

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

**Évelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao,
Anne B. Tettaut, Anna Malec, Germaine Méténapéo, Estelle Kaltush**

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Conseil des Montagnais de Natashquan

Respondent

Decision

File No.: T1318/4808

Member: Robert Malo

Date: December 9, 2014

Citation: 2014 CHRT 33

Table of Contents

	Page
I. Background	1
II. The facts	2
A. Complainants' evidence	2
B. Cross-examination of the primary complainant.....	6
C. Respondent's evidence.....	13
III. Summary of the parties' arguments	19
A. Complainants' arguments	19
B. Respondent's arguments	21
IV. Analysis.....	22
V. Conclusion	37

I. Background

[1] In a complaint filed with the Canadian Human Rights Commission (the Commission) dated April 21, 2007, the complainants claim to be victims of discrimination based on their race. The Commission referred the complaint to the Canadian Human Rights Tribunal (the Tribunal) on August 19, 2008.

[2] In their complaint, the complainants indicate that they are teachers at the Natashquan Reserve and that they feel they do not have the same benefits as some non-Aboriginal teachers who work there.

[3] They further submit in their complaint that in their profession, some individuals allegedly earn a better pay owing to the fact that they are non-Aboriginal, and yet, the complainants are performing the same work as they are.

[4] They argue that this situation exists because the Conseil de bande des Montagnais (the respondent herein) is made up of men who are [TRANSLATION] “are paid generously and when they run out of money to pay themselves, it is common practice for them to dip into the education funds” (see the complainants’ complaint, page 1).

[5] Specifically, the complainant accuses the respondent of engaging in differential treatment against them in favour of non-Aboriginal teachers who were hired by the respondent by granting certain isolated post allowances, annual trip allowances and housing allowances.

[6] For its part, the respondent responds to the complainants’ arguments by indicating that the allowance amounts mentioned above are based on the concept of residence and not on race.

[7] Consequently, the respondent alleges that there is no *prima facie* evidence adduced by the complainants regarding their complaint and, accordingly, the respondent asks that it be dismissed.

[8] Moreover, even if the Tribunal were to uphold the complaint on the basis of the criteria established by the case law, the respondent alleges that it would suffer undue hardship in light of its significant deficit for the years in question. Consequently, the complainants' complaint cannot succeed on that ground as well.

[9] For the reasons expressed in this decision, it is my intention not to uphold the complainants' complaint.

II. The facts

A. Complainants' evidence

Rodrigue Wapistan

[10] As first witness, the complainants called Rodrigue Wapistan, Chief of the Natashquan Aboriginal community since 2002.

[11] Mr. Wapistan also stated that he was the community's Director General until 2004.

[12] Mr. Wapistan informed the Tribunal that the community has 1,100 members on-reserve and close to 300 members living outside the boundaries of the same reserve.

[13] In his testimony, Mr. Wapistan confirmed to the Tribunal that the Natashquan Aboriginal community receives grants from Aboriginal Affairs and Northern Development Canada (Aboriginal Affairs) and that the community's financial situation is precarious. In that regard, he confirmed that a co-manager had to be appointed to help the Conseil des Montagnais de Natashquan to better manage its deficits.

[14] He also confirmed to the Tribunal the squalid and deplorable housing conditions in the community. He indicated that there is overcrowding in terms of the availability of living space,

which causes social problems for families and youth in the community. He confirmed that three to four families may be living under the same roof.

[15] During his term as Director General, between 2002 and 2004, the complainants' file, relating to housing allowance issues, was entrusted to him. That is when the Conseil des Montagnais de Natashquan decided to transfer the file to their counsel.

Évelyne Malec

[16] As first witness, the complainant, Évelyne Malec, provided the Tribunal with her testimony.

[17] She initially indicated to the Tribunal that she is a teacher at Uauitshitun School, which is located in the Innu community of Natashquan (for further reference, see document entitled [TRANSLATION] "Nutashquan and the Northern Plan" dated March 2012 in Exhibit P-1, tab 1).

[18] Ms. Malec holds a Bachelor's Degree in Early Childhood Education and in Elementary Education as well as the following certifications:

- Teacher's Certificate;
- Specialized graduate degree in psychosocial intervention in an educational environment;
- Certificate in Aboriginal Studies;
- Certificate in American Indian Studies;
- Diploma of Collegial Studies.

(See Exhibit P-1, tab 4.)

[19] Ms. Malec lives in an area of Natashquan known and designated Pointe-Parent, a small community of 50 people. She does not live directly in the Natashquan community as she is

married to a non-Aboriginal, Richard Boies, and also because there are very few housing units within the community.

[20] Ms. Malec has been teaching at the Uauitshitun School since 2001 and, prior to 2001, she worked at the Commission scolaire de la Moyenne-Côte-Nord where she allegedly obtained all required isolated post allowances and retention bonuses.

[21] Ms. Malec testified that she duly filed a complaint with the Commission owing to the fact that non-Aboriginal teachers had advantages over her, and that in this regard she felt devalued.

[22] In her testimony, she reviewed the Human Resources policy for Uauitshitun School employees, as it was the subject of an agreement between the Conseil des Montagnais de Natashquan and the employees at the Uauitshitun School in Natashquan in June 2005 (see Exhibit P-1, tab 6, at page 314). In citing the Human Resources policy, the complainant referred to paragraph 10.7, which pertains to the isolated post allowances granted to non-resident teaching staff and professional employees, and to paragraph 10.8, which deals with allowances for annual trips granted to non-resident employees. She also referred to paragraph 10.9, which covers moving allowances for non-resident employees, and paragraph 10.10, which concerns housing allowances for non-resident employees. In all of these cases, the complainant indicates that she did not receive any of the amounts mentioned.

