

# Arbitration Bulletin

February 14, 1997  
No. 01/97

## IN THE MATTER OF:

**An Arbitration Between:**

**AGASSIZ TEACHERS' ASSOCIATION NO. 13  
OF THE MANITOBA TEACHERS' SOCIETY,**

**(hereinafter referred to as "the Association")**

**- and -**

**AGASSIZ SCHOOL DIVISION NO. 13**

**(hereinafter referred to as "the Division")**

**- and -**

**GLEND A KINGSBURY,**

**(hereinafter referred to as "the Grievor")**

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## **GENDER DISCRIMINATION IN A TEACHER SELECTION PROCESS**

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<b>Board:</b>	Gavin M. Wood – Chairperson Gerry Parkinson – Nominee of the School Board Sylvia Jansen – Nominee of the Teachers' Association
<b>Counsel:</b>	Robert Simpson – Counsel for the School Division Mel Myers, Q.C. – Counsel for the Teachers' Association

### ***Background (From the Award - In-Part)***

The grievance concerns the position of a special needs teacher position at the Centennial School in Beausejour, Manitoba for the 1995-1996 school year. Ms. Kingsbury applied unsuccessfully for the position. She has grieved that she was discriminated against on the basis of gender in the hiring process. The background facts need to be set out in some detail. The Association called three witnesses initially and one witness in rebuttal; the Division called three witnesses. There are several factual issues arising in this arbitration which will be highlighted as the background is set. Ms. Kingsbury provided a resume of her background. She began teaching school in the fall of 1969. Over the ensuing years, she taught

various subjects to a number of grades in several schools. With her husband an RCMP officer, she was subject to periodic relocation. In her evidence it was emphasized that over the years she was involved in the mainstreaming of students with special needs.

As a result of a transfer of her husband, she moved to the Town of Lac du Bonnet in December, 1991. She started substituting with the Division and then in April, 1992 became a teaching assistant. In the fall of 1992, she took a term contract (a half-time position through the spring of 1993) at Centennial School in Lac du Bonnet dealing with students with special needs. She received a further term contract at the Centennial School (a half-time position) as a special needs teacher from September to December, 1993. From January to June, 1994, she was full time. In the 1994-95 school year she was full-time, divided one-half with special needs students and one-half with a grade three class.

By way of upgrade Ms. Kingsbury had also taken a series of courses with a special needs emphasis over the years.

Ms. Kingsbury testified that she had received no complaints with respect to her teaching while at the Centennial School. Mr. Doug Craig, the principal of Centennial School, confirmed that he had not discussed any complaints with Ms. Kingsbury.

There was a revised program with regards to special needs students to be introduced at the Centennial School for the 1995-1996 school year. This had been prepared in the spring of 1995 by the principal, school counsellor and resource teacher of the school. Ms. Kingsbury was aware of the planned changes in the model; however, she was not involved in its actual development. She commented that she had been "left out in the cold" with regards to the planned changes. Mr. Craig confirmed that she had not been asked to assist in its development.

The Division advertised in the spring of 1995 for three special needs teachers at (1) the Centennial School in Lac du Bonnet; (2) at the Ed Schreyer School; and (3) the Beausejour Elementary School in Beausejour. Ms. Kingsbury applied for the Centennial School position.

Mr. Doug Craig, the principal of Centennial School, was called by the Division. He had taught initially and for the past fifteen years was the principal of Centennial School. He confirmed that there were changes being introduced with regards to the role of the special needs teacher at the Centennial School for the 1995-1996 school year. He indicated that there was concern by Ms. Heather Postnick, the resource teacher, and Ms. Joanne Lowrie, the school counsellor, as to whether Ms. Kingsbury would be suitable to work with the new program. This concern was not conveyed by Mr. Craig to her. He testified that the resource teacher and guidance counsellor did not even want Ms. Kingsbury to be interviewed for the position but he felt - as a courtesy - that she should be interviewed, particularly given that she had worked at the Centennial School for the past three years.

