until 2007. The evidence also shows that the allowance she would have received from the respondent for the 2003-2004 year should be subtracted from this amount because she did not work at Uauitshitun School that year.

- **Anne Bellefleur-Tettaut** – She does not have a bachelor's degree but according to the evidence, has a teacher's certificate and a teaching permit. Ms. Bellefleur-Tettaut taught Innu at the school from 1983 to 2007. She testified that there are no universities that offer a bachelor's degree in Aboriginal language teaching. This evidence was not challenged. Although technically it could be argued that she does not meet the first criterion of the policy to receive the allowance, the Tribunal considers she had the equivalent experience and qualifications as a teacher with a bachelor's degree. Therefore, the Tribunal finds that she should be entitled to the

isolated post allowance for the period of the 1990s (date when the school came under the respondent's jurisdiction) to 2007, when she retired, except for 2003-2004, when she did not work. The complainant has three children who are all adults today; the oldest is 33 and the youngest 25. When she began working for the respondent in 1990, the three children were minors, the youngest being 6. The Tribunal can therefore deduce that for 12 of the 17 years during which she was subject to the policy, she had dependent children. For those 12 years, she was entitled to the annual isolated post allowance of $6,000. For the five other years, she is entitled to $3,000 per year.

- **Estelle Kaltush** – She has a bachelor's degree in education. Since 1990, except for four years, she has been teaching at Uauitshitun School. She has two children, a 30-year-old daughter and another who just finished CEGEP. Ms. Kaltush is entitled to the isolated post allowance of $6,000 for the period of 1990 to 2007, when she had dependent children. The respondent could, however, deduct four years from the amount because, according to the evidence, Ms. Kaltush did not work during those years, when she says she took a "sabbatical."

- **Anna Malec** - She has a bachelor's degree and has worked for the respondent since 1990. According to the evidence, she had dependent children during the entire period in question and is therefore entitled to $6,000 per year for 1990-2007, except for the 2003-2004 year.

- **Marceline Kaltush** – She has a bachelor's degree and has worked at the school since 1990. Although she does not have any children, she says she is responsible for her nephew and niece. The boy is currently 19 and the girl 17. She has been responsible for her nephew since he was 4. The girl came to live with her in 2001. This evidence was not challenged. Since she has dependent children, she is entitled to the $6,000 annual allowance for the teaching years from 1994 to 2007, except for 2003-2004.

- **Sylvie Malec** – She has been teaching at Uauitshitun School since January 2003, except for the 2003-2004 year. She does not have a bachelor's degree, but for the same reasons as Anne Bellefleur-Tettaut, the Tribunal considers she is entitled to the isolated post allowance. Ms. Malec has dependent children and is therefore entitled to the $6,000 annual allowance for her teaching years until 2007.

- **Monique Ishpatao** – She has a bachelor's degree. She has been teaching at the school since 1990. She does not have any dependent children and therefore is entitled to the allowance of $3,000 a year, from 1990 to 2007, except for the 2003-2004 year.

[120] Pursuant to paragraph 53(2)(*b*) of the *Act*, the complainants, except for Germaine Mesténapéao for whom no evidence was presented, are therefore entitled to the allowances described in the preceding paragraphs as a result of the respondent's discriminatory practice.

**B. Compensation For Pain And Suffering - Paragraph 53(2)(*E*) of the *Act***

[121] The complainants are asking for compensation for pain and suffering experienced as a result of the discriminatory practice in accordance with paragraph 53(2)(*e*) of the *Act*. I do not feel that significant compensation is appropriate in this case. The complainants testified that the respondent's decision had affected their self-esteem. In my opinion, the evidence shows that it had only a minor effect on them. In the circumstances, it is justifiable to order the payment of compensation for pain and suffering in the amount of $500 to each complainant except Germaine Mesténapéao.

**C. Special Compensation - Subsection 53(3)**

[122] Under subsection 53(3) of the *Act*, the Tribunal may order the payment of special compensation to the victim if the respondent committed acts wilfully or recklessly. Did the respondent act recklessly? In other words, was it aware of the risk that its discriminatory practice might be perceived as wilful or reckless but proceeded nonetheless? In my opinion, the evidence

does not support this submission. The respondent's decision to treat the complainants differently than the other teachers was perhaps not wise, but it was not, in my opinion, reckless within the meaning of subsection 53(3).

[123] The complainants' request for special compensation pursuant to subsection 53(3) of the *Act* is therefore dismissed.

*Signed by*

Michel Doucet
Tribunal Member

Ottawa, Ontario
January 27, 2010

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1318/4808

**Style of Cause:** Evelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec, Germaine Mestépapéo, Estelle Kaltush v. Conseil des Montagnais de Natashquan

**Decision of the Tribunal Dated:** January 27, 2010

**Date and Place of Hearing:** June 10 to 12, 2009
July 13 to 16, 2009

Natashquan, Quebec

**Appearances:**

Richard Boies, for the Complainants

No one appearing, for the Canadian Human Rights Commission

Maurice Dussault, for the Respondent