[23] Similarly, the complainant referred, in her testimony, to the agreement between the Conseil des Montagnais de Natashquan and the employees at the Uauitshitun School in Natashquan (see Exhibit P-1, tab 7), which was signed in May 2005 by all teachers, including the complainant.

[24] Again, the complainant indicated that she did not receive the isolated post allowances found in the said document.

[25] Ms. Malec also referred to 2003-2004 when she was dismissed by the Conseil de bande de Natashquan, and filed a complaint under the *Canada Labour Code* for unjust dismissal. That complaint was the subject of an arbitral award dated July 27, 2004 (see Exhibit I-1, tab 57).

[26] In that arbitral award, the adjudicator concluded that the political and financial climate during the 2002-2003 school year had been challenging, at a time when the respondent was dealing with budget constraints.

[27] The complainant was successful in that arbitral award and obtained a re-hiring order with the payment of certain employment income.

[28] Following that order, the parties signed a release on August 19, 2004, which included a number of terms of payment and of reinstatement of the complainant in her teaching position at the Uauitshitun School (see Exhibit P-1, tab 11). The complainant indicated that the document was signed by Antoine Ishpatao and Gilles Auclair, co-manager for BDL, who was responsible for the recovery of the respondent's financial situation at the time.

[29] Also, with respect to the \$20,000, the complainant submitted that she did not receive the \$1,000 per month, as specified in the release, for quite some time and that she had to pursue legal action in the Court of Québec against the respondent to obtain said amounts (see Exhibit P-1, tab 12).

[30] At the end of her examination, the complainant indicated that she wants to be recognized as a professional who works in a remote location in the same manner as all non-Aboriginal teachers.

[31] Thus, she wants to receive payment of the isolated post allowances from 2001, with the exception of 2003-2004, to present.

[32] She is also seeking moral damages for loss of self-esteem, considering that she did not feel valued by the respondent.

B. Cross-examination of the primary complainant

[33] In cross-examination, the complainant, Évelyne Malec, referred to the fact that she has been married to Richard Boies for 22 years. Mr. Boies is also a teacher at the Uauitshitun School.

[34] When he was hired, Mr. Boies lived in Lévis, Quebec. Ms. Malec indicated in her testimony that Mr. Boies has been receiving isolated post and housing allowances since 2001. It was also in 2001, after posing questions to Mr. Boies, that the complainant found out that he was indeed receiving those allowances. She therefore contacted non-Aboriginal faculty members of the Uauitshitun School and realized that they were also entitled to the allowances as they resided in remote locations.

[35] The complainant's sister, Anna Malec, also apparently told her that [TRANSLATION] "in the good old days", i.e. in 1970-1980, there were isolated post allowances for Aboriginal teachers. This situation existed prior to the taking over of the education sector by the Aboriginal community, that is to say, the Conseil de bande.

[36] Baffled by why she was unable to obtain payment of the two allowances, i.e. isolated post and housing, the complainant decided to file a complaint with the Commission.

[37] It is worth noting that over the course of her cross-examination, the complainant admitted that there was a shortage of staff at the Uauitshitun School. She also indicated that when she was hired, she lived one or two kilometres from the Innu community of Natashquan, that is, in Pointe-Parent, near Natashquan.

The other complainants

[38] Following the complaint filed by complainant Évelyne Malec on April 21, 2007, the complaint was also signed by other complainants, Sylvie Malec, Anne Bellefleur Tettaut, Estelle Kaltush, Marceline Kaltush, Anna Malec, Monique Ishpatao and Germaine Méténapéo. It should be noted that Ms. Méténapéo did not testify at the hearing.

[39] Each complainant who testified before the Tribunal noted her particular circumstances with regard to her schooling and her years of service with the respondent.

[40] I gather from those testimonies that none of them received the isolated post or housing allowance. All these individuals expressed to me an interest in obtaining payment of said isolated post and housing allowances, with moral damages considering the effect of the prohibited discrimination of which they were allegedly victims.

[41] I also gather from their testimonies that allowances at issue were paid to the non-Aboriginal teaching staff from outside the area, but not to faculty members living in the Natashquan Aboriginal community.

[42] Thus, I take the liberty of summarizing the testimonies of the other complainants by limiting myself to their main characteristics.

Sylvie Malec

[43] Sylvie Malec possesses the following academic credentials:

- Teacher at the Uauitshitun School in Natashquan in Innu since 2002;
- Secondary V and a DEC;
- A second certificate in Aboriginal languages.

(See Exhibit P-1, tab 4)

[44] It should be noted that Sylvie Malec has dependent children.

Anne Bellefleur Tettaut

[45] Anne Bellefleur Tettaut worked as a teacher in the Innu language and has been retired since 2007. She is originally from the Natashquan reserve and possesses the following academic credentials:

- A certificate in education sciences and a teaching permit.

(See Exhibit P-1, tab 4)

[46] She also has three dependent children, and two other children who were placed in her care.

Estelle Kaltush

[47] Estelle Kaltush held the position of principal of Uauitshitun School for 2012-2013 and 2013-2014. Prior to that, she was a teacher and vice-principal and held the position of educational assistant in early 1985. Ms. Kaltush possesses the following academic credentials:

- A bachelor's degree in education and a certificate in education sciences, and a teaching permit.

(See Exhibit P-1, tab 4)

[48] Prior to the taking over of the education sector by the Conseil de bande in 1989-1990, Ms. Kaltush was under the jurisdiction of Aboriginal Affairs which supposedly paid her isolated post allowances. After the year 1990, she no longer received isolated post or housing allowances. She has always lived in the Natashquan Aboriginal community.