There was also testimony with regards to an incident which had occurred in the spring of 1995. A student with special needs had become physically involved with another student. Ms. Kingsbury was present. She was cross-examined with regards to the incident. She said that she had been shaken, as were other present, and was crying after the incident. She had taken Mr. Craig's suggestion and had gone home after the incident. Ms. Kingsbury also emphasized that she had been complimented later by Mr. Craig, Mr. O'Hagan, Assistant Superintendent of the Division, and Ms. Postnick as to her performance during the incident.

Concerning the incident, Mr. Craig indicated that Ms. Kingsbury had been especially upset over what had occurred. The resource teacher and guidance counsellor had expressed to him that Ms. Kingsbury had not used good judgment in dealing with the student in question. Again Mr. Craig did indicate that Ms. Kingsbury had not been made aware of those expressions of concern.

The advertisement for the special needs positions provided:

"Applications are invited for full time term Special Needs Teachers at the above schools. While experience in working with, and knowledge of behaviorally disturbing young children and adolescents is an asset, Special Needs Teacher training is preferred ...."

"Applications stating qualifications, experience and references should be submitted by June 16, 1995 to ...."

There was an initial screening of the applicants by Mr. O'Hagan, the Assistant Superintendent of the Agassiz School Division. Mr. O'Hagan, who was called by Mr. Simpson, had been employed in the education field for approximately 28 years, beginning his employment as Assistant Superintendent/Special Education Co-ordinator with the Division in September, 1989. After he had conducted an initial screening of the applicants, the short list was submitted to the principals and resource teachers of the three schools for their review and decision as to who each wished to interview. The interviews were scheduled to be conducted on Friday, June 23, 1995, at the School Division offices. The total panel of parties carrying out the interviews was seven in number, although the principals and resource teachers from each of the schools interviewed only those applicants that they were interested in. Mr. Craig and Ms. Postnick interviewed most of the applicants; together with Mr. O'Hagan, they interviewed seven people, including Ms. Kingsbury.

Ms. Kingsbury felt her interview had gone quite well. She said that there was no suggestion, that she could note, of gender being a factor in the interview process. She was surprised when informed that she was being considered for all three of the positions.

Mr. Craig and Mr. O'Hagan testified that Mr. Waldo Klassen, the Superintendent of the School Division, was not involved whatsoever with regards to the selection process for the three positions. They denied that gender played any role in their determination. Mr. Craig said that Ms. Kingsbury effectively was interviewed for all three of the advertised positions, even though only Ms. Postnick, Mr. O'Hagan and himself actually participated in her interview; this despite that she had only applied for the one position.

With regards specifically to the teaching position at the Centennial School, Mr. Craig and Mr. O'Hagan testified that one person stood out in the interview process: Lorinda Dyrkacz. Various of the witnesses confirmed her strong qualifications. She was offered two positions at Centennial School and Ed Schreyer School. These offers were made late on Friday afternoon. Question was raised by Mr. Myers as to the bona fideness of the Centennial School offer in that Ms. Dyrkacz had been a special needs teacher at Ed Schreyer School for two to three years at the time of the interview. She lived approximately fifteen minutes from that School and would have had to travel forty minutes to Centennial School. Ms. Dyrkacz accepted the offer for Ed Schreyer School on the Friday.

One applicant for the Centennial School position, Mr. Lars Feilberg, was unable to attend for the scheduled Friday interviews. An interview had been arranged with him at Centennial School for Monday, June 26, 1995. After Ms. Dyrkacz declined the offer for the position at Centennial School, Mr. Craig and Mr. O'Hagan testified that it was determined to proceed with the interview with Mr. Feilberg on Monday morning and that if the position was not offered to Mr. Feilberg, that a new interview list would be struck and new interviews conducted for the Centennial School position. Apparently none of the candidates who had been interviewed on June 23, 1995, were satisfactory, save of course for Ms. Dyrkacz.

On Saturday, June 24, 1995, a graduation ceremony and dance were held at the arena in Lac du Bonnet. Mr. Waldo Klassen was in attendance. Mr. Klassen had been Superintendent of the Division since 1990. He had begun teaching in the last 1960's and then had held positions as a vice principal and later a principal.

Mr. Klassen denied that he had any involvement in the application or interview process for the three special needs positions. He was aware of the advertisement for the positions and that an interview process was on-going. He testified he was unaware as to the actual scheduling of the interviews or of the outcome of the interviews held on Friday (with the job offer at Centennial School having been declined by Ms. Dyrkacz).