[49] In the years during which she was a teacher, she had two dependent children.

[50] Ms. Kaltush was questioned about a document dated February 21, 2007, addressed to Mr. Boies, the complainant Évelyne Malec's spouse (see Exhibit P-1, tab 19).

[51] Ms. Kaltush testified that she did not participate in the study conducted by the Conseil de bande that led to this document.

[52] Today, as the school's principal, Ms. Kaltush is responsible for the administration of the allowances. She confirmed to the Tribunal that it is necessary to reside outside a radius of 50 kilometres from the reserve to obtain payment of the isolated post and housing allowances.

[53] She also confirmed to the Tribunal that she participated in the recruitment of faculty and that it was not easy to recruit new faculty members given the resources available within the Aboriginal community, as well as the difficulties in understanding the Innu language.

Marcelline Kaltush

[54] Marcelline Kaltush has been a teacher at Uauitshitun School for 28 years and lives in the Innu community of Natashquan, that is, on the reserve.

[55] Ms. Kaltush possesses the following academic credentials:

- A certificate in education sciences;
- A teaching certificate;
- A teaching permit;
- A bachelor's degree in education.

(See Exhibit P-1, tab 4)

[56] She also confirmed to the Tribunal that she has had dependent children since the 1990s.

Anna Malec

[57] Anna Malec is a preschool teacher at the school who is a member of the Indian reserve of Natashquan. She has been teaching for close to 40 years.

[58] She confirmed to the Tribunal that between 1973 and 1990, she worked for Aboriginal Affairs and was responsible for the education sector. She was receiving isolated post allowances at the time.

[59] In 1990, upon the taking over of the education sector by the Conseil de bande, the isolated post allowances were cut. She confirmed to the Tribunal that she built her home on the Indian reserve of Natashquan.

[60] In terms of education, Ms. Malec possesses the following academic credentials:

- A certificate in education sciences;
- A teaching permit;
- A teaching certificate;
- A bachelor's degree in education.

(See Exhibit P-1, tab 4)

[61] Ms. Malec has had four dependent children since 1990.

Monique Ishpatao

[62] Monique Ishpatao is a teacher at Uauitshitun School on the reserve she is also originally from.

[63] Ms. Ishpatao possesses the following academic credentials:

- A certificate in education sciences;
- A teaching permit;
- A teaching certificate;
- A bachelor's degree in education.

(See Exhibit P-1, tab 4)

[64] She has a dependent child who still lives with her.

[65] The child was allegedly adopted the traditional way, that is to say, without any legal formalities.

[66] As last witness, the complainants called Richard Boies, who is the spouse of Évelyne Malec, the primary complainant in this case.

Richard Boies

[67] Richard Boies has been a teacher at Uauitshitun School since he came to this school in fall 1990.

[68] He has been married to Évelyne Malec for about ten years, and has been in a relationship with Ms. Malec since 1992.

[69] He is originally from Lévis.

[70] At the time of his hiring, he was paid in accordance with the standards and conditions provided for in his contract of employment, in addition to the isolated post and housing allowances since 1990.

[71] His residence is located in Pointe-Parent, Quebec. It borders the land area of the Natashquan reserve.

[72] Mr. Boies indicated that, in the past, he had had difficulties in dealing with the Conseil de bande which did not want to award him payment of his isolated post and housing allowances in light of the fact that he lived with an Aboriginal woman, Ms. Malec. He referred, in that regard, to a contract of employment (see Exhibit P-1, tab 21) that he was provided with for the 2007-2008 school year, but which he refused to sign because the contract did not include the allowances to which he claimed to be entitled.

[73] Mr. Boies challenged the contract in Court, after which the isolated post and housing allowances were paid to him, payments which continue to present for he has an indeterminate contract.

[74] However, based on the current administration of the allowances, Mr. Boies testified that he was going to lose those benefits because he is a resident of the Aboriginal community and is resides within a radius of 50 kilometres from the Natashquan reserve.

[75] Considering that he lives in the same area as the complainants, that he performs the same work as them, he is of the view that complainants should be afforded the same benefits as non-residents.

[76] Mr. Boies testified that, based on his discussions with his colleagues, there has always been dissatisfaction on the part of staff members over the unfair distribution of the isolated post and housing allowances by the Conseil de bande. When he confronted the Conseil de bande about this dissatisfaction, he was allegedly told that there was not enough money and that it was impossible to pay such allowances to everybody.

[77] According to Mr. Boies, there are recruitment problems within the Natashquan Aboriginal community and there are still positions to be filled. There are also apparently teachers who lack the requisite qualifications to teach.

C. Respondent's evidence

Jacques Tanguay

[78] Mr. Tanguay has lived in Natashquan since 1996. He has a bachelor's degree in secondary education, teaching and administrative qualifications. He has also been assigned to Uauitshitun School.

[79] Mr. Tanguay testified that there is salary disproportionality between the teachers of Roger-Martineau School (referred to as the [TRANSLATION] "white school") in Natashquan and Uauitshitun School.

[80] He confirmed to the Tribunal the difficulties in recruiting teachers at the Innu school by indicating that a number of them went to work at Roger-Martineau School.

[81] He indicated to the Tribunal that there was a comprehensive contract for the payment of teachers' wages and that said comprehensive contract distinguished between residents and non-residents. In that regard, there were isolated post and transportation allowances for trips and said allowances had often been the subject of discussions. As for the dissatisfaction among teachers not awarded allowances, he always referred to the Conseil de bande as it had the authority to make final decisions.

[82] In his testimony, Mr. Tanguay confirmed that there were differences in treatment between residents and non-residents, but not between Aboriginal and non-Aboriginal people. Apart from salary issues, there were no differences between Aboriginal and non-Aboriginal people.

André Leclerc

Mr. Leclerc works as an education consultant in the municipality of Schefferville and at the Conseil des Atikamekw.

[83] He was a teacher, then a counsellor in Sept-Îles, and he participated in an assessment of the Natashquan school in 2006-2007 (see Exhibit I-35).

[84] He has always been very involved in the Aboriginal community. In 1985-1986, he took over the administrative management of Uauitshitun School as part of an acquisition of autonomy by Aboriginal communities and the implementation of the Ministry of Education's program.

[85] With respect to Exhibit I-1, tab 35, which is the report on the assessment of educational services at Uauitshitun School in Natashquan, the assessment in question was conducted for purposes of accountability so as to determine whether services were properly performed. An analysis of the school's management appears on page 48 of the report. The report shows a high turnover rate of administration and high absenteeism of students, as well as a lack of standards and regulations of which there are various interpretations. Mr. Leclerc also confirmed that personnel files are mismanaged, which explains the frustration of teachers.

[86] In September 2007, the school's administration was handed over to him.

[87] He further confirmed that BDL was appointed third party manager of the reserve of the Aboriginal people of Natashquan.

[88] Mr. Leclerc was questioned about a document entitled [TRANSLATION] "Human Resources Policy Management; Specific Clauses on Education", dated November 2007 (see Exhibit P-1, tab 24). In response to a question about clause 4.9 of the document and the definition of the term [TRANSLATION] "resident", Mr. Leclerc stated that the isolated post and housing allowances existed for the purposes of recruiting new teachers who came from outside

the Aboriginal reserve. He indicated that other Aboriginal communities had also adopted the same policies.

[89] He explained to the Tribunal that BDL managed the entire program whereas he managed the staff on pedagogical matters with Estelle Kaltush. Thus, he also confirmed that the teachers' salary grid set forth in Appendix "1" of Exhibit P-1, tab 24 was prepared by BDL and adopted by the Conseil de bande de Natashquan.

[90] In June 2008, he stepped down as school principal.

[91] In cross-examination, in response to a question by the complainants' representative, the witness stated to the Tribunal that in the duties and working conditions portion of the report (see page 17 of the report in Exhibit I-1, tab 35), there was no distinction between an Aboriginal and non-Aboriginal teacher.

[92] Also, in reference to the findings and recommendations found in Chapter 7.2 of the same report, the witness indicated to the Tribunal that he was unable to effect a change of direction, considering the lack of cooperation and the widespread frustration among school staff. He confirmed that there are significant deficiencies in many aspects of Uauitshitun school, and that in this regard [TRANSLATION] "the students are not receiving the educational services to which they are entitled" (see section 7.2, first paragraph, at page 47 of Exhibit I-1, tab 35). In the face of Uauitshitun School's many challenges, he confirmed that exemptions were granted to allow teachers to teach even though they did not have all the requisite qualifications owing precisely to recruitment issues.

[93] He confirmed that there was an intergenerational conflict, especially at the secondary school level, which helped to precipitate some of the issues that led to frustration, having regard to the salary cuts applied. In that regard, he confirmed the existence of interrelational problems between BDL and school staff, and the Conseil de bande. That was the situation in June 2007.

[94] As regards the existing frustrations with the employer, the witness indicated to the Tribunal that there had been conflicts with certain employees and that those conflicts remained considering that certain employees opposed the planned salary cuts by the third party manager and the Conseil de bande.

Geneviève Taschereau-Néashit

[95] Geneviève Taschereau-Néashit is a retired teacher. However, she taught in Aboriginal communities for almost 40 years.

[96] She married an Aboriginal person in 1972 and therefore acquired Aboriginal status through marriage. She had been divorced for at least one year when she testified.

[97] During the years 2005-2006 and 2006-2007, she worked at Uauitshitun School. She was contacted at the time by Alice Kaltush as a teaching position had become available.

[98] In her testimony she referred to Exhibit I-1, tab 20, which is a new employment form that she completed with her employer, the Conseil des Montagnais de Natashquan.

[99] Subsequently, Ms. Taschereau-Néashit was questioned about her indeterminate employment contract for 2006-2007 (see Exhibit I-1, tab 14).

[100] At that point, she confirmed to the Tribunal her non-resident status within the Natashquan Aboriginal community, and that in that regard she was entitled to the isolated post, housing and trip allowances.

[101] When questioned about the existence of isolated post allowances, Ms. Taschereau-Néashit confirmed that the same policy existed in other Aboriginal communities and that, in her view, this situation was absolutely normal.

Jules Wapistan

[102] Jules Wapistan has been the respondent's Human Resources Director since August 2014. He has been on the Conseil de bande since 1979 and has performed various administrative functions within the Aboriginal community.

[103] In his testimony, Mr. Wapistan confirmed to the Tribunal that the Conseil de bande has a co-manager who was required by Aboriginal Affairs given the fragile financial situation of the Aboriginal community.

[104] He stated that this situation had existed since 1995-1996 and that in 2006, a third party manager was appointed. Said appointment was made on the basis of ratios imposed by Aboriginal Affairs which indicated that the Aboriginal community's financial status was precarious.

[105] Thus, BDL was appointed third party manager from 2006 to 2009 and made a number of proposals in bankruptcy to various suppliers to reduce their debts.