During the course of the evening, Mr. Klassen approached a table with several people seated, including Ms. Margaret Curwen and Mr. Dennis Perron. Ms. Curwen had been a teacher for many years and with the School Division for the past fourteen years. Mr. Perron had graduated with his bachelor of Education degree in 1990 and had taught with the Division for two years. He had accepted a position at the Ed Schreyer School (.85% of full-time) for the 1995-96 school year, but with the express understanding that he would lose part of that position should a teacher who was on sick leave return during the course of the school year.

Mr. Perron had not applied for the advertised position at Centennial School, explaining that because he knew that Ms. Kingsbury had been employed at that School in the special needs category for some years that he assumed she would "get" the position.

During the course of a conversation held at the table, Mr. Klassen asked if Mr. Perron would like to apply for the special needs position at the Centennial School. Mr. Perron responded that he understood that the applications were closed and that interviews had been, or were being, held. Mr. Perron testified Mr. Klassen said that a suitable candidate had not been found and then made a comment concerning "a male" and the special needs position at the Centennial School. There was considerable evidence heard and argument received as to what actually Mr. Klassen had said in that regard. The first of the factual issues then concerns that exchange between Mr. Klassen and Mr. Perron.

Mr. Klassen undertook to try to speak to Mr. Craig on Sunday as to the possibility of Mr. Perron having an interview. Mr. Klassen commented that with regards to Mr. Perron's commitment for the 1995-96 school year that he thought the principal of Ed Schreyer School might be prepared to release him.

There was a follow up by Mr. Klassen on Sunday, but he was unable to reach Mr. Craig. Mr. Klassen called Mr. Perron on Sunday evening. He told Mr. Perron that he should attend on Monday at the School to find out if he might be interviewed.

On Monday, June 26, 1995, Mr. Feilberg was interviewed at the Centennial School, beginning at approximately 8:15 a.m. Mr. Feilberg recalls seeing Mr. Perron at some point that morning, possibly when he was leaving the interview. Mr. Feilberg's interview lasted until a few minutes before 9:00 a.m. The interview of Mr. Feilberg was carried out by Ms. Postnick and Mr. Craig. Mr. O'Hagan was not present at the interview, due to a prior commitment. (In fact, Mr. O'Hagan was not in Lac du Bonnet that whole week.) Mr. Perron in his testimony recalled that Mr. O'Hagan was present that morning, but it is clear from the evidence that he is mistaken at least in that regard.

After the interview, Mr. Craig and Ms. Postnick determined to offer the position at Centennial School to Mr. Feilberg. Mr. Craig as pre-arranged contacted Mr. O'Hagan at Whitemouth, and Mr. O'Hagan then contacted Mr. Feilberg to offer him the position. The witnesses estimated that Mr. Feilberg was contacted sometime between 10:00 a.m. and 10:30 a.m. that morning. Mr. Feilberg accepted the offer. Mr. O'Hagan then contacted Mr. Craig and advised him that Mr. Feilberg had accepted the position.

Mr. Perron in his testimony maintained that he was interviewed by Ms. Postnick and Mr. Craig (and Mr. O'Hagan) on the morning of June 26, 1995. Mr. Perron described the interview in some detail and maintained that during the course of that interview it became evident to him that the interviewers were looking for a male in order to handle the particular students that would be involved in the special needs program for the coming school year.

Mr. Craig maintained in his evidence that while he recalled speaking to Mr. Perron later on the morning of June 25, 1995, that no interview took place. His recollection is that the discussion involved Mr. Perron coming to his office in the school and asking some questions about the special needs position (in particular, what it entailed). Strangely enough the second factual issue then involves whether Mr. Perron was interviewed on June 25, 1995 and, if so, what was said during the course of the interview.

Ms. Kingsbury was advised by Mr. Craig verbally on Monday afternoon that she would not be offered the Centennial School position. No reasons were provided. She was also told the following day verbally by Ms. Postnick and subsequently by letter (Exhibit 14) along with the other applicants who had been interviewed on June 23, 1995.

Ms. Kingsbury, with the assistance of Mr. Craig, applied for a position at one of the Beausejour schools later on the afternoon of June 26, 1995. This was for grades five, seven and eight. She did not obtain that position.