[106] He also confirmed to the Tribunal that the third party manager's mandate came from Aboriginal Affairs, which managed the community's budget and had the final say on management decisions within the community.

[107] In 2009, there was a change in co-manager. A new accounting firm, Malette, was appointed. It continued the work begun by BDL, which had developed management policies to help attain a balanced budget.

[108] Also, Mr. Wapistan drew the Tribunal's attention to Exhibit I-1, tab 32, which identified a recovery plan that was accepted by Aboriginal Affairs on November 30, 2006.

[109] On the same date, he confirmed that he was the coordinator for the implementation of the recovery plan and he indicated that the plan was implemented, referring to the resolutions appearing in tabs 36 to 39 of Exhibit I-1.

[110] In response to the budget cuts to be imposed to achieve a balanced budget, the 50 kilometre rule was introduced in 2006 to determine who was a resident and a non-resident in granting isolated post and housing allowances against which the complainant filed complaints.

[111] Said policy was reportedly suggested by the third party manager BDL, which, at the time was co-manager with the respondent. For seven years, the same policy was continually applied. As for the respondent's financial situation as of the date of the hearing of these proceedings, Mr. Wapistan confirmed to the Tribunal that the budget for the last fiscal year as at March 31, 2014, is still running a deficit.

[112] Between March 31, 2007, and March 31, 2014, there were only two years where surpluses were generated.

[113] When also questioned about another document related to an assessment report of Uauitshitun School, dated April 2009, by an ad hoc committee (see Exhibit P-1, tab 25), Mr. Wapistan stated that some recommendations were adopted while others could not be. In that regard, their application was the responsibility of the Conseil de bande and a councilor, Nicolas Wapistan, was appointed in that respect.

[114] More specifically, Recommendation No. 5 at page 12 of the document, with respect to a harmonization of the salary policy for the education sector with that of the region's provincial schools, without discrimination on the basis of race or origin, could not be applied (see Recommendation No. 5).

[115] Consequently, Mr. Wapistan indicated to the Tribunal that he had heard about the complaints over the allowances when he and BDL came to Uauitshitun School in 2007. At that

time, a meeting was held among Aboriginal teachers at which they sought the same benefits as non-Aboriginal teachers. At the end of his examination-in-chief, Mr. Wapistan confirmed that there had been benefit cuts for teachers who were no longer considered to be non-residents.

[116] Finally, Mr. Wapistan confirmed his agreement pertaining to Exhibit P-1, tab 1, which is a document entitled [TRANSLATION] “Nutashquan and the Northern Plan” and which takes stock of the Natashquan community’s needs. The document is dated March 2012. In that regard, he confirmed the acute shortage of housing identified.

[117] Also, he agreed with the portion of the document on education (see paragraph 2.1 of Exhibit P-1, tab 1), and considers that the ability of the community to pay is limited. Consequently, he confirmed the respondent’s position [TRANSLATION] “that it cannot pay any more”.

III. Summary of the parties’ arguments

A. Complainants’ arguments

[118] The complainants’ representative submits that payment of the isolated post and housing allowances should be awarded to the complainants from 1989-1990 to present given the discrimination in the respondent’s rules and policies.

[119] In addition, the complainants’ representative claims moral damages for all of the complainants considering the loss of self-esteem and injury to their dignity, and argues, once again, that the Tribunal ought to put an end to the discrimination alleged in the complaint.

[120] As for Évelyne Malec, the representative claims on her behalf full compensation for the isolated post and housing allowances for 1989-1990 until present.

[121] As for the existence of allowances as such, the representative indicates to the Tribunal that prior to 1989, the allowances were paid to everyone, to Aboriginal people and non-Aboriginal people in a lump-sum amount.

[122] In 1989, when the Conseil de bande took over the education sector by, some changes occurred.

[123] Between 1989 and 2007, the complainants' representative indicated that there were no allowances for Aboriginal people, which disappeared at the time, but that there were allowances for non-Aboriginal people.

[124] He submits that over time, some non-Aboriginal people settled in the Natashquan community, but that they continued to keep their allowances whereas Aboriginal residents did not have any. Hence, the alleged discrimination.

[125] In 2005, he noted a change with a third party manager in place, that is, BDL.

[126] He noted that the releases that had been the subject of a settlement between the complainants and the Conseil de bande were cut and the allocation terminated.

[127] Also, he confirmed a meeting with Mr. Wapistan and BDL, notice of which was issued to BDL.

[128] In 2007, a new policy was developed.

[129] To conclude, the complainants' representative indicates

[TRANSLATION]

- that the complainants feel discriminated against;

- that there is no succession of teachers to educate the Natashquan Aboriginal nation;
- that the complainants had to file complaints at various levels to obtain reimbursement of certain sums of money owing to them following contractual issues with the respondent;
- that they wish to end salary discrimination by doing away with the isolated post and housing allowance policies.

B. Respondent's arguments

[130] The respondent's representative indicates to the Tribunal that the issue is whether there is discrimination regarding allowances, i.e. isolated post and housing allowances. He also indicated that I did not have to determine whether or not the salary policies adopted were justified.

[131] Also, the respondent's representative submits that a *prima facie case* of discrimination, contrary to sections 3 and 7 of the *Canadian Human Rights Act* (the *Act*), has not been established.

[132] He submits that the policy at issue does not discriminate on the basis of race or ethnic origin. The distinction it creates is rather based on the scope of the definition of residence on the Indian reserve. In that regard, he referred to the various definitions in the documents in Exhibit P-1, at tabs 6, 7 and 24, regarding the various definitions of the terms [TRANSLATION] "resident" and [TRANSLATION] "non-resident".

[133] Consequently, he submits that no *prima facie case* of discrimination has been established based on all of the evidence filed before the Tribunal.

[134] However, if I were to conclude that such a *prima facie case* was established, he submits that there would be supporting evidence as to the presence of significant financial constraints in the Natashquan Aboriginal community. Thus, there would be adequate justification in reply to the alleged discrimination.

[135] In that regard, he referred to the respondent's precarious financial situation that has existed since 2005-2006 and that persists today. In this sense, he contends that the same policy regarding the financial recovery process applied was adopted not only in the education sector, but also in the health sector of the Natashquan Aboriginal community. The same budgetary restrictions were also applied to the school's support staff, which also did not receive isolated post allowances (see Exhibit I-1, tab 30, at page 3).

[136] Finally, the respondent asserted the existence of releases (see Exhibit P-1, tab 11) and, in this respect, the complainants allegedly waived their remedy for compensation. Consequently, he indicated that I cannot not go back prior to August 19, 2004, to seek compensation for the complainants.

[137] Thus, if an order of relief is issued by the Tribunal, it would have to be retroactive to 2004-2005 or later, where applicable.

[138] As a last resort, the respondent's representative indicates that I may limit the relief sought by the complainants even where there was no prescription with respect to their remedy.

[139] He indicated that the complaints date back to 2007 and that some complainants did not complain, not even to their husbands, as the husbands could have been band chiefs. He therefore asked me to take into account the complainants' conduct in this case.

IV. Analysis

[140] After having considered the evidence adduced by the parties in this case, and their arguments, I conclude that the complainants' complaint cannot be upheld for the following reasons.

[141] Indeed, the complainants explained to the Tribunal that they consider themselves to be victims of discrimination by the respondent because they did not obtain, like some

non-Aboriginal teachers, payment of certain allowances, i.e. isolated post allowances, annual trip allowances and housing allowances.

[142] In their written complaint, dated April 21, 2007, the primary complainant, Évelyne Malec, stated in particular [TRANSLATION]: “when I am working, I feel devalued because I am not entitled to the same benefits as non-Aboriginal teachers.”

[143] Indeed, the essence of the complainants’ complaint, for which the hearing was held and in which all of the complainants made their claim to the Tribunal, is further defined as follows: the complainants want to obtain the same pay benefits as non-Aboriginal teachers who were recruited to teach at Uauitshitun School in the Natashquan Aboriginal community.

[144] In support of their pay claim, the complainants allege that they were victims of discrimination owing to their race.

[145] Thus, the Tribunal notes that the complainants are of the view that the provisions of section 3 of the *Act* were purportedly violated on the basis of race or national or ethnic origin.

[146] In that regard, it is therefore useful to reproduce the provisions of section 3 of the *Act*, which reads as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

[147] At the hearing, the parties did not refer to the other provisions of the *Act* in describing that certain other discriminatory acts were committed against them.

[148] Upon analysis, it appears to the Tribunal that the provisions of section 7 pertain more specifically to the allegations made by the complainants. In that regard, the complainants stated to me that they felt disadvantaged over the course of their employment by certain provisions contained in the administrative policies adopted by the respondent.

[149] Consequently, I restate the provisions of section 7 of the *Act*, which read as follows:

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

[150] In their statement of particulars and remedies sought, dated January 30, 2009, the same allegations are made against the respondent. The complainants argue as follows:

[TRANSLATION]

there is a long history of a state of affairs that has existed for years where Aboriginal women do not have the same pay benefits as non-Aboriginal people. This state of affairs is common knowledge and has always been a way to reduce expenses. Making pay conditions fair for all would have led to a significant increase in salary budget. Thus, there is greater tolerance of the situation even though it is unfair. It has therefore been a long-standing practice in the administration of our band to adopt a policy that upholds wage discrimination. Pay benefits are awarded to non-Aboriginal people but not Aboriginal people.

(See paragraph 4, page 3 of the statement of particulars and remedies sought dated January 30, 2009.)

[151] Such is therefore the essence of the complainants' complaint that was filed with the Commission and which the Tribunal must now consider.

[152] In other words, are the administrative policies adopted by the respondent, which is purportedly the source of the differential treatment alleged by the complainants, covered by the provisions of sections 3 and 7 of the *Act*?

[153] To provide a better understanding of the source of the differential treatment of which the complainants allege to be victims, the Tribunal must refer to the documents that are at the root of this differential treatment.

[154] Thus, throughout the hearing of this case, three documents were cited to the Tribunal to determine the source of the alleged discrimination. It is therefore necessary to refer to the main provisions giving rise to the complainants' complaints against the respondent.

[155] In the first document, entitled [TRANSLATION] "Human Resources Policy - Employees at Uauitshitun School" and dated June 2004, reference is made to the fact that an agreement was allegedly entered into between the Conseil des Montagnais de Natashquan and the employees of Uauitshitun School in Natashquan in June 2005 (see Exhibit P-1, tab 6, page 314):

[TRANSLATION]

4.14 Place of residence

Residence in the legal sense of the term at the time of hiring, inasmuch as the residence is located in the province of Quebec.

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 trips for non-resident employees

a. Three (3) annual trips at the following times or by special authorization from the school's administration:

1st trip: Start date at the beginning of the year and departure for vacation.

2nd trip: Christmas

3rd trip: Easter or spring break.

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

Montréal, \$950; Québec, \$750 and 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 trip.