She testified that she was devastated by not receiving the position at Centennial School and that she gradually became concerned over the reason that she did not receive an offer. She learned that Mr. Feilberg had been hired for the position; she questioned how it was that she with her credentials was not offered the job rather than Mr. Feilberg.

She began to take certain steps. She contacted a school trustee but there was apparently no follow up to the concern that she expressed. She also carried out inquiries which revealed to her that there had been a comment or comments made about the position at Centennial School requiring "a male", or words to that effect. She received other confidential information that she declined to reveal during the course of her testimony. As a result of her inquiries she ultimately spoke with the Teachers' Association.

Also she met with Mr. Klassen, the Superintendent, at the School Division offices. This was at her request. The meeting took place on October 13, 1995. Ms. Kingsbury, as a requirement of a course which she had taken over the summer of 1995, had submitted a term paper in which she had set out, inter alia, her concerns over what she perceived to be the circumstances of a male being wanted for the special needs position at Centennial School and what had taken place in that regard (as she believed she had determined). During the course of the meeting, Ms. Kingsbury read to Mr. Klassen from the term paper. She said that Mr. Klassen had made certain comments during the course of the reading of this paper. Mr. Klassen disputed the comments attributed to him. Those comments during the meeting are the third factual issue facing the Board.

Mr. Klassen and Ms. Kingsbury are in agreement that he undertook at the close of the meeting to "follow up". During the meeting Mr. Klassen had been told by Ms. Kingsbury that she found it awkward as a substitute teacher at the Centennial School. There was tension felt between Mr. Craig, Ms. Postnick and herself which was making the substituting difficult. Mr. Klassen undertook to speak to Mr. Craig concerning that tension. Although Mr. Klassen cannot specifically recall doing so, it appears that he did speak to Mr. Craig and then reported back to Ms. Kingsbury.

Ms. Kingsbury maintained that Mr. Klassen also undertook to check further as to whether there had been bias in favour of a male in the hiring of the special needs teacher at Centennial School. Mr. Klassen insisted that he did not offer to do any such checking. Ms. Kingsbury said that in a subsequent telephone

conversation Mr. Klassen reported back to her as a result of his inquiries. Mr. Klassen denied any such reporting. This constitutes a fourth issue.

A grievance was brought by Ms. Kingsbury by way of letter dated November 24, 1995 to Mr. Waldo Klassen as Superintendent of the School Division.

A human rights complaint was also brought by Ms. Kingsbury, and the complaint statement of Ms. Kingsbury (dated January 5, 1996), together with Mr. Klassen's response (dated February 6, 1996), were filed during the grievance hearing.

### ***SUBMISSIONS***

Counsel argued verbally at the conclusion of the evidence. During the course of those arguments, certain decisions and articles were submitted. Counsel then determined to submit further decisions and subsequently did so together with written summaries of their submissions.

In argument, Mr. Myers began by summarizing the facts which he believed had been established on the evidence. Understandably he emphasized the factual issues. Overall his thrust was that the position of the School Division was so "bizarre" as to what had occurred that the inference should be drawn that the particular selection process was gender biased. He reviewed the factual issues.

Concerning the overall evidence, Mr. Myers argued that an adverse inference should be made against the Division for failing to call Ms. Postnick, the resource teacher. Mr. Myers submitted that "clearly the resource teacher is adverse in interest to the Association's case in that she was part of the interview wherein preference for a male was indicated to Mr. Perron". He argued that: "accordingly the Association is under no obligation to call the teacher as a witness despite the fact that she is a member of the bargaining unit".

Mr. Myers reviewed a number of authorities concerning when failure to call leads to an adverse inference being drawn.

In summary, Counsel for the Association maintained: "where, as in the present case, a party fails to call a witness which may have knowledge of a relevant and contentious point in issue, an arbitration board should draw an adverse interest from the failure to call the witness and to thus assume that the witness evidence would not have supported that parties position".

Mr. Simpson at the outset of the hearing had objected to the jurisdiction of the Board of Arbitration to hear the grievance. Recognizing that the evidence would be heard, he reserved his right to argue the jurisdictional issue during closing submission. Aware of this, Mr. Myers provided as well argument on the jurisdictional issue, maintaining that the grievance was arbitrable.

It was also argued the alleged policy involved a violation of the Human Rights Code and this violation established jurisdiction.

Mr. Simpson on behalf of the Division began his response with the factual issues. Not surprisingly, he dealt with the elements that Mr. Myers referred to as "bizarre" and characterized them as not bizarre at all but rather as quite explainable. The consideration of those arguments of Counsel is referenced below.

Mr. Simpson then turned to the issue as to whether an adverse inference should be drawn. He first reviewed certain aspects of the evidence, stressing that the Division had called evidence on the same points of which the resource teacher had first hand knowledge. Based on that review of the evidence, he

urged the Board to conclude that "there is no obligation on the part of the Division to adduce any further evidence".

In summary, the Division submitted "because it answered the Association's allegation that Mr. Perron was interviewed, the issue is now one of credibility, and not one of adverse inference".

The Division also argued that the Association could have called the resource teacher. Firstly, it was pointed out that she was not adverse in interest as to whether Mr. Perron had been interviewed. There was no proprietary interest in the resource teacher and it followed that no adverse inference should then be drawn against the Division. As he had reserved the right to do, Mr. Simpson also argued that the Board did not have the jurisdiction to deal with the subject matter of the grievance.

Mr. Myers argued that the Association had no responsibility to call a witness who was adverse in interest and who participated in the very decision that was being grieved.

On the arbitrability of the grievance, as one might expect, it was argued that the evidence supported the finding that a rule or practice or policy of the Division to not hire females in certain situations had been made out on the evidence.

### ***CONSIDERATIONS***

In summary, the Board was faced with strongly argued positions. The Association maintained that Ms. Kingsbury was discriminated against. In considering the evidence in totality, the Board was asked to draw a negative inference from the failure on the part of the Division to call the resource teacher. The Division maintained that there was no discrimination in the hiring for the special needs position and that no inference should be drawn against either party but rather that there should be the usual consideration as to credibility in the face of contradictory evidence. The Division also faced the Board with the challenge of whether it had jurisdiction to consider the subject matter of the grievance.

Although the jurisdictional issue was raised at the outset, it need only be considered if the factual findings support the grievance brought. It is appropriate first to turn to the factual issues in dispute.

#### Factual Issues

The first of the factual issues concerns what was said between Mr. Klassen and Mr. Perron at the graduation reception on June 24, 1995. On this three witnesses testified. Mr. Klassen recalled speaking with Mr. Perron as they stood beside one of the tables in the arena. He encouraged him to consider applying for the special needs position at the Centennial School. He did not recall making any reference to males during the course of that conversation. However, he admitted that he may have said that being a male might be an asset in applying for the position, or to that effect. Mr. Klassen denied saying that they were looking for, or wanted, a male for the job, or to that effect. He specifically denied that he had said that a male was required for the position or that the Division was looking for a male for the position. Mr. Klassen then was vague in what he may have said - he was specific in what he did not say.

Mr. Perron testified that Mr. Klassen did make reference to a "male" while discussing the position at the Centennial School. However, Mr. Perron was unable to recall the words that were used by Mr. Klassen. He said that Mr. Klassen may have said words to the effect that they "could use a male in the position" or that they "wanted a male for that job" or that "being a male might be an asset". In his overall evidence, both on direct and on cross examination, Mr. Perron gave the impression that the only part of the conversation he could remember clearly was the use of the word "male" by Mr. Klassen in discussing the position - beyond that Mr. Perron was vague in his recall. He could not be specific.

Ms. Curwen testified that she had overheard the conversation between Messrs. Perron and Klassen while sitting at the table. Initially in her testimony Ms. Curwen recalled Mr. Klassen to have said that Mr. Perron should apply and that "we need a man". She was clear in her memory that Mr. Klassen had specified the need for a man and Ms. Curwen explained that she was surprised by the comment. However, the cross examination she said that the words used were "we are looking for a man".

The Board then is faced with the evidence of three witnesses: one of whom claims to have no specific recall of the comment, one has only a vague, general recollection and one claiming a specific recall but who changed the words she recalled within a few minutes during the course of her evidence. As was pointed out, the phrases Ms Curwen recalled on her direct and her cross examination were very similar. And Ms. Curwen, an independent witness with no interest in the dispute, was attempting to convey the substance rather than the actual words overheard.