10.9 Moving allowances for non-resident employees

a. The allowance is paid to the employee at the time of hiring and at the end of the employee's employment relationship with the Conseil des Innus de Nutashkuan. The employee's moving allowance at the end of the employee's employment relationship shall be paid on the condition that he or she has maintained at least six months of continuous and full-time employment at Uauitshitun School.

b. The amount of the allowance varies according to city of residence at the time of the employee's hiring and the allowance for the other cities not mentioned (50 km outside of Nutashkuan) shall be prorated based on select cities:

Montréal, \$1,500; Québec, \$1,000 and Sept-Îles, \$700.

c. Reimbursement shall be issued upon submission of supporting documentation of relocation accompanied by the duly completed form.

d. When two employees are married or common-law spouses, the moving allowance is only granted to one of the members of the couple.

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 shall receive 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.

[156] The second document, entitled [TRANSLATION] “Agreement between the Conseil des Montagnais de Natashquan and Employees at the Uauitshitun School in Natashquan—Mutual Agreement on the Treatment of Employees at the Uauitshitun School in Natashquan”, dated June 2005 and signed by the school’s employees (see Exhibit P-1, tab 7, page 358), provides as follows:

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.

6.5.1 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 trips for employees hired outside a 50 km radius.

8.4.1 Allowances are provided for three annual trips.

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

1st trip: Start date at the beginning of the year and vacation departure

2nd trip: Christmas.

3rd trip: Easter or spring break.

8.4.3 Amount of allowance

8.4.3.I The allowance for annual trips 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 and Sept-Îles, \$300.

8.4.4.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 trip.

8.5 Moving allowances for employees from outside

8.5.1 The allowance is paid to the employee at the time of hiring and at the end of the employee's employment relationship with the Conseil des Innus de Nutashkuan.

8.5.2 The employee's moving allowance at the end of the employee's employment relationship is paid on the condition that he or she has maintained at least three months of continuous and full-time employment at Uauitshitun School during the school year.

8.5.3 Amount of allowance

The allowance is as follows: \$800 for everyone.

8.5.4 When two employees are married or common-law spouses, the moving allowance is only granted to one of the members of the couple.

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: \$500.

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

[157] Finally, a third document, entitled [TRANSLATION] "Human Resources Policy Management—Specific Clauses on Education—of the Conseil des Innus de Nutashkuan, November 2007" (see Exhibit P-1, tab 24), provides as follows:

4.9 Resident

Any person working for the Council whose ordinary and main place of residence and/or that of his or her spouse is located within 50 km of 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.

[...]

6.7 Isolated post allowance

6.7.1 The isolated post allowance is credited to the employee in 26 bi-monthly payments at the time of the pay period.

6.8 Allowances for employee's annual trips

6.8.1 Three (3) annual trips scheduled as follows or by special authorization from school management:

6.8.2 First trip: Start of work at the beginning of the year and departure on holidays.

6.8.3 Second trip: Christmas.

6.8.4 Third trip: Easter or break week.

6.8.5 The allowance for each annual trip for a non-resident is set at \$750, including the outbound and return trip.

6.8.6 The allowance will be paid at least 5 business days before the annual trip's effective date.

6.9 Housing allowance

6.9.1 The maximum annual housing allowance for a non-resident is \$4,500 and is set on a pro-rata basis of 10 months, where appropriate.

[158] A careful reading of each of three documents I referred to above reveals the existence of isolated post allowances for non-resident teaching staff and professional employees. The same is true for allowances for annual trips for non-resident employees and for the housing allowance.

[159] The first document dated June 2005 (see Exhibit P-1, tab 6) defines the concept of residence, as shown in paragraphs 4.14 and 4.15. In that regard, main residence status and/or that of his or her spouse is in Natashquan or less than 50 kilometres from Natashquan.

[160] Clause 4.14 of the same document defines “residence” in the legal sense of the term “at the time of hiring”, inasmuch as the residence is located in the province of Quebec.

[161] This administrative policy concerning residence was mentioned in the third document I cited, Exhibit P-1, tab 24, regarding the respondent’s human resources policy management, dated November 2007.

[162] Paragraph 4.9 again defines the concept of residence indicating as follows [TRANSLATION]: “whose ordinary and main place of residence and/or that of his or her spouse is located within 50 km of Nutashquan.”

[163] In this last document, in paragraph 6.9.1, the housing allowance may be paid to a non-resident, based, of course, on the definition in paragraph 4.9 of the same document.

[164] As for the agreement between the Conseil des Montagnais de Natashquan and the employees of the Uauitshitun School in Natashquan (see Exhibit P-1, tab 7), it contains certain provisions in favour of employees hired outside a 50 km radius in the case of allowances for annual trips for employees (see paragraph 8.4) and moving allowances for employees from

outside (paragraph 8.5). There is no such express provision for employees “from outside” in the case of the housing allowance (paragraph 8.6). In this last case, it would appear that the same policy was followed by the respondent and specifically applied to employees from outside (although the evidence is unclear on this latter point).

[165] Therefore, the finding to be made is that residency was the criterion applied by the respondent to grant payment of the allowances the complainants are seeking and not race or national or ethnic origin.

[166] However, it appears to me that residency is not one of the prohibited grounds of discrimination referred to in subsection 3(1) of the *Act*.

[167] The complainants alleged, when they testified before me, that there was still discrimination between Aboriginal and non-Aboriginal people, which was based on the fact that the allowances they are seeking to enforce were paid to individuals whose place of residence was not located within 50 km of Natashquan.

[168] In the Tribunal’s opinion, this is a moot point. Indeed, the real issue here is the one raised by the complainants as to whether or not an individual’s place of residence was located within 50 km of Natashquan, as shown in the various documents I cited earlier, and not the disparities between Aboriginal and non-Aboriginal people.