However, this Board of Arbitration is faced with an allegation of bias in the words of the superintendent for the School Division. Certainly through no fault of the three witnesses, the testimony is subject to question as to what even "approximately" or in substance was said.

It seems that the word "male" was used by Mr. Klassen in discussing the special needs position with Mr. Perron. That usage was, at the least, very unfortunate and will be commented on below. However, it cannot be concluded on the testimony that Mr. Klassen by his words was disclosing that the administration staff for the Division was discriminating in favour of males in the selection process for the position at the Centennial School.

The second factual issue surrounds Mr. Perron's attendance at the Centennial School sometime on the morning of June 26, 1995. Mr. Perron testified that on that morning he was interviewed in Mr. Craig's office by Mr. Craig, Ms. Postnick and Mr. O'Hagan. He gave considerable details concerning the interview. He said that during the course of the interview it became clear that the interviewers felt that a male would be best for the position (in being able to handle the male special needs students).

Mr. Feilberg testified with regards to the morning of June 26, 1995. Mr. Feilberg was interviewed at the Centennial School at approximately 8:15 a.m. Mr. Feilberg did see Mr. Perron at some point that morning, although he could not recall when. Mr. Feilberg drove to Elma after the interview and then was contacted by Mr. O'Hagan between 10:00 and 10:30 a.m. and offered the position. He accepted immediately.

Mr. O'Hagan testified that he was not present at the interview, having a previous commitment in Whitemouth. By prior arrangement Mr. O'Hagan was contacted by Mr. Craig after the interview of Mr. Feilberg. Mr. Craig indicated that Ms. Postnick and himself were satisfied to have the position offered to Mr. Feilberg. Mr. O'Hagan simply accepted their recommendation.

Mr. Craig in his testimony was consistent to a point with all of these other witnesses. Mr. Craig said that Mr. Perron approached him at the Centennial School late on the morning of June 26th. Initially Mr. Perron spoke to him in the general office. They went into Mr. Craig's office. Ms. Postnick was in the general office at that time. Mr. Craig recalled Mr. Perron asking some questions about the job in a conversation of possibly 5 minutes in duration. However, Mr. Craig denied that the discussions involved an interview of Mr. Perron.

To be considered is how Mr. Perron came to attend at the Centennial School that morning. Mr. Perron testified that he had been told by Mr. Klassen to attend the school and speak to Mr. Craig about the position. Mr. Klassen confirms this as well, saying that he had been unable to reach Mr. Craig during the Sunday. On Sunday evening by telephone he had encouraged Mr. Perron to speak to Mr. Craig. Mr. Klassen said that he did not know that there was an interview arranged for Mr. Feilberg, however.



With respect to this second factual issue counsel for the Association argued that a negative inference should arise due to the failure on the part of the Division to call Ms. Postnick, the resource teacher. As attested to above, both counsel provided extensive oral and written submissions on this point.

A board of arbitration may draw an inference in appropriate circumstances. The cases and arbitration awards cited by both counsel certainly establish the nature of the rule and a board's authority to utilize it.

From the cases and awards cited by counsel it appears to be a matter of degree, or sufficiency, of the evidence as to when an additional witness or witnesses need be called to prevent an inference from being drawn. From reading the authorities, it cannot be said that all witnesses on a factual dispute need be called. Certainly in some circumstances the evidence is sufficiently strong in support of one rendition of the facts to call upon the other party to attempt to rebut that rendition by calling an available witness who in the normal course would be called by that party. But that is not the case here.

Given the evidence heard concerning the morning of June 26, 1995, an inference should not be made that the resource teacher would have testified contrary to the evidence called by the Division.

Certainly the testimony heard concerning the events on the Monday morning is puzzling. After considering all of that testimony, it does appear that Mr. Perron is incorrect in his recall of his having been interviewed. Mr. Perron, having been encouraged by Mr. Klassen to apply, in memory has satisfied himself that an interview did occur. Mr. Perron gave his evidence in a straight forward manner. But it must be concluded that only the interview of Mr. Feilberg was held on the morning of June 26, 1995.

The third factual issue concerns what was said during the meeting between Ms. Kingsbury and Mr. Klassen on October 13, 1995. There is no dispute as to much of that conversation. Ms. Kingsbury read extensively from a term paper that she had submitted in a course she had taken over the summer of 1995. Also during the course of that meeting she expressed concern over the tension that she perceived between Mr. Craig and Ms. Postnick and herself when she attended during the fall of 1995 as a substitute teacher at Centennial School. Mr. Klassen confirmed all of that.

Ms. Kingsbury maintained that during the course of the meeting with Mr. Klassen, she read the following from pages 3 and 4 of the paper:

"I was determined to find out why I was replaced for my own piece of mind and for my future professional development needs.

I would have been disappointed in losing the position to someone with better qualifications however, but would have understood the reasoning. I was clearly not prepared for what I was about to learn.

My husband and I, searching for a reason, discovered from very reliable sources that on the Monday after the interviews had reportedly been closed, the administration interviewed more people in Lac du Bonnet. These people turned out to be males and of course, one of those males was selected for the job. We also were advised that one of the men interviewed had not even applied for the job but had been asked by the Superintendent of Schools to interview for the job. The reason, because they wanted a male. Given the personalities of the children coming up next year, mostly males, they felt that a male was needed as these children were from single parent (mother only) families. The idea is that these children needed an authority figure - a male."

Mr. Klassen responded, she said, with words to the effect that "persons should watch what they say in public", to which she responded "I guess they should".

Mr. Klassen did not deny having made that comment. He did not recall it. In cross examination he admitted that he may have. Ms. Kingsbury was quite definite (and unshakable in cross examination) on her recall of what Mr. Klassen said. Given that during the exchange with Mr. Perron at the arena on June 24, 1995, Mr. Klassen used the word "male", it is not surprising that Mr. Klassen made such a comment about watching what one said in public. He may well have recalled - at least vaguely - that he had made a remark about "a male" to Mr. Perron. Yet, his comment about being careful does not confirm that his comments on June 24, 1995 were to the effect that a male was required, or was being sought, for the Centennial School special needs position. The comment about watching what one says is not inconsistent with the Division's denial that its administrators discriminated.

There is a fourth factual issue. Ms. Kingsbury said that during the meeting, Mr. Klassen also indicated that he would follow up by speaking with Mr. Craig. She said that Mr. Klassen did follow up and contacted her by telephone a few days later. He said he had spoken with Mr. Craig and been assured by the principal that he would improve the situation and relieve the tension when Ms. Kingsbury attended as a substitute teacher. She said that Mr. Klassen also said that Mr. Craig had confirmed that being a male had been an asset for a candidate in the interview process for the position, but that it had not been pre-determined that the job would be offered to a male.

Mr. Klassen could not specifically recall a follow up by contacting Ms. Kingsbury a few days after the meeting. He conceded there may have been. He maintained that he would not have told Ms. Kingsbury in any subsequent contact, however, that a male candidate was favored in the interview process. Mr. Craig denied having ever indicated to Mr. Klassen, or anyone else, that gender was a consideration in the interview process carried out for the Centennial School position.

Despite Mr. Klassen's lack of recall, on the evidence there was a follow up telephone conversation between Mr. Klassen and Ms. Kingsbury in which she assured that the tension would be resolved. During that call there may have been as well some further reference concerning the issue of gender bias in the selection process. However, whatever was said in that follow up call is not sufficient of itself to cause a finding that there had been discrimination in the interview process.

## ***DECISION***

It is valuable to reconsider certain aspects of the submission of Mr. Myers. For Mr. Myers was quite forthright in noting that the very nature of discrimination precludes direct evidence being available to prove the bias. Discrimination must be proven indirectly by inference from the facts that are established.

Concerning the evidence, in summary Mr. Myers argued that the facts inexorably point to the inference of bias. He challenged the reasons offered for Ms. Kingsbury's rejection (including concerns of the resource teacher and school councilor, an incident with a student and a perceived disinclination by her to work with the new special needs program) characterizing the reasons as spurious and frankly having been "cobbled together" as an attempted justification for that rejection after the fact.