[169] In that regard, the Tribunal would like to point out that one of the respondent’s witnesses, Geneviève Taschereau-Néashit, was a person residing outside a 50 km radius of Natashquan, but she held Aboriginal status through her former marriage to a non-Aboriginal man.

[170] However, it appears that Ms. Taschereau-Néashit was able to obtain the benefit of the isolated post, housing and trip allowances despite the fact that she was a non-resident Aboriginal (see Exhibits I-1, tab 14 and I-1, tab 20). Therefore, I cannot accept the complainants’ argument that there is discrimination between Aboriginal and non-Aboriginal people.

[171] In support of this decision, I would like to refer to the following case law.

[172] In *McGill University Health Centre (Montréal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at paragraph 49, the Honourable Justice Abella stated as follows:

49 What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

[Emphasis added.]

[173] In another unanimous decision of the Supreme Court of Canada, *Moore v. British Columbia (Education)*, 2012 SCC 61, the following is stated at paragraph 33 of the decision:

[33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[174] While I agree with the fact that the first two conditions have been met in reference to *Moore*, the third condition, a protected characteristic may have been a factor in the adverse impact, has not in my opinion.

[175] Indeed, as I indicated earlier, residency is not one of the prohibited grounds of discrimination referred to in subsection 3(1) of the *Act*.

[176] This reasoning was adopted in a decision of the Federal Court of Canada in *Dobbin v. Canada (Department of Fisheries and Oceans)*, 2005 FC 2010, which reaffirmed the principle that a person's place of residence is not an enumerated ground of discrimination.

[177] In that regard, I adopt the following paragraphs from *Dobbin*:

[8] I find no reviewable error in the Commission's decision to refuse to deal with the Applicants' complaint pursuant to paragraph 41(1)(c) of the Act. Since a person's place of residence is not an enumerated ground of discrimination, it follows that the Commission would have no jurisdiction to enquire on alleged differential treatment of Newfoundland and Labrador fishers, as compared to the fishers in other provinces, based on quotas that were put into place by the Respondent. Distinction based on place of residence does not constitute a prohibited ground of discrimination under the Act. Clearly, the Act does not give the Commission statutory authority to investigate how a resident or a group of residents of one province or territory may be treated by a government department or federally regulated company as compared to how that organisation might treat a resident or group of residents of another province or territory.

[9] **There are numerous situations where individuals have been treated differently because of their "place of residence". This will not normally constitute a prohibited ground or distinction under human rights legislation.** For example, in *Nova Scotia Confederation of University Faculty Assn. v. Nova Scotia (Human Rights Commission)*, [1995] N.S.J. No. 296 (NSSC) (QL), the Nova Scotia Supreme Court reviewed a decision of the Nova Scotia Human Rights Commission to dismiss a complaint that was based on "place of residence". In that case, the basis for discrimination was that a differential fee was charged to foreign students by Universities in Nova Scotia. The Court upheld the finding of the Commission that the complaint was beyond its jurisdiction since the differential treatment was determined to be based on "place of residence". See also, *Simon Fraser University International Students v. Simon Fraser University*, [1996] B.C.C.H.R.D. No. 13 (BCCHR) (QL).

[10] Moreover, the Applicants' complaint fails to disclose any material fact suggesting that the Respondent's decision to refuse to provide the same fishing opportunity for CFA 16 to the Newfoundland based fishers may be motivated, in whole or in part, on the ground that the Applicants, as Newfoundlanders, are ethnically different or constitute a distinct group from the fishermen based in other provinces because of their national origin. The fact of the matter is that CFA 16 is managed by the Quebec Region. It appears that the allocation to the CFA 13 Quebec based fishers in CFA 16 in 2002 was a decision of the Respondent through consultation with the industry in the Quebec Region. While the

Respondent has favoured the Quebec based fishers when it delivered the disputed quotas, the differential treatment is clearly based on their place of residence and not on their ethnicity or particular national origin.

[Emphasis added.]

[178] In another decision of the Human Rights Tribunal for British Columbia, in *Gardezi* (*Gardezi v. Insurance Corporation of British Columbia*, 2010 B.C.H.R.T. 262), the principles of *Dobbin* were reaffirmed.

[179] In that regard, paragraph 40 of the decision states as follows:

[40] Ms. Gardezi's complaint is, at its root, a complaint based on her last place of residence. Place of residence, standing on its own, is not a prohibited ground of discrimination.

[180] As a result, for the reasons just stated, I find that the complainants' complaint is unfounded in fact and in law and, on that ground alone, it is therefore dismissed.

[181] Also, I would like to add that if I had come to the conclusion that a *prima facie* case was established, which this decision fails to recognize, the respondent, in my view, would have been successful in proving to the Tribunal that the administrative policies it applied do not appear excessive, particularly considering the respondent's financial conditions, which were described as [TRANSLATION] "catastrophic" by witness Jules Wapistan.

[182] I find, therefore, that the conduct and practices adopted by the respondent under the various administrative policies it adopted cannot be considered unjustified in this case, as noted by the Honourable Justice Abella in *Moore* of the Supreme Court of Canada.

V. Conclusion

[183] For all the reasons set out above, the complainants' complaint is therefore dismissed.

Signed by

Robert Malo
Tribunal Member

Ottawa, Ontario
December 9, 2014

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: December 9, 2014

Date and Place of Hearing: September 23 to 25, 2014

Natashquan, Québec

Appearances:

Richard Boies, for the Complainants

No one appearing, for the Canadian Human Rights Commission

John White, for the Respondent