Ms. Kingsbury's teaching background, particularly in the field of special needs students, was considered extensively by Counsel for the Association. Her credentials were compared to those of Mr. Feilberg.

There was also question raised by Mr. Myers as to the selection process. There was the lateness of the application from Mr. Feilberg. (Although, an explanation was provided as to the reason why late applications were accepted). Also with regards to the selection process, its bona fideness seemed at first blush to be established by the fact that the position at Centennial School was offered initially to a

female, Lorinda Dyrkacz. It was argued, however, that Ms. Dyrkacz was such an outstanding candidate that she was able "to overcome" the bias. It was also questioned as to whether the offer to her was bona fide given her particular circumstances in June 1995.

Considering the totality of the evidence including Ms. Kingsbury's credentials and the concerns over the objectiveness of the selection process, Counsel for the Association maintained that there was strong doubt as to whether the selection process was gender neutral. He then urged the Board to infer that the process was discriminatory against females on the basis of the comment made by Mr. Klassen to Mr. Perron concerning "a male". That comment was confirmed, it was argued by the later comment by Mr. Klassen on October 13, 1995 (about watching what one says in public).

The finding of the Board, however, is that while Mr. Klassen did use the word "male" he thereby did not indicate that the selection process was biased. And the later comment on October 13, 1995, although made, goes only to support that Mr. Klassen had used the word "male" when discussing the special needs position with Mr. Perron. It does not, of itself, establish discrimination in that selection process.

Without wishing to overstate, this grievance ultimately turns on whether discrimination can be inferred based on the comments made by Mr. Klassen. The comments were unfortunate. Ms. Kingsbury understandably was troubled and concerned when she was advised of the comment made to Mr. Perron. She then had some verification that an inappropriate comment had been made in her meeting with Mr. Klassen. It goes without saying that the initial comment by Mr. Klassen should not have been made.

Yet, while one can understand Ms. Kingsbury's concern and, frankly, the reason for the grievance being pursued, ultimately the evidence does not establish that Ms. Kingsbury was discriminated against in the selection process. On the evidence, particularly when the Board of Arbitration's findings on the contentious factual issues are included in the assessment of the evidence, a finding of discrimination cannot be made.

It is important to note that there was no evidence of linkage or connection between Mr. Klassen, his comments and his having Mr. Perron attend at Mr. Craig's office and the decision in the selection process. Both Mr. Craig and Mr. O'Hagan gave evidence in a forthright manner. Neither appeared to attempt to overstate his actual recollection of the events. They maintained that Mr. Klassen had had no involvement in the selection process for the Centennial School special needs position. They interviewed a number of candidates for that position, both male and female, and offered the position initially to a female candidate. They testified that had Mr. Feilberg not proven to be a satisfactory candidate that they had determined to then strike a new interview list and conduct a further set of interviews. Finally they denied that there was any gender bias in the selection process. Cross examination of them did not alter the assessment of them as credible witnesses.

There is no evidence of any direct contact between Mr. Klassen and Messrs. Craig and O'Hagan concerning the selection process for the Centennial School special needs position.

The evidence then fails to establish discrimination as alleged in the grievance.

It would be unfair to fail to comment on Mr. Myers's argument that the difference between the qualifications of Ms. Kingsbury and Mr. Feilberg support a conclusion of discrimination. There was extensive evidence led as to that difference. However, there was also evidence of a disinclination on the part of at least the resource teacher and school councilor to have Ms. Kingsbury even on the short list for the position. There was some evidence, almost of an anecdotal nature, about some limitations in Ms. Kingsbury's work performance, none of which matters had been brought to her attention.

A Board of Arbitration is at an obvious disadvantage in attempting to assess why one candidate was selected for a position over another. One must realize that when a teacher has worked in a school for some time there may be an informal and ongoing evaluation of the person's capacities by administrative staff. The Board does not have the benefit of this informal evaluation process. The points raised by the Association in questioning the credentials of Mr. Feilberg against Ms. Kingsbury's are to be noted. However, the Board is mindful of the difficulty of assessing ultimately why one candidate was successful over another.

With the decision reached on the evidence, it is unnecessary to deal with the jurisdictional issue raised by the Division.

In the result, the grievance is dismissed.